# FEBRUARY 2020
# PENNSYLVANIA BAR EXAMINATION

## Sample Answers

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# Performance Test: Sample Answer

## Issue 1

February 25, 2020

The William Penns, Inc.

The No Duty Rule As it Applies to The Tossed Octopus File#06032005

Dear Mr. Penn,

The purpose of this letter is to explain to you the application of the no-duty rule in relation to the recent negligence claim against your organization. The no-duty rule will be the best defense to the claim. However, there are facts and law that could make it an imperfect defense so it is important I clarify these issues with you.

<u>The Tossing of the Octopus is arguably a Common, Frequent, and Expected Part of Attending the Penn's Game. However, Some Facts in The Claim Potentially Fall Outside the No-Duty Rule.</u>

Generally, in Pennsylvania (PA), the operator of a place of amusement is "not an insurer of his patrons" and therefore, patrons will only be able to recover for injuries caused by the operator's failure to exercise reasonable care in the construction, maintenance and management of the facility." Loughran. The no-duty rule bars a plaintiff's claims for injuries suffered as a result of "common, frequent, and expected risks inherent during the activity in question." Id. Although the assumption of risk doctrine is abolished in PA, the no-duty rule has evolved as a version of it. Id.

When determining what is a customary part of the game, PA courts have said that they cannot be "limited to the rigid standards" of the rule book of the game. Loughran. When evaluating a ball purposely throw into the stands at a baseball game, the court considered the fans actions of "routinely clamor[ing] to retrieve balls landing in the stands via home runs or foul balls. Loughran. The court notes, "even a first time spectator ... is imputed with the common or neighborhood knowledge of the risks of the game." Loughran.

In the current claim, the plaintiff purchased a first row ticket to a Penn's game. The claim acknowledges that there is a protective glass partition. She states in her claim that she "paid for premium ticket so that she could enjoy the game without having to worry about getting hit by a puck." Fendick complaint. As stated above, a spectator is imputed with the knowledge of inherent risks. Although she relied on the glass partition, it did not support a duty by the Penns to protect her from all inherent risks in being in the stadium and connected to the common, frequent, and expected risks inherent to attending a hockey game.

The risk of an octopus being thrown onto the ice is an inherent risk of attending a Hockey game. This is supported by Exhibit A that details the frequency with which octopuses and similar sea creatures have been tossed onto the ice at games. Consistently, from 2002-2017 there have been documented actions of fans throwing octopus, catfish, steaks, and even a skinned duck onto the ice.

However, the actions that took place at the Penns game can possibly be construed as not an inherent risk in attending a hockey game. It is important to address where the facts of this case potentially fall outside the established PA law around the no-duty rule. In the controlling case Loughran, the plaintiff was hit by a ball purposely throw by the player. Here, the plaintiff was injured first by a fan throwing an octopus from behind her, and then from a player flipping the animal off the ice. It is important to note these are two distinct actions that can be interpreted differently.

<u>The Inherent Risk of the Thrown Octopus was Not Necessary to the Game.</u>

The dissent in Loughran specifically notes, "There is a distinction between a ball thrown within the confines of the game and one thrown for a purely gratuitous purpose." Loughran. Here, a fan sitting behind the plaintiff threw the octopus. The no-duty rule repeatedly addressed facts where a ball came from the field either errantly or purposely. That is an established "custom" of the game. Loughran. However, the case law does not address the action of other fans. In fact the law specifically states "patrons will only be able to recover for injuries caused by the operator's failure to exercise reasonable care in the construction, maintenance and management of the facility." A fan smuggling in an octopus could fall under management of the facility. This is where the no-duty defense is the weakest.

However, the action of the player, flipping the octopus off the ice for the safety and continuation of the game (Fendick complaint) could fall under the no-duty rule. Here, the Loughran case no-duty analysis' reliance on the Restatement 2nd of Torts definition of assumption of risk is implicated, "the plaintiff has entered voluntarily into some relation with the defendant which he knows involves risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of the responsibility."

Regarding the action of the player, the plaintiff would have to expect that there is a risk of something coming off the ice, whether a puck or not. This is where the no-duty rule as described above is most applicable to the facts presented in the complaint.

In conclusion, regarding the plaintiff's injuries resulting from the player flipping the octopus off the ice, the Penns are protected by the no-duty rule. However, it is a weaker argument when addressing the actions of the fan sitting behind the plaintiff.

Sincerely,

Sarah Benjamin

## Issue 2

Negligence Action

The issue is whether the Plaintiff has established a negligence action. First, in order to assert the no-duty rule, there must be a negligence claim filed by the plaintiff. In order to properly assert a claim of negligence, "the four basic elements of duty, breach, causation, and damages must be established." Loughran, ¶ 6.

Here, Plaintiff's complaint stated that Defendant had a duty to protect Plaintiff from objects being thrown to and from the ice and Defendant breached that duty by failing to prevent fans and its players from throwing objects to and from the ice, and its failure to institute safeguards caused Plaintiff to be struck by an octopus and injured as a result. The complaint also alleges that the Plaintiff suffered injury including a concussion, an eye injury, headaches etc. in addition to monetary damages. Therefore, Plaintiff has established a proper negligence action.

## Issue 3

The no-duty rule

The issue of whether the no duty rule can be applied as a defense to Plaintiff's claim depends on whether the throwing of the octopus by both the fan and player can be considered a common, frequent, or expected part of the game at The William Penns hockey games.

The no duty rule states that "the operator of a place of amusement is not an insurer of his patrons, patrons will only be able to recover for injuries caused by the operator's failure to exercise reasonable care in the construction, maintenance, and management of the facility. (quoting Jones v. Three Rivers Management Group) The no duty rule applies to bar a plaintiff's claim for injuries suffered as a result of common, frequent and expected risks inherent during the activity in question. Application of the no duty rule hinges on whether the activity in question is a "common, frequent, or expected part of the game." Customs cannot be limited to rigid standards of the game. Activities that have become inextricably intertwined with a fan's game experience are considered to be a customary part of the game. The no duty rule clearly states that recovery is not granted to those who voluntarily expose themselves to risks by participating in or viewing an activity. (Loughran v. Philles) Courts have held that even first-time spectators are imputed with common or "neighborhood knowledge" of the risks of the game. (Schentzel v. Philadelphia National League Club) Spectators assume the risk of being hit at games if it is inherent to the game and viewing experience. Plaintiff assumed the risk because it was an inherent risk in attending a game.

## Issue 4

The no-duty rule applies

The question here is first, does the no-duty rule apply to The Penns as an operator of a place of amusement and is the throwing of an octopus considered common, frequent and expected in the game of hockey.

The no-duty rule in Pennsylvania asserts that a spectator at a sporting event is not owed a duty by either the team or individual player to protect against a ball (or object) being thrown into the stands. Loughran. According to Loughran, patrons are only able to recover for injuries "caused by the operator's failure to exercise reasonable care in the construction, maintenance and management of the facility." The Loughran court further held that the "no-duty" rule will only apply when injuries are suffered as a result of common, frequent, and expected risks inherent during the activity in question. Plaintiff has to show that only when amusement facility "deviated in some relevant respect from established custom will it be proper for an inherent-risk case to go to the jury." Loughran. The entire no-duty analysis "hinges on whether the activity in question is a common, frequent or expected part of the game." Loughran. The no-duty rule here is applicable in that The Penns owns and operates the hockey stadium which is considered an amusement facility. Compl. Looking to the Court's analysis in Loughran. The rule will only be successful as a defense when the activity in question is considered a common part of the game (see discussion below).

Here, Plaintiff went to The William Penns hockey game October 26, 2020 against the Coal City Cougars. Plaintiff had purchased a ticket to sit in the front row of the stadium because she was aware that objects sometimes flew from the playing surface into the stands and she was worried about getting hit by a hockey puck. Mid-way through the first period Plaintiff was struck in the back of the head by an octopus thrown by a fan. This caused Plaintiff to split her forehead open. The octopus made it onto the ice and then was tossed back over the glass by a player. The octopus once again struck Plaintiff this time in the right eye. Plaintiff was given care at the stadium and admitted overnight at a Medical Center. Plaintiff's injuries include a concussion, laceration, scratched cornea, strained neck muscle, permanent scarring and headaches. Plaintiff also suffered lost wages due to the injuries as Plaintiff was not able to work. Plaintiff has filed a negligence action against The William Penns, Inc. alleging The William Penns, Inc. breached its duty to protect Plaintiff from objects being thrown to and from the ice. Similar to Loughran v. Phillies, The William Penns, Inc. may argue that under the no duty rule, it was common to expect that items would be thrown on the ice during a hockey game. There is an almost 70 year history in the sport of hockey of fans throwing octopus, lobster, fish and other objects onto the ice. Plaintiff purchased the ticket to the game and was a willing participant in the viewing of the hockey game. Plaintiff knew of the risks inherent to the game of hockey such as pucks flying into the stands. The fact that Plaintiff did not have common knowledge as to the tradition of throwing octopus, seafood, and other objects onto the ice is irrelevant as first-time spectators are imputed with the risks of the game.

For these reasons, there is a strong possibility that Plaintiff's will not be granted recovery for her alleged negligence claim based on the application of the no duty rule.

## Issue 5

The no-duty rule is not a defense for The Penns

The game Ms. Fendick attended was only a regular season game. Exhibit A to the Complaint only provides one example of a carcass thrown onto the ice during the regular season, and it occurred in response to the Red Wings' tradition. For that reason, even those fans familiar with the legend of the octopus most likely would not expect an octopus to be thrown onto the ice during the course of the regular season game attended by Ms. Fendick. In addition, even if it were foreseeable for a fan to throw an octopus onto the ice during the game, it was not foreseeable that a player would return the octopus to the stands. Nothing in Exhibit A to the Complaint references a player launching the carcass back into the stands. Indeed, even if The William Penns, Inc. did not have a duty to safeguard fans from octopuses thrown from other attendees, they had a duty to safeguard fans from objects launched from the ice to the stands. Of course, there was protective glass, but Ms. Fendick had regained her seat before being struck by the octopus a second time due to a player flicking the octopus back into the stands and this letter does not address the elements of breach or causation. For these reasons, an unqualified opinion as to the applicability of the no-duty rule to these facts is unavailable.

In conclusion, these facts most likely do not merit the application of the no-duty rule. The octopus was hurled during a regular season game and bears no established relationship to either of the competing teams. In addition, the plaintiff was also injured when a player launched the offending octopus back into the stands. Accordingly, the no-duty rule most likely does not apply.

## Issue 6

Conclusion

In conclusion, this act of the octopus carcass throwing was not common to regular season games and therefore The William Penns will not be successful in their claim that they had no duty here. The William Penns do not have a viable defense under the no-duty rule, because the no-duty rule will not apply because this was a regular season game and this practice was not common for regular season games. The William Penns owed a duty to Ms. Fendick during the regular season game and it breached that duty resulting in Ms. Fendick being injured and likely entitled to damages.

# Question 1: Sample Answer

## Issue 1

The court is likely to grant the petition to invalidate Jack's 2018 will. In order to create a valid will that is enforceable through probate, the testator must have had capacity at the time of making the will. One is deemed to have capacity to prepare a valid will if he understands the nature of his bounty and understands the property he owns. In other words, a testator has capacity if he understands, in a general manner, the property he has and the persons to whom he would naturally want to give that property.

Here, the evidence shows Jack quite possibly lacked capacity. While the capacity requirement in order to make a valid will is a rather low standard, it appears here that Jack lacked capacity for his will to be enforceable. First, Jack created his will toward the very end of 2018; however, he was diagnosed with Alzheimer's disease in 2017. Evidence of a disease that affects one's cognitive functioning and memory capabilities is evidence that one may lack capacity. If one forgets his belongings, property, and family that is also evidence of lack of capacity. The instructions in the DraftYourWill questionnaire appear to be very clear--that the testator should include all of his children in the question asking about children, even if he does not intend to name them as beneficiaries. Jack, however, failed to include his son, Ben. There also does not appear to be any intentional reason for Jack to have excluded him, contrary to what the instructions dictated. Ben did not live close and did not visit often, but neither did Amy, and Jack still included Amy when listing his children. Furthermore, the instructions said Jack should list all of his assets, including investments. Jack only included a bank account with $100,000 in it, and he forgot to include an extremely valuable investment account containing $5M in stocks and bonds when filling out the questionnaire to draft his will.

It is important to note that Jack, as a 92-year-old individual, created his will through this online questionnaire without the assistance of a lawyer. It is certainly possible that he simply misread the questions and that the Alzheimer's was not the reason for his mistakes. However, given the fact that Jack expressly "forgot" to include the investment account, as the facts indicate, and that his medical records show specific examples of cognitive decline in 2018, the year in which he made the will, it is likely that the court will grant the petition and invalidate Jack's 2018 will.

## Issue 2

If the will is deemed valid, Amy's share will not be divested under the No Contest Clause. Under PA law, no contest clauses are valid and enforceable. If a will contains a no contest clause, which dictates that any beneficiary who contests the validity of the will or any gift made under it will forfeit her share, the clause is valid. Thus, if a beneficiary challenges the will's validity, that beneficiary will not take under the will. However, the court wants to encourage people to bring forth legitimate claims as to a will's validity. It is important to give effect to the testator's intent, and if a testator lacks capacity to dispose of his property, then his

will likely fails to evidence his true intentions. Therefore, even where a will contains a valid no contest clause, a beneficiary is permitted to challenge the will's validity when there is good cause to contest the will. If the will is deemed invalid, then there was clearly good cause for the beneficiary to have been concerned. However, if the will is deemed valid, but the evidence shows that the beneficiary had a good faith and legitimate concern as to its validity, then the court will not punish the beneficiary for the will challenge, and the beneficiary may still take under the will. In this instance, the no contest clause is not enforced.

Here, the no contest clause is valid. Jack's will contained the proper language suggested by the questionnaire that a beneficiary will be divested of her share under the will if she challenges it. Yet, the evidence shows that Jack's capacity is questionable. The fact that he failed to follow instructions on the questionnaire to name all his children and assets and that he suffered from dementia since the year before he drafted the will, with particular instances of cognitive decline in the year he made the will, points to a serious doubt as to Jack's testamentary capacity. Thus, Amy had a legitimate claim on which to challenge Jack's capacity and ensure the will is valid. As such, she will not forfeit her share by way of the will contest, even though the clause is valid. Therefore, Amy's share will not be divested under the No Contest Clause, and she will take her 20% under the will.

## Issue 3

Laura must advise Cindy not to testify falsely, and if Cindy refuses to listen and perjures herself on the stand, Laura must inform the court. Under the PA Rules of Professional Conduct, an attorney may not knowingly allow a client to commit perjury on the stand. If a lawyer is informed in advance of the testimony that the client or any other witness intends to lie on the stand, the lawyer must inform the client or witness of the consequences of perjury and advise her to not go through with their plan and if the witness proceeds the lawyer may need to withdraw.

Here, Cindy (Laura's client) has indicated to Laura that she intends to testify to a critical part of the case--that she was present when Jack prepared the will and that he understood exactly what he was doing. Laura has ascertained that Cindy is mistaken and that testifying to that effect would constitute perjury. Laura should also inform Cindy that Laura cannot allow Cindy to testify falsely, and if she does, that Laura will be obligated to report the perjury to the court and she may need to withdraw from representation. Once Laura advises Cindy in this way, if Cindy insists on testifying falsely, Laura cannot allow Cindy to lie on the stand, and Laura must report Cindy's conduct to the court.

Therefore, Laura should proceed by advising Cindy that Laura cannot allow her to commit perjury, and that if she does so on the stand, Laura must report the conduct to the court and may need to withdraw as Cindy's attorney.

## Issue 4

Cindy was not permitted to deduct the expense of her home office because she did not use the space exclusively for work.

According to the Internal Revenue Code, a taxpayer is able to deduct all ordinary business expenses including a home office – provided it is the principle office and it is a designated area of a house used exclusively for work purposes.

Here, Cindy has converted the basement of her home to a home office for a successful business. She added a desk and computer to the office. In 2019, Cindy did not use any other office than the one in her basement and she worked 30 hours per week. However, she also added an exercise bike because she is a frequent participant in online cycling classes. Cindy exercised on average for 7 hours per week in her home office. According to the facts, she took a lot of online cycling classes. She did not use the office exclusively for business. Accordingly, Cindy should not be able to deduct her home office as a business expense.

# Question 2: Sample Answer

## Issue 1

Carl has the right to dissent to the proposed merger and the diminished value of his stocks and he should do so by making clear his dissent and voting no on the merger. The law in PA regarding a corporation's proposed merger where a board member or stockholder objects to the merger based on their fear of diluted stock value states that a board member or shareholder in this situation may make his objection known by dissenters rights and exercise his option to have his shares paid out by the company for fair value. A preliminary matter in asserting dissenters rights is that the corporation must not be publicly traded and must have less than 2,000 shareholders in order for a shareholder or board member to assert his rights. In order to assert dissenters rights, a board member or shareholder must make it known in writing that they wish to dissent to the merger to the board of directors, they must then either vote no or abstain from voting in the merger vote and finally must make it known to the company that they have dissented and wish to be paid out for the fair value of their shares shortly after the vote occurs.

Here, Carl would be able to assert his dissenters right. First as a preliminary matter Smith is a non-publicly traded corporation and has three shareholders. If Carl seeks to use his dissenters right to obtain the fair value for his shares prior to the merger, he must make it known to Art and Bill, i.e. the board of directors, that he wishes to exercise his dissenters rights regarding the merger and that he objects. Carl must then either vote no or abstain from voting when the company calls the shareholder's meeting to vote on the merger, and finally, Carl would have to contact the company after voting no or abstaining from voting at the merger and request that he be paid fair value for his shares. If Carl follows this procedure to exercise his dissenter's rights he will be paid the fair value for his share. In conclusion, Carl should exercise his dissenters rights to be paid the fair value of his shares.

## Issue 2

If the merger is consummated, NE will take on the assets and liabilities of Smith, including the ownership of the real estate, its mortgage and its other debts to general creditors. The rule of law in PA dealing with corporate mergers states that a merger between companies will result in one company (the servient company) being totally and wholly absorbed into the parent company. After this merger occurs, there will no longer be a servient company, and the parent company will have taken on all debts and obligations and assets of the servient company.

Here, once the merger between Smith and NE has concluded, Smith will no longer exist and NE will have taken on all of the company's debts and assets, including the real estate that was previously held by Smith, the mortgage on that property and any other debts to general creditors. In this merger NE would be the remaining corporation and Smith will cease to exist. In conclusion, NE will take on all debts and assets of Smith in the merger.

## Issue 3

Garments must deliver the coveralls at a reasonable time. The rule of law for when a contract is created for goods under the UCC states that the only necessary item required in a contract for the sale of goods between merchants is the quantity of the item in order for a valid contract to be created. In the absence of other terms that have been omitted from the contract, the UCC will fill the gaps in those contractual terms that are reasonable under norms of the course of dealing of the parties or the industry in general.

Here, Garment's must deliver the overalls to Smith in a reasonable amount of time that would be reasonable for parties in the area who were contracting regarding the same or similar products, here coveralls. Since there has not been an explicit term for when the coveralls have to be delivered to Smith, Garments will be obliged to deliver the coveralls in a reasonable time by industry standards. In conclusion, as the contract did not include a term for delivery time, the UCC will gap fill and require a reasonable time for delivery.

## Issue 4

Smith will likely be able to assert a breach of express warranty under the UCC. At issue is whether Smith may assert a breach of warranty for the delivery of gray instead of white coveralls, despite the purchase agreement having a proper disclaimer of implied warranties. In addition to implied warranties a sales agreement may also contain an express warranty, where the seller warrants as to a particular sample of the good that the seller knows the buyer is relying upon as a material reason for entering into the agreement. In other words, the sample is one that induces the buyer to enter into the agreement.

Smith may argue that it has an express warranty under the agreement because Art indicated to Garments that he needed white coveralls and the Garments salesperson said that white coveralls were not a problem. The salesperson then showed Art a sample of the bright white coverall and told Art that he could provide similar coveralls for Smith. The facts indicate that Garments created an express warranty that the coveralls would be bright white, and Art is, therefore, likely able to assert a breach of an express warranty despite the fact that the sales agreement waived all implied warranties.

# Question 3: Sample Answer

## Issue 1

The facts support a charge of receiving stolen property against Mike. The issue is whether Mike committed the crime of receiving stolen property. Receiving stolen property involves the receipt of goods known to be stolen with the intent to permanently deprive the owner thereof--i.e. without intending to return the property to the rightful owner. The actus reus of the crime, i.e. the guilty act, is taking control or possession of the stolen property. The mens rea, or intent, is knowingly, which means that the actor knows that the unlawful result is practically certain to occur.

Here, Mike took the bike rack from Scott. The bike rack was stolen property. Mike knew that the bike rack was stolen because Scott told Mike that it was stolen. Mike had this knowledge at the time he took possession of the bike rack. He also did not return or intend to return the bike rack to its owner because he put it out with his garbage. Therefore, the facts support a charge of receiving stolen property against Mike.

## Issue 2

The court would likely not suppress the bike rack because there is no reasonable expectation of privacy with respect to property placed in a public area and no warrant is required to search and take abandoned property. The issue is whether the police unlawfully seized the bike rack where the bike rack was placed by the curb the day before trash collection. The US and PA constitutions protect individuals from unreasonable searches and seizures. Police officers generally need a search warrant to search for and seize property. Evidence obtained without a search warrant is generally inadmissible. The key inquiry for whether a warrant is required is whether the individual has a reasonable expectation of privacy or whether the property has been abandoned. A person does not have a reasonable expectation of privacy from seizure of property placed within the public view and area. Nor do the police need to obtain a warrant in order to seize abandoned property. Property is abandoned if the possessor takes actions consistent with an objective intent to abandon the property.

Here, Mike placed the bike rack by the curb next to his garbage cans the night before the trash man was scheduled to pick up trash. By every objective indication, Mike intended to abandon the property. Therefore, no warrant was needed for the police to take the property. Additionally, there is no reasonable expectation in privacy in a person's garbage that they knowingly place at the side of the road with the intent to dispose of. Mike also consciously decided to "get rid of" the bike rack when he placed it by the curb. Police did not need a warrant to seize the bike rack, so the bike rack is admissible. Therefore, the court would not suppress the bike rack.

## Issue 3

The DA should respond by arguing that although the statement by Scott is hearsay, it can be introduced as an exception to the hearsay rule--the former testimony exception. Under PA Rules of Evidence, hearsay is a statement (an assertion) made outside of the current court proceeding that is offered for the truth of the matter asserted in the statement. While hearsay is inadmissible, the PA Rules offer several exceptions to this rule. The former testimony exception is one that allows the introduction of hearsay evidence if: (1) the declarant (the person who made the statement) is now unavailable, (2) the former statement was made in a formal proceeding while the declarant was under the penalty of perjury, and (3) in a criminal case, the declarant was subject to cross examination, or more specifically, the opposing party's attorney had the opportunity to cross-examine the witness, whether or not he actually did so. A declarant is unavailable if he has died since the time of the statement. If these elements are met, then a declarant's prior statement can be introduced, since the witness is unable to testify in the current proceeding.

Here, the statement the DA is attempting to introduce is hearsay. It is an assertion, thus a statement, made out of court (in the preliminary hearing) that is being offered for its truth (that Scott had told Mike that the bike rack was stolen). However, the statement satisfies the former testimony exception to the hearsay rule because Scott is now unavailable to testify because he died in a boating accident after the preliminary hearing and before Mike's current trial. Further, Scott was under penalty of perjury when he made the statement because he made it while testifying in a criminal preliminary hearing. Also, Scott was subject to cross examination on the statement. Mike's attorney had the opportunity to cross examine him and chose not to. It is immaterial that Mike's attorney did not in fact cross examine Scott. The opportunity to do so satisfies the rule. Thus, the statement is admissible. The DA should respond that Scott's statement is admissible under the former testimony exception to the rule against hearsay.

## Issue 4

Neither the value of the bike or the helmet will be considered marital property subject to equitable distribution. Under PA law, when a married couple divorces, the court will equitably divide the property of the spouses, but only the property that qualifies as marital property. First, any property acquired during the marriage is presumed marital property. This presumption can be overcome, however, by a showing that the property meets an exception to the presumption. One exception is: any property acquired during the marriage that was in exchange for or was acquired with funds from before the marriage. This is true for the entirety of the property if the value did not increase during the marriage. If it did increase, then only the increase in value is considered marital property. Another exception is: any gifts, bequests, devises, or descents acquired during the marriage. These exceptions are not considered marital property, but instead are separate property and not subject to equitable distribution. The same rule stated above regarding increases in value applies to gifts as well.

Here, Mike and Sally married in July 2019, and Mike purchased the Speedster bike one week later. Thus, the Speedster bike was acquired during the marriage and is presumed marital

property. However, Mike purchased a Rocket 6 bike in April 2017, long before the marriage. He then sold the Rocket 6 for $5,000 and purchased the Speedster for $5,000. Given these facts, the Speedster was purchased with funds acquired by Mike for the sale of property he acquired prior to the marriage. Therefore, the Speedster bike is not marital property, as it was acquired using funds held by Mike prior to the marriage. Further, the facts state that the Speedster did not increase in value during the marriage, so there is no portion of the bike's value to be treated as marital property on this basis.

The helmet is a much clearer case. As stated, PA law treats gifts, bequests, devises, and descents as entirely separate property, so long as the property did not increase in value during the marriage. Here, Mike acquired the helmet three weeks after he got married, creating a presumption that it is marital property. But it meets an exception because it was given to him by his mother for his birthday. Accordingly, the helmet is separate property. Also, the facts state that the helmet did not increase in value during the marriage, so there is no portion of the helmet value to be treated as marital property on this basis. Therefore, both the bike and the helmet will be treated as separate property and not subject to equitable distribution.

# Question 4: Sample Answer

## Issue 1

The issue is how the court would analyze Kate's procedural due process claim based on her involuntary commitment. The US constitution provides that an individual is entitled to procedural due process protection regarding life, liberty, and property interests. This is applicable to the states through the 14th Amendment. A liberty interest is a fundamental right that protects a person from bodily restraint and requires due process protection. The proper procedure with regards to a liberty interest is notice and an opportunity to be heard at a hearing. When determining whether and when a hearing should be held (what process is due), courts look at the interest being infringed, the individual's interest in having that protected, the available alternative procedure, the government's interest in streamlining procedures, and whether delay would cause erroneous deprivation of that interest.

Here, the court will analyze Kate's claim of continued involuntary commitment as a deprivation of a liberty interest to be free from bodily restraint, and she will likely succeed on her claim because she her liberty interest was infringed upon unduly without an opportunity to be heard. Kate was involuntary committed after being found incompetent to stand trial because she became so depressed. The state statute allowed for involuntary commitment if the defendant was incompetent to stand trial or was found to be dangerous. The statute allowed for a review period every 6 months. Kate was found to not be dangerous. After being committed for two weeks, the charges were dropped and Kate was no longer a criminal defendant. Yet, she remained committed for an additional 5 months without being provided a hearing until the 6 month review period. This was a violation and deprivation of Kate's liberty interest in being free from bodily restraint. Here, the court will rule in Kate's favor because by keeping her committed for additional 5 months she was deprived of her liberty. A liberty interest is a fundamental right, the deprivation of such is serious and the delay in providing her a hearing caused her an erroneous deprivation. The government interest here is not compelling because the 6 month review process used caused a significant deprivation to Kate's liberty. When the charges were dropped against Kate she should have been released or provided a hearing because she was no longer a criminal defendant and she was not dangerous. By keeping Kate committed for an additional 5 months her due process rights were violated.

Therefore, the court will analyze Kate's claim as a deprivation of a liberty interest because she was not free from bodily restraint. Kate will likely be successful in this claim because the government does not have a valid interest in keeping her committed without a hearing if she is not dangerous and is no longer a criminal defendant incompetent to stand trial.

## Issue 2

The issue is whether Kate will be able to establish a prima facie case of discrimination under the ADA. The ADA protects employees who are disabled from discrimination in regards to employment and compensation. The ADA protects individuals who are disabled but are

otherwise qualified for the job and can perform the essential functions of the job with or without an accommodation. To establish a prima facie case under the ADA, the claimant must show that she is a qualified individual with a disability who suffered adverse employment action as a result of her disability.

To be considered a qualified individual with a disability, the claimant must have a disability, which is a physical or mental impairment that causes substantial interference with a major life activity; the individual had a record of having such a disability; or the employee is regarded as having such a disability. A major life activity includes daily activities such as household chores and the ability to take care of oneself. A disability will not be disregarded simply because it can be helped with medicine, i.e., it will still be considered a disability that substantially interferes with a major life activity even though it can be alleviated through treatment. An adverse employment action includes termination as well as a demotion.

Here, Kate will be able to establish a prima facie case of discrimination under the ADA. First, Kate is a qualified individual with a disability. Kate has MDD, a mental impairment, which even though she seeks treatment for, has a substantial interference with major life activities because without treatment it affects her ability to eat, sleep, bathe, and communicate. Kate told her supervisor of her MDD. Further, Kate was performing well at her job. She received positive feedback from customers and completed all assignments satisfactorily. Thus, Kate is a qualified individual with a disability. Third, Kate suffered an adverse employment action. Kate was not offered a permanent position after her probationary period even though she had been performing well at the job. Because she was not offered employment and essentially was terminated, Kate suffered an adverse employment action. Lastly, Kate suffered this adverse employment action because of her disability. When Kate was not offered the permanent position she was told it was because the Corp found someone "more energetic and better equipped to handle the stress." This was directly related to her disability. Moreover, the notes from her supervisor further establish that the adverse employment action was because of her disability. The supervisor's notes provided that she seems anxious and overwhelmed, that she probably could not get out of bed when she said she had car trouble, and that she was being irrational. Additionally, another probationary employee who did not have mental or physical health problems was offered a permanent position. These notes establish that Kate suffered the adverse employment action because of her disability. Therefore, Kate can make out a prima facie case of employment discrimination because she is a qualified individual with a disability (mental impairment) that causes substantial interference with major life activities; she suffered adverse employment action; and the adverse employment action was because of her disability.

## Issue 3

The issue is upon which grounds should JD object to disclosure of his notes, and how the court will likely rule. Generally, a party may discover all relevant things that are not privileged, or non-privileged things likely to lead to discovery of relevant information. However, an attorney’s work product is protected from disclosure during discovery. Work product is something prepared by an attorney (or agent of the attorney) in anticipation of litigation. Work product may be discovered when the opposing party shows substantial need for the document

and that it would suffer undue hardship in obtaining the equivalent. Nonetheless, a court will protect the mental impressions of an attorney, even when work product must be disclosed.

J.D. should object on the grounds of work product protections because the notes were prepared by him (an attorney) in anticipation/preparation for litigation. However, the court will nonetheless rule that the notes should be disclosed. The opposing party has a substantial need for this evidence because the notes contain statements from the sole witness to the events in question. The opposing party can show undue hardship in obtaining the equivalent because there is a significant expense associated with locating and contacting the witness if it is even possible. Therefore, the court should require disclosure of the notes, but it will require they be redacted to protect J.D's thoughts and opinions about Bob's credibility and how Bob's observations affect Kate's ADA claim.

# Question 5: Sample Answer

## Issue 1

Ann will be successful because the risk of loss transferred to Tom upon execution of the land sale contract. The issue is whether Tom must pay the full purchase price despite the destruction of Greenacre. Under the doctrine of equitable conversion, the buyer obtains equitable title to real property upon signing the land sale contract. This means that the risk of loss passes to the buyer upon signing the contract unless the parties provide otherwise. If the property is destroyed after the contract is signed, the buyer can be compelled to specifically perform, i.e. close with the full purchase price.

Here, Tom agreed to buy Greenacre and paid the deposit. The contract did not allocate the risk of loss, so Tom bears that risk by default. Tom must go through with the sale even though Greenacre was destroyed before closing. Therefore, Ann's suit will be successful.

## Issue 2

The issue is whether a valid contract was formed between Bill and Ann when Bill promised to buy Ann a Cartier watch in exchange for her meeting him for lunch. The rule is that the key elements to any valid contract are offer, acceptance, and consideration. Consideration is really the issue here. Consideration is bargained for legal detriment. The promise induces the detriment and the detriment induces the promise. The slightest consideration, even nominal consideration, is sufficient to have consideration.

In this case, B sees A in their building and states he will buy A a watch if she has lunch with him at Morties. This was an offer by Bill accepted only by A's performance of the terms of the contract which included having lunch at the said place and time. Despite the short nature of the walk and despite the fact that A is not really suffering any great detriment she is being induced to do something she otherwise would not have in response to B's offer. Therefore, an enforceable contract was created between A and B.

## Issue 3

(a). Chuck will be entitled to recover the costs to satisfy the lien. At issue are the warranties included in a general warranty deed. There are 3 types of deeds that can be provided to a buyer - a general warranty deed, a specialty warranty deed and a quitclaim deed. The general warranty deed is the most fulsome of the three - it provides its holder warranty of title as well as warranty that the property at issue is free of liens and judgment. It covers the seller's period of ownership as well as those earlier in the chain of title. Upon grant of a general warranty deed, if there is a lien on the property, its holder can recover from the grantor of the deed the amount of those costs. Here, Bill validly deeded his property to Chuck with a general

warranty deed. As such, Bill promised that, among other things, there were no validly existing liens on the property at the time of sale by him, or by anyone else. Even though Bill was not responsible for the lien, to provide a general warranty deed to the property with an existing lien is a breach, and Chuck can recover those costs from Bill.

(b). Here, Chuck would not be entitled to recover from Bill the costs to satisfy the lien. At issue are the warranties included in a specialty warranty deed. The specialty warranty deed includes fewer warranties from seller to buyer. While it grants title, it does not cover any liens that may exist on the property prior to the current seller's time of ownership and does not look "up the chain" of title to cover any liens that may exist from previous owners. As such, if the language was written as modified, Chuck will not be successful in recovering his costs from Bill to satisfy the lien.

## Issue 4

(a) How should the court rule on the objection under the Parol Evidence Rule? The court should rule that the evidence regarding the prior statement is barred under the Parol Evidence Rule. Because the Agreement contained "merger" clause the Parol Evidence Rule can be used to prevent certain extrinsic evidence from being introduced. The relevant part of the Parol Evidence Rule to this case states that any statements or writings made prior to an agreement (especially one that has an integration clause) cannot be introduced to contradict the express terms of the contract. In other words the contract is the supreme authority on what the contract is intended to enforce.

Here because the contract expressly stated that Allied was to pay Bill's overhead charge they cannot introduce evidence of statements made prior to signing that contradict the express terms of the contract. The contract specifically had an integration clause that stated that all prior agreements and understandings are merged herein. As a result, Bill will be successful in objecting to the prior statement being admitted as it was made prior to the signing of a fully integrated contract under the Parol Evidence Rule.

(b) Is the evidence of the incorrect wage rates blocked under the Parol Evidence Rule? No the evidence will not be blocked by the Parol Evidence Rule. Evidence that the 2020 wage rate was an error would contradict the express terms of the contract and seemingly violate the Parol Evidence Rule. However, one exception to the rule is that courts may allow extrinsic evidence to clarify a mutual mistake by the parties in a contract to correct a resulting error in that contract. As the facts state the inclusion of 2020 for the wage rates was a drafting error in the agreement and that both parties missed it. Thus evidence that it should have been 2019 wage rates will not be contradicting the terms of the agreement in the eyes of the law but serve as evidence as to the mistake so it may be corrected. This means that Bill's objection will likely be overturned because evidence of a mutual mistake resulting in an error in a contract fits within a narrow exception of the Parol Evidence Rule that allows for the evidence to be admitted.

# Question 6: Sample Answer

## Issue 1

Pearl (P) should sue D-Lovely (D) for strict liability under a defective design/failure to warn theory.

The issue is whether P can sue D under a strict liability product defect theory.

Strict liability is a theory of liability that holds the defendant responsible regardless of the care observed. Strict liability applies in three main areas: products liability, animals, and abnormally dangerous activities. Products liability comes in three forms: design defect, manufacturing defect, and failure to warn. Under design defect theory, the design of the product must be defective in such a way that it creates an unreasonable risk of harm through foreseeable use. There must be a reasonable alternative design that decreases this risk at little relative cost to the manufacturer. This balancing test is known as the risk-utility analysis. There is also a consumer expectation test that requires that the defect is unreasonable and unknowable to an ordinary consumer. The product must also contain the defect at the time it leaves the control of the manufacturer or commercial seller. Under the failure to warn theory, a manufacturer of goods is liable for failure to warn consumers about dangers arising from the foreseeable use of the product. Under these theories, the defect in design or failure to warn must proximately cause harm to the plaintiff.

Here, P can assert a design defect claim against D. It is likely that the danger of laser dispersion was unknowable and unreasonable to the ordinary consumer under the consumer expectation test. Under the risk utility test, the D-Laser could have been designed with a shield to protect against unwanted hair removal because it would have required only $1 to make the shield. The danger to consumers is great by comparison because the use of the laser without the shield could result in permanent unwanted hair loss.

P may also have a failure to warn claim against D. It is foreseeable that the laser could be dispersed to affect nearby hairs that the consumer intends to keep. D therefore has an obligation to warn consumers that nearby hair growth should be shielded to prevent unwanted hair loss.

Therefore, P should sue D under defective design and failure to warn theories because she suffered actual harm -- i.e. permanent hair loss-- proximately caused by the defects in the D-Laser.

## Issue 2

D-Lovely should join Dandy as a third party defendant. At issue is what procedural steps D-Lovely can use to assert its tort claim against Dandy in the same lawsuit as Pearl's claim. Under the Pennsylvania Rules of Civil Procedure, a defendant may join a third party where the third party may be liable for part or all of the defendant's liability pursuant to the same facts and

circumstances underlying the original claim. The proper method to join such a third party is by filing a writ of praecipe or a complaint against the additional defendant within 60 days of the filing of the complaint of when the joining parties answer to the complaint is due.

Here, D-Lovely is claiming that Dandy is liable for at least a portion of D-Lovely's liability to Pearl, because Dandy failed to include the proper instructions in the D-Laser box. Since Dandy may be jointly and severally liable under the products liability case and such liability arises out of the same facts and circumstances underlying the original claim, D-Lovely should file a writ of praecipe to join Dandy or a complaint against Dandy as a third party defendant in the case within 60 days of receipt of the original complaint.

## Issue 3

Pearl should assert that the Winters records may be introduced under the business records exception to hearsay. At issue is whether Pearl can introduce the Winters records over D-Lovely's objection that the records are hearsay. Hearsay is an out of court statement used to prove the truth of the matter asserted. Although hearsay is generally not admissible at trial, it may be admissible if it falls into one of several categories of exceptions to hearsay. Hearsay exceptions typically exist, because they are situations that cause doubt as to the truth of out of court statements as they are not subject to cross examination. Under the Pennsylvania Rules of Evidence, one exception to hearsay is the business records exception, which exists if such records are maintained in the ordinary course of business, were created at the time at which the recorded events occurred and not in contemplation of trial, and the records are attested to as to their general accuracy, method of keeping and authenticity. The individual charged with creating or maintaining such business records may properly attest to the authenticity of such records.

Here, Pearl seeks to introduce records created by D-Lovely that purport to show that there were anecdotal reports of unintended hair loss experienced by test subjects during product testing. The records were produced during the research and development phase (not in anticipation of litigation) and were a part of Witt Winters' routine observations. Further, Winters maintains all such records in his office for D-Lovely, so he would be the proper individual to lay the foundation to support the introduction of such records. Once the proper foundation is laid, the records should be admitted under the business records exception to hearsay.

Although the business records are hearsay since they are an out of court statement intended to be used to prove the truth of the matter asserted, the court should overrule D-Lovely's objection that the records cannot be introduced as they likely fall within the business records exception.