February 2024 Georgia Bar Examination Sample Answers

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ESSAY QUESTION 1

Sample Answer 1

(i) Tesla has committed fraud and deceit in contract. At issue is whether the contract between Rome and Tesla was entered into due to material misrepresentations of fact.

Under Georgia law, a valid contract requires mutual assent (offer and acceptance), consideration, and lack of defenses. Offer occurs when a party communicates a willingness to accept a deal on specified terms. Acceptance occurs when the party who was given an offer accepts according to the offers terms. Consideration is defined as a bargained for exchange of legal value. Consideration can be almost anything, including a peppercorn. Furthermore, contracts for the sale of goods, defined as tangible moveable items, is governed by the UCC, where all other contracts are governed by the common law. Some common defenses to valid contract formation are the statute of frauds, duress, undue influence, and fraud. To show that a contract was entered into fraudulently, a party must show that they were induced to enter into the contract based on material misrepresentation of fact, and that but for these misrepresentations, they would not have entered into contract.

Here, it seems that there is mutual assent. While it is unclear in the fact pattern where the specific offer and acceptance took place, the parties clearly negotiated and at one point came to an agreement regarding the contract, which means offer and acceptance must have taken place. Tesla presented a contract to Rome, which Rome signed, implying an offer and acceptance. Furthermore, there is consideration, because Tesla is offering his legal services in exchange for a share in IPR. Because there was mutual assent to enter into the Amended Agreement and valid consideration given, there is a valid contract. However, the contract is likely not enforceable because Tesla made fraudulent misrepresentations regarding the substance of the contract. Per the fact pattern, Tesla was given the responsibility of finding potential restaurant sites. Included in the Amended Agreement was a provision stating the restaurants must be in multi-use shopping centers, and second member-consent rights that limited Rome's control. Neither provision was disclosed to Rome. Rome entered the agreement being assured he would remain the majority owner, and remain the manager of the LLC. Tesla then assured Rome he was looking out for him, and Rome signed the agreement. Based on these facts, there was a material misrepresentation

of fact that induced Rome to contract. Had Rome known that his management was limited by a second party consent provision, or the limitation on which spaces the restaurant could lease, he likely would not have entered into the agreement, as he would then understand he is no longer in control of management in the way he intended. While these provisions were simply not disclosed, non-disclosure can suffice to show fraud.

Thus, Tesla is liable for fraud.

In a contract case, punitive damages are not available, and expectation damages are the norm. Expectation damages put a party where they would have been had the contract been performed, or in the case of fraud, had the contract not been entered. Consequential damages are generally not available in contract, unless the breaching party had reason to know the damages would occur, and the damages are foreseeable. Thus, Rome should expect damages that would make him whole, around $5 million dollars for the leasehold breaches and any for foreseeable damages that should have been expected by Tesla, such as the loss in the business value. Because Tesla was aware of what he was doing and the consequences of these business actions, it is plausible he will be held liable for consequential damages.

(ii) Tesla is liable in tort for breaching his fiduciary duties to Rome. At issue is whether Tesla's representation of Rome fell below a standard of lawyers.

Malpractice can be brought through a negligence suit in tort. Negligence requires a showing of (1) the defendant owing the plaintiff a duty of care, (2) a breach of the applicable duty of care, (3) actual and proximate causation, and (4) damages. Generally, a duty of care is owed to all foreseeable plaintiffs. In the context of malpractice, a professional owes clients a duty to act as a reasonably prudent member of that profession. Actual cause is shown when but for the negligent act, the injury would not have occurred. Proximate cause is shown when the injury from the action is foreseeable. In Georgia, to bring a malpractice claim, the complaint must also contain an affidavit from one member of the defendant's profession stating that their conduct constitutes malpractice. In Georgia, under the Georgia Rules of Professional Conduct, a lawyer owes his client several fiduciary duties including the duty of loyalty, diligence, and competence. The duty of loyalty holds that a lawyer must not represent clients with conflicting views, including the lawyer themselves. A conflict arises between a lawyer and a client when a lawyer enters into a business or other agreement with a client, without making certain requires disclosures (discussed in greater detail below).

First, damages are clear because IPR, Romes company, is now worth significantly less than it was prior to these transactions. Here, Tesla clearly owes Rome a duty of care, since Rome is his client, and it is entirely foreseeable that Rome will be injured by the misconduct of Tesla. Furthermore, the duty owed is that of a reasonable lawyer. Tesla clearly breached this duty by breaching the fiduciary duty of loyalty, by agreeing to represent Rome in a transaction in which he was interested without making proper disclosures to Rome (discussed in greater detail below). Tesla is the actual cause of this because but for his negligence and breach of duty, IPR likely would not be in such dire circumstances, and would certainly not be facing legal action on the front of

the leasehold estates. Tesla is the proximate cause as well, because it is foreseeable that by breaching the duty of loyalty and entering into these agreements for IPR, such damages would occur. As stated in the beginning, damages are clearly shown.

Thus, a prima facie case for malpractice based on the breach of the duty of loyalty can be made. As stated above, to make this complaint, Rome will need to attach an affidavit from a lawyer stating that there is malpractice. In a tort action punitive damages are available. In Georgia tort damages are generally limited to $250,000, the exceptions to this rule not applicable in this case. Consequential damages are also available in tort, and will be available to Rome.

(iii) Rome would likely have a successful grievance against Tesla should he file with the State Bar. At issue is whether Tesla broke the Georgia Rules of Professional Conduct.

In Georgia, lawyers may be sued for malpractice, independent to discipline from the State Bar. Malpractice may also be grounds for discipline, but may not be. Discipline is appropriate when a lawyer violates the Georgia Rules of Professional Conduct. Under the Georgia Rules of Professional Conduct, a lawyer must not represent a client when there is a conflict of interest. To do so would violate the fiduciary duty of loyalty each lawyer owes to their clients. A conflict may arise between current clients, current and former clients, or the lawyers own interests and the client. Under the Rules of Professional Conduct, a conflict of interest is present when a lawyer enters into business negotiations with a client. A lawyer must refrain from entering such transactions unless the client is informed of the conflict and what it entails and is advised to seek independent counsel. Waiver of such a conflict must be in the form of informed consent in writing. The State Bar has broad discretion on how to punish lawyers who violate the Rules of Professional Conduct.

Here, Tesla did violate the rules by entering into a business agreement with a client without making the proper disclosures. Tesla created and presented Rome with the Amended Agreement he made. Furthermore, Tesla took 25% ownership of IPR, showing he was entering in a business transaction with his client outside the context of representation. Regardless of whether there was fraud, this claim is valid. Here, Rome and Tesla entered into an agreement in which Tesla would become a part owner in IPR, and represented himself and Rome in the transaction, creating a clear conflict between the two parties. Furthermore, Tesla did not advise Rome there was a conflict, encourage him to seek independent counsel, or get informed consent in writing.

Thus, there is a clear violation of the Rules of Professional Conduct. The State Bar has wide discretion in punishment ranging from fines to suspension or even disbarment.

Sample Answer 2

To: Firm

From: Examinee

Re: Rome v. Tesla

(i) Fraud and Deceit:

At issue is whether Rome has a claim against Tesla for fraud and deceit. In Georgia, in order to establish fraud, a person must show that there was a material misrepresentation made regarding the contract, that the misrepresentation was made to induce the particular person's assent or would induce a reasonable person's assent, and that the person justifiably relied on the misrepresentation. A misrepresentation does not have to be affirmative--a concealment of material fact will suffice, particularly if the person concealing such fact has a fiduciary duty to the client to disclose. Additionally, reliance is usually presumed justifiable, unless the misrepresentation is patently obvious, or the plaintiff knew of the false statement/concealment.

Here, the provision in the amended agreement that required new restaurants to be on property leased from multi-use shopping centers owned by Tesla was a material fact to the agreement, and Tesla failed to disclose this fact. Additionally, Tesla failed to disclose that the leases which Tesla had full control over negotiating were priced above market value, and that Rome was named as a personal guarantor in them. More so, Tesla limited Rome's control through a second-member consent rights contained within the amended agreement, in direct contradiction with Rome's expressed desire to retain majority control over IPR. The facts indicate that Rome relied on Tesla as his counsel--this includes relying on Tesla's express assurance that Tesla was looking out for Romes interest when he had Rome sign the amended agreement. The facts also indicate that Tesla initially approached Rome and expressed that there were "sharks" who would try to "take advantage of [Rome] due to his inexperience." This statement goes to Tesla's knowledge of Rome's inexperience, and thus knowledge that concealment of important material facts may easily induce Rome's assent, as he lacked experience in business.

Reliance on a certain fact is typically presumed justifiable. Here, with no evidence that Rome had knowledge of a material fact's concealment, and nothing that renders the concealment patently obvious to a reasonable person, Rome's reliance is presumably justified.
Because there was a material misrepresentation by Tesla's failure to disclose specific facts regarding the agreement, the failure to disclose induced assent to the agreement, and Rome justifiably relied on the agreement, Rome has a cause of action against Tesla for fraud and deceit. Enforcement of their contract would be unconscionable.

(ii) Breach of fiduciary duty:

At issue is whether Tesla has breached a fiduciary duty to Rome. In Georgia, generally, there is no duty to affirmatively act. However, certain relationships give rise to special duties--these are referred to as fiduciary relationships. One such relationship that gives rise to a fiduciary duty is the relationship between a lawyer and his client. A lawyer has a duty of diligence and competence with respect to representation of a client, and has a duty to act in the client's best interest. Additionally, an owner in an LLC has a fiduciary duty of good faith and fair dealing.

Tesla breached this duty to Rome in a number of different ways. Tesla had a duty to reveal any potential conflict of interest that he had to Rome regarding getting involved in the business personally. Additionally, he had a duty to Rome to explain to him the provisions of the contract which he was asking Rome to sign. Because Tesla had so much more knowledge regarding business transactions, he had an obligation as Rome's attorney to use this knowledge to Rome's benefit, not his detriment. Additionally, Tesla promised Rome that he would have control of IPR as majority owner, but later limited Rome's control via the amended agreement's second-member consent rights.

By taking advantage of Rome's lack of knowledge, and failing to act in Rome's best interest, Tesla breached his fiduciary duty to Rome.

(iii) Violation of the Georgia Rules of Professional Conduct:

At issue is whether Tesla violated any rules of professional conduct. Under the Georgia rules of professional conduct, a lawyer has a duty to disclose any conflict of interest involved in his representation of a client. This duty extends to personal interests which may present conflicts. In order to represent someone where there is a conflict of interest, a lawyer must obtain his clients informed, written consent.

To gather informed consent from a client, a lawyer must: (1) hold a meeting with that client in a manner sufficient to show the client the significance of the conflict; (2) provide the client with written materials regarding the risks and potential alternatives to the representation; and (3) give the client opportunity to consult with outside, independent counsel. Informed consent cannot be obtained if the conflict of interest would substantially impair the lawyer's ability to diligently and effectively represent the client.

Here, there is no information showing that Tesla even informed Rome of the potential conflict of interest, let alone got his informed written consent. By failing to disclose personal conflicts of interest or receiving Rome's informed consent, Tesla has violated the Georgia Rules of Professional Conduct.

(iv) Procedural requirements for a complaint alleging malpractice:

At issue is what is required for a complaint alleging malpractice.

In Georgia, complaints alleging professional malpractice must include an affidavit of someone within the practice establishing the duty of care owed. Thus, to file a complaint against Tesla, Rome should submit an affidavit of a Georgia lawyer establishing the standard of care so that he may prove that Tesla's conduct fell below this duty, breaching it and violating the rules of professional conduct.

Additionally, a complaint alleging fraud must be plead with more specificity than a regular complaint--if a complaint alleges fraud, the plaintiff must include the circumstances/facts that give rise to the claim of fraud.

(v) Damages:

At issue is any issues that might arise relating to the types of damages that Rome may seek to recover.

Damages must flow from the cause of action. Special damages are those with fixed monetary amounts and must be plead with reasonable certainty in order to be recoverable. Consequential damages must be reasonably foreseeable in order to be recoverable.

Rome may seek to recover the lease payments and the value lost in his intellectual property. Both of these damages flow from the misrepresentation.The lease payments may be easier for Rome to recover as they can be established with sufficient certainty. However, the loss in value of his intellectual property and must be established with reasonable certainty to be recoverable.

Sample Answer 3

To: Partner

From: Examinee

Date: February 27, 2024

Re: Joe Rome's claims against Rick Tesla

MEMORANDUM

i) <u>The issue is whether Rome has a claim against Tesla for fraud and deceit.</u>

Rome has a claim against Tesla for fraud and deceit.

a) A defendant makes a fraudulent misrepresentation when the defendant i) makes a statement or fails to disclose a material fact ii) with intent to mislead iii) that induces reliance on the part of the plaintiff, and iv) such reliance causes the plaintiff harm. A contract created based upon fraud will be void.

Here, Tesla made a number of express representations to Rome that undoubtedly misled Rome. Tesla promised Rome that he would protect Rome from the "sharks" in the business and help him in growing the business and profits of IPR. Tesla also failed to disclose to Rome i) the provision in the Amended Agreement that required the new IPR locations be opened in shopping centers owned by Tesla, and Tesla planned to sell these centers after the market value increased with the additions of IPR locations, ii) the fact that the lease were priced above market value with Rome as personal guarantor, and iii) the conflict of interest inherent in the transaction between Tesla and Rome, discussed in further detail below. These facts are material in that, had Rome known about them, Rome likely would not have entered into the agreement with Tesla, as these significantly alter the bargain between the two parties and reveal the disparity in bargaining power, and would not be desirable by Rome, a successful restauranter. It is evident that Tesla concealed this information with the intent to mislead Rome, as without this information, Rome was more likely to enter into the transaction with Tesla, and thus Tesla was more likely to reap the benefits of the increase in market value of his shopping centers.

Rome did in fact enter into the Amended Agreement for IPR, LLC, and by entering into this agreement, he relied substantially on the representations made by Tesla, particularly being that Tesla was acting as Rome's attorney in "advising" him on the desirability and meanings of these provisions, and the transaction as a whole. Tesla drafted the initial paperwork for IPR, and Rome has always relied on Tesla as his legal counsel and business advisor. Therefore, it is reasonable that, due to the relationship between Rome and Tesla, Tesla relied on the statements made by Rome in making this business decision. While Rome is an experienced businessman, he is not familiar with the legal terrain, and Tesla, an experienced attorney with a degree from

Prestige, is. Because of the expertise required to form the opinions Tesla is providing Rome with, a reasonable person would not take additional steps to investigate the verity of the statements made by Tesla. Therefore, Rome substantially relied on the statements made by Tesla in entering into the Amended Agreement.

Finally, Rome suffered serious harm by virtue of entering into the Agreement with Tesla. Not only has IPR lost substantial IP value, but the new locations failed due to the locations in which they were opened, and Rome is now being sued for $5 million in leasehold improvements for which he did not know he was a personal guarantor.

Therefore, the facts state a claim for fraud and deceit.

Rome can recover for the tort of fraudulent misrepresentation by way of compensatory damages, which will restore the losses Rome has incurred, and punitive damages, where conduct on Tesla's behalf was willful and wanton.

b) Additionally, a claim for undue influence may be brought where two parties are in such a relationship that one party is able to exert authority, control, or influence over the other party such that the other party is no longer making decisions of their own volition. Such relationships include parent-child, employer-employee, and fiduciary relationships, as seen here between an attorney and a client. Where undue influence exists, a contract is voidable.

Here, Tesla may be said to be in such a position of authority that Tesla was able to exert undue influence over Rome by virtue of their attorney-client relationship. Therefore, Rome should also claim that Tesla exerted undue influence over Rome such that Rome was not freely entering into the contract, and therefore, the agreement itself should be voidable. However, while Rome justifiably relied on Tesla as his attorney, because of Rome's substantial business experience, having operated his LLC since 2009, it is not likely that Rome will be found to have been unable to freely enter into the contract on his own volition.

c) A contract is voidable for unilateral mistake where one party was mistaken on the terms of the transaction, the terms were material to the transaction, and the transaction was entered into on the basic assumption that the party was not mistaken. Where the non-mistaken party knows of the mistaken party's mistake, the non-mistaken party is liable for breach of contract and resulting damages.

Here, in addition to behaving fraudulently, Tesla also knew that Rome lacked substantial knowledge of many of the material provisions of the Amended Agreement that made the business transaction so advantageous to Tesla. Therefore, Rome may also attack the Agreement on the theory of unilateral mistake.

d) A party may seek release from a contract when its terms were procured by fraud or when its terms would be unconscionable to carry out.

Here, Rome should seek to be released from the leases Rome is named as a personal guarantor in. Rome did not enter into these leases himself and was not aware that Tesla was doing so based upon Tesla's fraudulent representations that Rome would retain control of the LLC. Rome did not have a reason to believe that Tesla was acting behind his back in these transactions, and enforcing them upon Rome would be unconscionable. Therefore, Rome should seek to avoid the contracts. This is particularly so where Rome likely established his business in the form of an LLC to receive the benefits and protections of an LLC, which first and foremost generally shield members from personal liability.

e) A party may seek to rescind a contract that, as here, was entered into upon fraudulent terms.

Rome should seek to have the Amended Agreement rescinded by the court so the parties are no longer bound, and he should seek rescission of the leases entered into on his behalf.

Rome has a claim against Tesla for breach of fiduciary duty.

A breach of fiduciary duty occurs when the fiduciary of a corporation, partnership, or LLC fails to act in the best interests of the entity. The duty of loyalty arises when a member puts the interests of himself above the interests of the business. A duty of care arises when a member fails to act with ordinary diligence and reasonable prudence. Here, Tesla, as 25% owner of IPR, has breached a fiduciary duty of loyalty to IPR for acting in his own personal interests instead of in the best interests of IPR. Tesla put his interests above those of IPR in inducing Rome to enter into the Amended Agreement by failing to disclose the above-mentioned material facts, by only opening new restaurants in centers he already owned, regardless of the fact that the restaurants were unlikely to succeed in those locales due to client bases, and by taking such course of conduct with the sole intent of selling the centers for a larger profit than they may have sold for without the IPR locations. Tesla may argue that he had no such duty because he only owned a 25% stake in the LLC and was not the manager, but this argument will fail because all members to an LLC owe such a duty.

iii) <u>The issue is whether Tesla is subject to discipline for violations of the Georgia Rules of Professional Conduct.</u>

Tesla is subject to discipline for numerous violations of the Georgia Rules of Professional Conduct.

An attorney who violates the Georgia Rules of Professional Conduct is subject to discipline by the state board. Here, Tesla has violated the Georgia RPC by representing a client with a conflict of interest, acting as both an attorney and a managing member of an LLC with another non-lawyer, and entering into a conflicted business transaction with a client. Tesla has also failed to competently represent Rome in both the setting up and running of Rome's LLC and related affairs by failing to keep Rome informed on the meaning of the transactions Tesla is entering into, and by grossly taking advantage of Rome for his own business purposes.

Generally, an attorney generally may not represent a client with whom he has a conflict of interest unless he has obtained written, informed consent of the client upon the client's i) receipt of information pertaining to the material risks encompassed by the representation of the particular attorney ii) opportunity to seek advice from another attorney and iii) provision of written, informed consent. Here, Rome is proceeding under the notion that Tesla is acting in his best interest as his attorney. However, Tesla is conflicted in the transaction for two reasons: 1) because Tesla is serving as both an attorney and an entrepreneur and member of IPR and 2) Tesla has entered into a business transaction with a client from which he stands to profit. Both of these facts are undisclosed to Rome, and therefore, Rome has not been able to seek outside counsel, to be informed of the material conflicts and risks, or to provide written, informed consent.

An attorney may not practice law in association with a corporation where a non-lawyer is a director or officer, an executive, or holds a substantial ownership stake. Additionally, an attorney may not enter into business transactions with a client, unless the client has received adequate notification of the material risks associated with the conflict and has had the opportunity to both seek outside counsel and provide written, informed consent. Here, Tesla should never have entered into the Amended Agreement with Rome. Tesla cannot hold a stake in an LLC in which he has not only drafted the initial registration papers for, but in which he has a personal interest. IPR's new locations are all in Tesla's pre-owned shopping centers, meaning Tesla stands to reap a substantial profit, unbeknownst to Rome, from this deal. Therefore, Tesla will be subject to discipline for violation of the Georgia Rules of Professional Conduct, having not only entered into a business agreement with a client without providing adequate information of the risks and allowing the client to seek outside counsel, but for also holding a position in which he both practices law and acts as a businessman and entrepreneur.

Attorneys have a duty to keep a client reasonably informed. The above duties require an attorney to inform a client where there exists a conflict of interest, but attorneys also have to provide adequate updates and information, both upon request and as necessary, during the representation of a client. Tesla owed Rome a duty to keep Rome up to date in matters such as entering into leases and negotiations, the pricing of such, and the conflicts inherent therein. Tesla also failed to review crucial provisions of the Amended Agreement with Rome, including those which limited Rome's control, contrary to his prior representation to Rome that Rome would retain control of the business. Therefore, even absent the two above-named conflicts, Tesla has more generally failed to keep Rome updated over the course of their dealings as well.

In Georgia, in addition to an attorney being subject to discipline for a violation of the Rules, the client may also assert a claim of professional malpractice. When filing a claim for professional malpractice, such claim must be accompanied by an affidavit by another expert in the field demonstrating that malpractice may have occurred. The expert affidavit needs to present information regarding the way in which a reasonable professional in the community would have behaved in the community. An attorney alleged to have committed malpractice will be held to the professional standards of another attorney. Rome will therefore need to obtain an expert affidavit from another attorney who is able to attest to the wrongfulness of Tesla's actions

and explain how a reasonable attorney should have handled the situation. A party is able to seek damages for a claim for professional malpractice. The party is entitled to compensatory damages for the loss or harm suffered as a result of the professional's misconduct, as well as punitive damages in cases of willful or wanton misconduct. Rome should seek these as well.

iv) <u>The issue is what potential issues might arise from Rome's recovery of damages.</u>

Where damages are difficult to quantify, a plaintiff can recover for the amount a defendant has been unjustly enriched. This restitutionary recovery is allowed when i) the plaintiff has conferred a benefit on the defendant, ii) the defendant has retained the benefit, and iii) the defendant's retention of the benefit is unjust.

It may be difficult for Rome to quantify damages where a substantial amount of the loss Rome has incurred includes the loss in the value of his intellectual property. However, Rome can assert that because under the parties' agreement, Tesla profited by selling all of the new restaurant properties while Rome was personally liable on the leases, Tesla should be liable to Rome for the amount he was unjustly enriched by.

Another potential area of conflict arises in the suits brought against Rome by the new owners for breach of the leases. Rome should implead Tesla in those ongoing suits. Indemnification occurs when a defendant impleads, or adds in, a third-party defendant, the original defendant then becoming a third-party plaintiff. When a third-party defendant impleads a third-party plaintiff, the third-party plaintiff may be bound to be liable for some or all of the damages assessed against the original defendant.

ESSAY QUESTION 2

Sample Answer 1

1. **Under Georgia law, whether the LLC is bound by the sales of the van and the boat?**

Anna's Authority to sell the Boat and Van

Under Georgia law, Members are the owners and operators of a Limited Liability Company (LLC). As a general matter, LLC's may be governed by contract law between the Members through their operating agreement and its articles of organization subject to criminal and tax law. However, in the absence of such provisions, the LLC Act governs the roles and responsibilities of an LLC and its Members.

Furthermore, under Georgia law, unless otherwise agreed in an LLC's governing documents, each Member is an agent of the LLC and has the authority to bind an LLC for contracts entered on behalf of, or purported to be entered on behalf of the LLC - with respect to decisions that relate to the day to day business affairs of the LLC. Moreover, even if a Member does not have such authority to enter into a contract on behalf of an LLC, a member may nevertheless bind the LLC into a contract if they are acting with apparent authority (i.e. the other party reasonably believes that she is dealing with the LLC), and absent the other party's actual knowledge to the contrary, the other party may reasonably believe she is entering into a binding agreement with an LLC when dealing with a Member. However, under Georgia law, absent an agreement to the contrary, unanimous consent of an LLC's Membership is required to sale all or substantially all of the LLC's assets or to make a major capital decision.

In our case, Annna, Bill, and Carrie (collectively the Trio) were all Members of the dog grooming LLC. Therefore, absent an agreement in the governing documents to the contrary, each Member would have the statutory authority to bind the LLC into a contractual agreement. However, the Trio did execute a provision in their operating agreement that provided that Unanimous consent of all members is required for any sale or transfer of any item of LLC tangible or intangible property used or useful in the ordinary course of the LLC's business.

Accordingly, the Van that Anna purported to sell would need the consent of Bill and Carrie because (presumably) the Van was used in their mobile dog grooming business. Moreover, the decision to sell the Boat would probably need the unanimous of Bill and Carrie because, even though the boat was (presumably) not used or useful in their ordinary course of dog grooming, such a sale involves the capital structure of the business and requires unanimous consent.

But, nevertheless, even though unanimous consent of Bill and Carrie would generally be required as it pertains to Anna's sale of the Boat and Van, pursuant to the operating agreement and the Georgia law requiring unanimity for capital decisions, respectively - Anna's contract may still be binding on the LLC because a Member is an agent for the LLC and may bind the LLC to a

contract despite her lack of authority to do so when the other party has no reason to believe the Member lacks such authority.

Therefore, in our case, Anna's contract to sell the Van and Boat would probably be enforceable by the other party because such pieces of property are of relatively little amount and it would be reasonable for the other party to believe that Anna could enter such an agreement on behalf of the LLC as a Member.

Remedies

However, although the contract may be binding on behalf of the LLC, Carrie and Bill would probably have a cause of action to recoup the value of the property from Anna because, by violating the terms of the operating agreement and exceeding the scope of her agency, she violated a fiduciary duty to the other Members even though she potentially made a profit for the LLC by selling above the fair market value.

2. Under Georgia law, what are David's rights with respect to managing and sharing in the profits of the LLC?

Under Georgia law, absent an agreement to the contrary, Members of an LLC may sell their Membership interest in the LLC. But, absent an agreement to the contrary, Georgia law provides that such a purchasing member may only receive the profits he is entitled to in proportion to his ownership interest (or in the manner the original Members agreed). However, unless otherwise agreed upon in the governing documents, such a Member has no right to manage the LLC and may only receive his proportion of profits.

However, with that said, under Georgia law, the other Members would still owe the same duties of care and loyalty to the purchasing Member and may not merely delay the payment of deserving profits out of personal animosity towards the purchasing Member.

In our case, because Bill had the ability to sell his membership interest to David considering the governing documents had no provisions forbidding such a transfer, but, David would not be able to participate in the management of the LLC, and would only be entitled to profits in proportion to his 1/3 interest purchased from Bill. And further, he would not be immediately entitled to such profits but would only be able to receive them when declared.

However, although David would not be entitled to management of the company, Anna and Carrie would still owe David a duty of good faith and fair dealing in spite of Anna's previous negative business encounters with David and Carrie's personal dislike of him. These would not be valid reasons to withhold any profits he is entitled to.

3. Under Georgia law, does Carrie's email have her intended effect of withdrawing her from the LLC?

Under Georgia law, unless otherwise agreed in the governing documents of an LLC, a Member may only withdraw from the LLC upon unanimous vote of all members, or upon a petition to dissolve with the Court. Therefore, because there were no provisions in the governing documents relating to the trio's ability to withdraw, Carrie's attempt to unanimously withdraw would not have her intended effect because Anna did not consent to her withdraw nor did Carrie attempt to dissolve the LLC by petitioning the court.

Sample Answer 2

(1) The LLC is bound by the sale of the boat, but not the sale of the van. Under Georgia law, an LLC's operating agreement governs the internal management of the LLC. Here, the operating agreement provides guidelines for the sale of any item of LLC property, requiring unanimous consent of all members where the property is (a) used in the ordinary course of the LLC's business; or (b) where it is useful in the ordinary course of the LLC's business. Here, the boat and the van are LLC property, as Bill conveyed title to both items of property to the LLC in exchange for his membership interest. However, neither piece of property was sold subject to unanimous consent of the members. Anna sold them unilaterally. While a single member is usually able to sell property in the LLC's name (at least where the LLC is member-managed), the LLC can recover property that was transferred without actual authority. As such, whether the sale of either piece of property is binding is dependent upon whether they are used for or are useful to the ordinary business of the LLC. The boat is not used by the LLC. Further, it has no use in the ordinary course of business of a mobile dog grooming business. As such, the sale of the boat is binding. However, while we have no facts indicating the van is used, a van is useful to a mobile dog grooming business (as it can be used as a mobile salon). Thus, while the sale of the boat was binding, the sale of the van was not.

Note that the third party buyer might argue that the LLC is bound by the sale of the van because, while Anna did not have actual authority to sell it, she had apparent authority. A principal is bound by contracts executed by its agent on its behalf whenever the agent acts with any form of authority (i.e., actual, apparent, inherent). Here, Anna, as a member in a member-managed LLC (the LLC is member-managed because the articles/operating agreement don't appoint managers) is an agent of the LLC. Further, as a member-agent in a member-managed LLC, she had apparent, and arguably inherent, authority in contract when she executed the sale of the boat and the van. Apparent authority likely arose from her status as a member of the LLC, i.e., the third party could argue they had a reasonable belief that Anna was acting on behalf of the LLC. Inherent authority may have arisen because Anna had actual authority to sell the boat, and the sale of the van was conduct similar to that authorized (i.e., sale of LLC property). If either or both of these forms of authority existed, then the LLC could be bound by the sale of the van even though Anna acted without actual authorization/in contravention of the operating agreement.

(2) David's only right in the LLC is in distributions. At issue is the default rule for transfer of a membership interest in an LLC. Unless the articles of organization or operating agreement say otherwise, a member cannot sell the entirety of their membership interest in the LLC. Rather, they can only sell their right to distributions. As such, while the transaction between Bill and David probably resulted in the transfer of Bill's distribution interest to David, David received no other interests/rights in the LLC. He has no say in business direction, and he has no managerial authority/influence. However, he is entitled to whatever share of the profits (i.e., distributions) that Bill was. It appears that the articles and operating agreement are silent on the apportionment of profits, and each of Bill, Anna, and Carrie paid $50,000 for their membership. So, David is, under the default rule for profit sharing, entitled to 1/3rd of the LLC's profits.

Note that Bill's unilateral sale of his distribution interest in the LLC is valid. While admitting a new member to the LLC requires the unanimous consent of the existing members, selling one's distribution interest in the LLC is not the same as adding a new member. Absent a contrary provision in the articles of organization or the operating agreement, a member does not require the consent of other members to sell their distribution interest.

(3) Carrie's email did not have the intended effect of withdrawing her from the LLC. A issue is the default rule for withdrawing from an LLC. As with most matters of internal operation, the protocol for withdrawing from an LLC is usually governed by the articles of organization or the operating agreement. However, where these documents are silent, the default rule governs. The default rule is that there is no withdrawal from an LLC. As such, Carrie's email did not have the intended effect of withdrawing her from the LLC.

Note that even in the event that Carrie could withdrawal from the LLC, her withdrawal would not have entitled her to a buyout absent some provision establishing such a right in the articles or operating agreement.

Sample Answer 3

The first issue is whether the LLC is bound by the sale of the van and the boat.

Georgia LLC law generally allows for the operating agreement of the business to displace the default rules for the LLC, such as profits/losses, consents required to sell company property, and fundamental changes such as withdrawal of a member/manager or the sale of substantially all of the business assets. If silent on the above-mentioned issues, Georgia corporate law has default rules such as profits follow losses/contributions and majority consent of ownership is required for most fundamental decisions, depending on the nature of the LLC.

Here, it appears that the operating agreement has displaced the default rule for the sale of business assets used or useful in the course of the LLC's business, with a unanimous consent of members required instead of the default majority. As such, it also appears that the van would be considered "an item of LLC tangible or intangible property used or useful in the course of the LLC's business," with the business being a mobile dog grooming business. On the other hand, it appears that the ski boat would not be considered the same, as it has nothing to do with the course of the LLC's business: mobile dog grooming. Instead, it served as Bill's contribution towards the LLC for his membership interest. Regardless, the LLC is likely not bound by the sale of the van and the boat. As to the van, its sale required conformity with the above-quoted provision (i.e., unanimous consent), as Bill and Carrie had no vote, idea, input, or consent granted. As to the ski boat, its sale required conformity with the default rule of majority vote, which was not given. As such, the LLC is not bound by the sale of either item.

The second issue is what David's rights are with respect to managing and sharing in the profits of the LLC.

The rules mentioned above are herein reincorporated.

Here, it appears that the operating agreement was silent as it relates to managing and sharing in the profits of the LLC. As such, the default rules apply. As to whether David can manage the LLC, assuming this is a member-managed LLC, Bill would have needed to comply with the requirement that the majority of members voted in favor of the sale of his membership interest to David. He did no such thing. As such, the sale of the membership interest is invalid and its effect on the LLC is that Bill remains with the membership interest he had before the purported "sale" (i.e., 1/3 management/ownership). However, if the members were to retroactively ratify the sale of the membership interests, they could do so and David would then have a 1/3 management/ownership stake. As to what David's rights are with respect to the sharing in profits, the operating agreement was again silent. As such, the default rule of profits following losses/contributions applies. As such, *assuming* a valid membership interest transfer between Bill and David, David would share in 1/3 of the profits, as he would have contributed the same as every other member. However, because the membership transfer is likely invalid, David likely has no management/ownership interest in the LLC and would be entitled to nothing.

The last issue is whether Carrie's email has her intended effect of withdrawing from the LLC.

The rules mentioned above are herein reincorporated.

Here, it appears that the operating agreement was silent as it relates to how a member may withdraw from the LLC. As such, the default rule, that a majority of members would need to approve her withdrawal and the subsequent purchase/sale of her membership interest. Because this did not happen, Carrie's email did not, in fact, have her intended effect of withdrawing from the LLC and she would need to get member consent for such an action.

In summary, the LLC is likely not bound by the sale of the boat or van, David likely has zero rights with respect to managing and sharing in LLC profits, and Carrie's email likely did not have her intended effect of withdrawing from the LLC.

ESSAY QUESTION 3

Sample Answer 1

1. How the letter will play out in court. At issue is whether the elements have been met and the appropriate burden of proof on each party.

As stated in the fact pattern, under Georgia law when there is evidence that a sender put a letter in a properly addressed, stamped envelope, and placed the letter in the mailbox, there is a rebuttable presumption that the intended recipient received the letter.

(a) Whether Vic has the evidence needed to establish the rebuttable presumption.

Based on the statement above, Vic needs to show that the letter he sent was properly addressed, stamped, and placed in the mailbox to establish the presumption the recipient received the letter. At issue is whether Vic has met this standard. The fact pattern states that Vic has produced a copy of the envelope addressed to Bob with a postage stamp that he placed in a US Postal Service mailbox. Assuming this letter is correctly addressed, Vic has meet the burden of proof giving him a rebuttable presumption that Bob received the letter.

(b) Who bears the burden of persuasion in showing the rebuttable presumption exists.

The burden of persuasion in creating this rebuttable presumption falls on Vic. At issue is who bears the burden of persuasion in proving affirmative defenses. When a party asserts an affirmative defense, they bear the burden of proving the elements. Here, Vic is asserting the affirmative defense that he did in fact send the letter, and thus must bear the burden of persuasion on this matter.

(c) Who bears the burden of production of rebuttal evidence.

Bob bears the burden of producing rebuttal evidence. At issue is who must rebut against a presumption in an affirmative defense. Whenever one party bears the burden of establishing a claim or affirmative defense which creates a presumption, the opposing party bears the burden of producing rebuttal evidence. Here, since Vic will have the burden of proving the presumption, Bob bears the burden of producing rebuttal evidence.

(d) Whether rebuttal evidence exists on these facts.

Based on these facts, Bob does have rebuttal evidence. At issue is what shows that the presumption that Bob received the mail and check is incorrect. Here, per the fact pattern, Bob sent a kind letter to Vic asking for payment for his services. Furthermore, Bob sent Vic multiple text messages and left messages on his phone requesting payment. While not necessarily conclusive, this certainly rebuts against the presumption that Bob received Vic's letter and payment. While not addressed in the fact pattern, since the payment was in the form of a check,

Vic can easily see whether or not the check was cashed. If the check were not cashed, this would be greater evidence to rebut the presumption that Bob received the mail.

(e) What happens to the presumption if sufficient rebuttal evidence is presented and how should the court instruct the jury?

Assuming that Bob presents sufficient rebuttal evidence, the presumption he has received the letter should be ignored by the court. At issue is what occurs when a presumption is not met and what jury instructions are proper. Civil cases are decided when evidence shows something has happened by a preponderance of the evidence. In the event that a presumption is not met, a judge may not instruct a jury that the presumption has been met. Thus, the judge should instruct the jury that if they find, by a preponderance of the evidence, since this is a civil case, Bob did not receive the letter, that he succeeds on the merits of his claim.

2. The court should instruct the jury to presume that Vic's failure to provide a copy of the cancelled check or his bank statement, means that the evidence would go against him. At issue is how the court should instruct the jury in this instance.

Under OCGA §24-14-22, when a party has more access to probative evidence to prove a fact and fails to produce it, it shall be presumed that the unproduced evidence goes against the party. When a fact is presumed, a jury should follow the courts order and the judge may instruct the jury to make findings based on the established presumptions. This differs from judicial notice, which is binding on a civil jury.

Here, in the event Vic fails to produce any evidence in the form of a bank statement of cancelled check, it will be assumed that the evidence weighs against him. In this case, the evidence would prove the rebuttal established in (1) against the presumption that Bob received the letter. Furthermore, the evidence could be used to show that Bob in fact never cashed the check, since that is the probative value of the bank statement or cancelled check. Were this to be presumed, the judge could instruct the jury to presume that the rebuttal for the presumption Bob received the letter is invalid, and that Bob never cashed the check Vic claims to have sent.

3. The court should overrule Bobs objection. At issue is whether the letter may come in under the rules of hearsay.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible unless it is excluded from the definition of hearsay or an exception to the hearsay rule applies. However, out-of-court statements may be used to prove things other than the truth of the matter asserted, like the effect on a listener, that a contract was intended to be executed, etc.

Here, Vic will argue that the letter is not being offered for the truth of the matter asserted, that Bobs address is what it appears on the envelope and that he sent the check itself, or of the contents of the writing of the letter, but just as proof that the letter itself was sent. Bob, in

contrast, will argue that the letter is being offered to prove the truth that Vic payed Bob. However, it seems that the main issue of the case is and the grounds for admitting the letter is to show that it was sent to Bob, not what it actually says. Thus, since the letter is not asserting that it was sent somewhere, or what Bob's address is, it will likely be admitted to show that it was sent. However, Judge Solomon should give the jury limiting instructions not to presume that it was sent if there is rebuttal, and not to use the letter as evidence that it was properly sent.

4. Judge Solomon should not admit either piece of character evidence. At issue is whether the character evidence is admissible in this case.

Generally, character evidence is inadmissible in civil cases. Character evidence is evidence of someones character purporting that they acted in accordance with that character trait in the instance in controversy. Character evidence may be used in a civil case when character is an element of the case, or when it is used to prove motive, intent, absence of mistake, identity, or common plan or scheme. Evidence of habit may be admissible in certain circumstances, but only if it is established the habit occurs precisely and frequently without fail, or is automatic, like always brushing your teeth first thing in the morning.

Here, the case is civil as it is a suit based on money damages.

Vic's character for paying his bills.

Vic will argue that while this is character evidence, as it is evidence that he is acting in accordance with the character that he pays his bills, it is an element of the claim. This argument will fail, because it is not proof that he payed his bills this time, and there is no claim of defamation in which it could be argued falsity or character is at issue. Vic's character is not of issue, whether he paid this specific bill is. Thus, this argument will fail and the character evidence is inadmissible. Furthermore, there is no habit, because it is not something that is automatic or happens on a consistent basis, since bills are paid at different times in different ways.

Bob's evidence that Vic forgets to mail letters.

The same rules for character evidence apply. Here, again the evidence is being brought in to argue that Vic acted in accordance with his character for not mailing letters. Furthermore, character is not an element of this claim, and thus it cannot be brought in. Furthermore, forgetting to do something is never evidence of habit. Thus, this evidence should be excluded by Judge Solomon.

5. Vic's wife may not testify against him. At issue is whether Vic may invoke the privilege in confidential marital communications.

In Georgia, confidential communications are privileged against discovery. There is also a spousal privilege, which allows a spouse not to testify against their spouse, should they choose. However, the confidential marital communications privilege holds that communications between

spouses that are intended to be and are in fact confidential cannot be discovered or testified to in court, unless the holder of the privilege consents. In Georgia, the communicating spouse alone holds the privilege.

Here, Vic privately admitted to his wife he forgot to mail the letter. The fact it was private, and of confidential nature means the communication was confidential and covered by the privilege. Because Vic holds the privilege, as the spouse who made the statement, his wife may not testify without his consent. As Vic has objected to calling his wife as a witness, she may not testify about this communication. The spousal privilege would not apply since Vic's wife is willing to testify.

Sample Answer 2

1. Rebuttable Presumption

Under Georgia law, presumptions are facts that are that are taken by the courts to have been established without adduction of further evidence by the party relying on it. Presumptions take the form of rebuttable and Conclusive presumptions. In the case of conclusive presumptions, the presumed fact is taken by the court as what the proponent says it is, this are permissible inferences of evidence law. Rebuttable presumptions on the otherhand can be chhallenged and set aside by the party that the evidence is being produced against if they can show that there is evidence that negates the presumption.

a. It is likely that Vic has the evidence to establish that the rebuttable presumption exists in this case.

The law on rebuttable presumptions in Georgia is set out above.
Here, Vic has provided evidence of the copy of the properly letter, the check and the postage stamped envelop. This pieces of evidence conform to the requirements for the rebuttable presumption being raised.

It is likely that Vic has the evidence to establish that the rebuttable presumption exists in this case as she has produced the materials that for that presumption to arise.

b. In Georgia, party which who proposes the rebuttable presumption bears the burden of persuasion on that issue. If the other party is able to adduce sufficient evidence to rebut the presumption, the party proposing the "rebuttable presumption" continues to bear the burden of persuasion and would have to adduce evidence to support their case on that issue or fail. However, iof the other party does not adduce sufficient rebuttable evidence the proponent succeeeds on that issue.

Here, Vic bears the burden of persuasion.

c. Bob has the burden of producing evidence to rebut the presumption that he received the check.

In Georgia,the party against against who "rebuttable evidence" has been produced on an issue bears the burden of producing evidence to rebut the presumption.

Here, Bob has the burden of producing evidence to rebut the presumption that he received the check. Although this may seem unfair, he can simply rebut the presumption by showing that he has not cashed the check in question by asking for records from Vic's bank. This shifts the burden of prouction to Vic on that issue, so she then has to show that indeed Bob cashed the check.

d. Rebuttable evidence exists on this facts, because Vic produced the properly addressed letter and mailing records. However, the court on the specific issue of who cashed the checks and whether Bob has indeed received payment will require the adduction of further evidence to make a determination.

e. The court should instrcut the jury that the presumption is not conclusive on whether Bob indeed got payment for his services. The court would have to issue further instructions to the jury to aid them make a determination on whether indeed Bob received the check.

2. The court should instruct the jury to presume that the unproduced evidence goes against Vic.

OCGA 24-14-22 provides that if a party has access to more probative evidence to prove a fact and fails top produce it, it shall be rebuttably presumed that that evidence goes against the party.

Here, Vic is in the best position to ascertain what happened to the check she claims to have mailed. He could easily do that from her bank. He refusal to do so will operate against him under OCGA 21-14-22.

In conclusion, the court should instruct the jury to presume that the unproduced evidence goes against Vic.

3. Best evidence Rule

Self-serving evidence

In Georgia, the best evidence rule provides that a to introduce a writing of legal significance it evidence, the writing must be produced. If a party wants to give testimony about the contents of the letter without providing it, they must show that they did not destroy it and have made significant effort to find it to no avail. Hearsay is an out of court statement offered for its truth. Also, a party may raise objection to evidence as self serving, however the courts in Georgia would not allow that in this case. Relevant evidence on an issue is admissible.

Here, it is likely the court would overrule Bob's objection, as the evidence is relevant and is not hearsay as it is the party's own letter being produced in court and it is germane to the issues at at hand in the case.

4. Character/ HabitEvidence

It is likely the court may reject this evidence as it is evidence of habit and may be prejudicial to Vic's case

In Georgia, evidence of prior bad conduct is inadmissible. Evidence tending to show a party as having a propensity to act in a certain bad way is inadmissible. However, evidence of a habit may be admissible to show that a party acted in a certain way and to show the absence of mistake.

Here, it is likely the court would have to reject this evidence as it is evidence of habit and may be prejudicial to Vic's case. This is one of the cases where the judge has wide discretion and may admit the evidence if it appears it would not be prejudicial and assist the jury.

5. Marital Communication Privilege

This type of marital communication intended to be private is covered by the privilege and Vic's objection to his wife's testimony on this matter is likely toi be upheld.

In Georgia, marital communication between spouses during the pendency of their marriage is privileged and a party may prevent evidence of that communication to be the subjcet of testimony by the other spouse in court. If the communication is confidential communiaction between parties and not to third parties it cannot be admitted.

Here, the Vic had a private communication with his wife during the pendency of his marriage. As it has not been indicated they are divorced. This type of marital communication intended to be private is covered by the privilege and Vic's objection to his wife's testimony on this matter is likely toi be up[held.

In conclusion, this type of marital communication intended to be private is covered by the privilege and Vic's objection to his wife's testimony on this matter is likely to be upheld.

Sample Answer 3

1. a) <u>The issue is whether Vic has the evidence needed to establish a rebuttable presumption under the facts.</u>

Vic's copy of the letter Vic mailed is admissible under the best evidence rule, and Vic has established the evidence needed for the rebuttable presumption.

The best evidence rule applies when the contents of a document are at issue. The best evidence rule states that the originals of a document must be admitted for the document to be used into evidence, but an exception for photocopies constituting an accurate representation of the original exists when the original is missing due to no fault of the proponent.

Here, Vic offers a copy of both the envelope and the letter to Bob, and Vic does not have the original for the sole reason that the original was allegedly already mailed to Bob. The admission of this letter is sufficient to invoke the rebuttable presumption that when there is evidence that a sender put a letter in a properly addressed, stamped envelope, and placed the letter in a mailbox, there is a rebuttable presumption that the intended recipient received the letter. Here, evidence of the envelope the letter was in, including the address and the stamp, will be sufficient, along with circumstantial evidence that Vic placed the letter in the mailbox, to invoke the presumption.

Further, while whether the check was mailed or not is directly in dispute here, the parties do not appear to be disputing the actual contents of Vic's letter. Therefore, even if the document was inadmissible as a copy, the best evidence rule would not bar the admission of Vic's letter because the parties are not disputing the actual contents of Vic's letter; they are merely disputing the receipt of the letter.

b) <u>The issue is which party bears the burden of persuasion.</u>

The party seeking the invocation of a rebuttable presumption bears the initial burden of persuasion that the presumption applies.

Because the rebuttable presumption arises that the intended recipient received the letter, if Vic desires the rebuttable presumption, Vic will bear the burden of persuasion. As discussed above, Vic should seek to prove that the letter was properly addressed, that the letter bore the proper stamp, and that Vic placed the letter in his mailbox.

c) <u>The issue is which party bears the burden of production of rebuttal evidence.</u>

When there is a rebuttable presumption, the party against whom the presumption weighs bears the burden of production to produce sufficient evidence as to overcome the presumption.

Here, Bob bears the burden to produce rebuttal evidence--ie., to prove that he did not, in fact, receive Vic's mailed letter.

d) <u>The issue is whether rebuttal evidence exists on these facts.</u>

In order to overcome a rebuttable presumption, a party must present evidence against that negates the presumption.

Here, in order to overcome the rebuttable presumption against him, Bob must produce evidence to demonstrate that he never received Vic's letter. Assuming Vic demonstrates both that the letter was properly addressed and stamped and that it was placed in the mailbox, Bob must produce evidence demonstrating that regardless, the letter did not arrive in his mailbox.

Further, Bob's burden to overcome the presumption will be difficult because Bob's response to Vic's letter seems to address it directly. This would tend to negate any assertion that Bob did not receive the letter at all. While Bob may argue that his letter was sent on its own accord and was not in response to Vic, two facts serve to weaken this argument: i) that Vic sent the letter to Bob one week prior to Bob sending his letter to Vic, and ii) that Vic claims to have "paid an invoice," and Bob's letter appears to be a response to an initial letter and does not appear to have contained an invoice.

e) <u>The issue is what result occurs if sufficient evidence is submitted to rebut the presumption.</u>

If sufficient evidence is offered to rebut a rebuttable presumption, the court may not instruct the jury that they "must" apply the rebuttable presumption in their deliberations.

The court must explain to the jury the premises of the rebuttable presumption and instruct them to consider the presumption in determining whether the evidence offered by the party was sufficient to overcome it.

Here, if Bob offers evidence tending to prove that he did not receive Vic's letter, the jury may determine whether Bob overcame the presumption. If Bob is found to have overcome the presumption, then the jury must not take the presumption as fact.

However, in an instance where sufficient evidence was not submitted to rebut the presumption, the court would be required to instruct the jury that they "must" consider the presumption as fact in their deliberations. This is contrary to the rule in criminal proceedings, where the court must instruct the jury that they "may" consider the presumption.

2. <u>The issue is how the Court should instruct the jury on the presumption of receipt relied upon by Vic, and the presumption about a failure to produce evidence relied upon by Bob.</u>

A jury must apply a rebuttable presumption in a civil case where the party against whom the presumption lies fails to offer any evidence to the contrary.

In a civil case, if there exists a rebuttable presumption and a party offers no evidence to rebut the presumption, the court will instruct the jury that the jury must take the rebuttable presumption as fact. When a party has access to more probative evidence to prove a fact and fails or refuses to do so, there is a rebuttable presumption that the evidence would be unfavorable to the party.

Here, if Vic demonstrates the proper mailing of the letter, the court should instruct the jury that the jury must consider the rebuttable presumption that Bob received the letter.

The court should also instruct the jury that the jury must consider the rebuttable presumption that Vic's access to more probative evidence and failure to produce goes against Vic.

3. <u>The issue is how the court should rule on Bob's hearsay objection to Vic's letter.</u>

The court should overrule Bob's objection to hearsay.

Evidence must be relevant in order to be admissible. Evidence is relevant when it is probative of any material fact to the claim, meaning that it tends to prove or disprove a fact that is essential to the resolution of the claim. Relevant evidence may still be excluded in limited circumstances, such as when the evidence is found to be more prejudicial than probative, or where the evidence is subject to the rule against hearsay.

Hearsay is an out of court statement offered for the truth of the matter asserted. A statement is not hearsay when it is admitted to prove a legally operative fact.

First, Vic's letter is relevant to the matter at hand, because it tends to help the trier of fact in determining whether the letter in question was mailed by Vic and received by Bob. Further, such evidence will not be unduly prejudicial, confusing to the jury, or in obstruction of justice, because it merely helps the jury to understand the disputed chain of communication between the parties.

Here, in defeating Bob's hearsay objection, Vic may argue that his letter does not fall under the rule against hearsay because the letter goes to prove a legally operative fact in the case at hand, ie. that Vic mailed a letter to Bob. Because this is in direct dispute and the claim will in part be determined by whether such letter was mailed and received, the letter here is not hearsay because it is not being admitted for the truth of the matter asserted--in this case, for the contents of the letter itself--but rather to produce one of the key documents in question for the jury.

In the alternative, Vic may argue that the letter is being offered to prove the effect on the listener. A statement tends to demonstrate effect on the listener when it provides the grounds for which the listener then reacted or acted in response. Vic can also argue that he is entering his

letter into evidence as an effect on the listener because it may have prompted Bob to reply to the letter.

4. <u>The issue is whether Vic or Both may testify to character and/or habit evidence.</u>

Vic may testify to his own habits and specific acts, and Bob may only testify to Vic's character once Vic has "opened the door."

Character evidence is generally inadmissible in a civil proceeding. However, a defendant may introduce evidence of his good character when it is relevant to the claim asserted. Under the Federal Rules, such character evidence must take the form of reputation or opinion testimony, but in Georgia, a defendant is permitted to admit specific acts of his good character into evidence. Another such exception to the rules regarding character evidence is habit evidence, which allows for testimony regarding a defendant's specific, constant habits to be offered.

Here, it is relevant to the claim asserted that Vic always pays his bills. Vic may testify to this for two reasons. First, a defendant may testify to his good character, so long as the testimony is relevant to the offense, using specific acts in Georgia. If Vic's consistent payment of his bills were to be determined to be a specific act, it would be admissible in this way. Second, because a defendant can offer testimony tending to reveal his habitual behavior, and because Vic likely pays bills regularly and relatively often, Vic can also offer this testimony as habit evidence to demonstrate his timeliness and promptness regarding his paying bills.

Once a defendant has "opened the door" to character evidence, however, the plaintiff may admit negative evidence of the defendant's character via reputation or opinion evidence, so long as it is relevant.

If Vic opens the door to the admission of character evidence by offering the statement that he "always pays his bills," Bob may then offer reputation or opinion testimony demonstrating the opposite and showing character of inconsistency, forgetfulness, or a similar characteristic on Vic's behalf, so that it is directly relevant to the claim. Here, Bob seeks to testify that Vic has a reputation for habitually forgetting to mail his letters and frequently finding them in jacket pockets or on his car dashboard. If this is truly a reputation that Vic holds within the community, Bob may testify to this in response once Vic has opened the door. If the judge finds, in his discretion, that this is not a genuine reputation that Vic has with the community, then Bob may, in the alternative, attempt to offer the statement as habit evidence as well. However, the statement will not likely be admissible as habit evidence unless it is clear that Vic regularly and specifically forgets to mail letters such that this is a routine part of his life. Therefore, because Vic has opened the door to character evidence already, Bob's greatest chance of success in admitting the statement will be to assert and demonstrate that the statement goes to show reputation evidence.

5. <u>The issue is how the court should rule on Vic's objection based on the spousal immunity privilege.</u>

The court should sustain Vic's objection to Bob calling Vic's wife as a witness against Vic.

Georgia law recognizes a spousal immunity privilege that prevents spouses from being compelled to testify against the other spouse in criminal and civil proceedings. Exceptions to this rule are limited and include when a spouse has a claim against another spouse or when a spouse has committed violence toward a minor child or property of the spouses. The communicating spouse is the holder of the privilege.

Here, Vic, as the communicating spouse who allegedly told his wife that he forgot to mail the letter, is the holder of the privilege. Therefore, Vic's objection to his wife being called to testify will be sustained. The court should therefore not allow Vic's wife to testify against him.

ESSAY QUESTION 4

Sample Answer 1

To: Martha and Sarah Smith

From: Examinee

Re: Claims of Title

1. Whether Martha has a valid claim that she has obtained title (ownership) to the three foot area of land along the shared property line with Nick where the fence was constructed?

Under Georgia law, a party may become the owner of another's property through adverse possession. In Georgia, a party may be entitled to such a lawful claim of title to another's property where they *actually* possess the other's property, their possession is an *open and notorious* manner (meaning a reasonable owner would be aware of the possession), their possession is *exclusive* (meaning the adverse possessor does not share possession of the property with the true owner), their possession is continuous for the statutory period (in Georgia, 20 years is generally the time period unless the possessor is possessing under color of title, in which case a possessor only needs to possess for 7 years), and in Georgia as distinguished from the common law, the possessor must *believe in good faith* that he is rightfully possessing the property.

In our case, John and Martha's fence was three feet over their neighbor Nick's property lines by 3 feet and they used the property, meaning the Smiths actually possessed Nick's property, and likewise they possessed it exclusively because Nick was unable to use that portion. Similarly, because the Smiths used the property as their own, they likely suffiicently used it in an open and notorious manner considering a reasonable neighbor would probably have been aware that the fence encroached on its property lines. Moreover, we have no facts indicating that the Smith's believed in any manner other than in good faith that they actually owned the property where the fence was located considering they utilized it as their own and the contractor was the party mistaken as to building the fence. However, we have no facts indicating that the Smith's were acting under the color of title, and therefore, because the Smith's only used the fence from 2007 until 2023 when Nick brought his action after getting a survey, they did not possess the property for the statutory period because their possession was only for 16 years rather than 20 years which is required.

Therefore, Martha probably does not have a valid claim for title to the three foot area.

2. Regarding the dispute with Typler:

i. Whether Martha is required to mitigate her damages by, for example, seeking a new tenant?

As a general matter, a leasehold estate is an estate that is limited in duration. The owner of the property subject to the leasehold is the landlord and the party leasing the estate is the tenant.
Moreover, under Georgia law, a usufruct is a leasehold estate for a period of years where the duration of the tenant's estate is limited by a time of less than five years, and terminates automatically upon expiration of the lease with no notice required. Moreover, as opposed to common law where the Landlord had a reasonable duty to mitigate damages for a tenant's improper failure to pay rent - in Georgia, a Landlord is not required to mitigate a Tenant's failure to pay rent by seeking a new tenant or otherwise attempting to mitigate the losses.

Accordingly, in our case, Martha and Tyler entered into a usufruct because their lease term was for one year, and the usufruct automatically terminated upon expiration. Martha has no duty to mitigate her damages by seeking a new tenant or otherwise, pursuant to Georgia law.

ii. What damages does Tyler owe as a result of his failure to pay rent or vacate the premises?

Under Georgia law, a tenant who fails to pay rent may be liable for the unpaid portion of rent, any damages the tenant has caused the property other than ordinary wear and tear, along with any incidental damages the landlord incurs arising from the landlord's reasonable attempt to mitigate the damages (i.e. paying a broker to list the property for lease), minus any portion the landlord is able to cover by a new tenant.

Similarly, under Georgia law, leases (or usufructs) for a period exceeding one year must be in a writing satisfying the statute of frauds to be enforceable. The writing must be signed by the party whom enforcement is sought and contain the essential terms of the deal, such as the amount of payment, the price, the identification of the parties, and a reasonable description of the premises.

Accordingly, in our case, Martha has an enforceable lease agreement with Tyler because, although it does not have to be in writing to be enforceable because the original term was for one year (and the SOF requires a contract that can't be performed within one year to be in writing), their contract is in writing and it presumably contains the essential terms considering it has the term of the lease and the amount to be paid, and when Tyler was required to pay.

Therefore, Because Tyler moved in and the leased commenced on December 1, 2022, and he failed to pay rent at any point from June 1, 2023, he owes Martha the amount of rent due pursuant to his lease ($1000 x 5 =$5000) plus the fair market value of the rental rate of the unit for December 2023, January 2024, and February 2024 because these periods were after his lease expired but while he continued to remain at the property.

iii. What type of tenancy has Tyler created by failing to vacate?

Under Georgia law, a Tenancy at Sufferance is created by operation of law where a holdover Tenant remains on a Landlord's property after the expiration of the lease term. Such a Tenancy at Sufferance will transform into a periodic tenancy (i.e. Month to Month) where if the Tenant tenders rent payment and the landlord accepts such payment.
In our case, Tyler failed to vacate after his lease term expired and this transformed his usufruct into a tenancy at sufferance because he is remaining on the premises without permission after the expiration of his rental term.

iv. Whether Martha is permitted to remove Tyler from the property by changing the locks or other measures of self-help? If not, what process must she invoke to remove Tyler and what are the general steps in that process?

Under Georgia law, a landlord may no longer use self-help repossession to remove a Tenant who has materially breached his lease agreement. As such, the Landlord must use the judicial eviction process in attempt to remove the tenant. The landlord must generally provide the tenant 60 days written notice to vacate a periodic tenancy. Further, upon receiving a proper judgment to evict a tenant, the Landlord must obtain a writ from the Sheriff and request the Sheriff or a deputy to properly vacate the tenant.

In our case, Martha would not be allowed to simply remove the locks because such an action would be a breach of the peace and would be unlawful self help eviction. As such, she would need to seek an eviction with the court and thereafter seek the Sheriff's office to help vacate Tyler after giving Tyler proper notice of her intent to evict.

3. Whether Martha owns valid title to the property so that she can sell it? If not, what steps does she need to take?

Under Georgia law, a joint tenancy with a right of survivorship is a fee simple estate in which the property automatically passes to the other tenant upon the other Joint Tenant's death. Moreover, to create a cotenacy, there must be the fourt unities present - the unity of possession, the unity of interest, the unity of time, and title. This means the joint tenants must have an equal right to possess the property, they must have an equal interest in the property, and they must have received the property at the same time and from the same title.

Moreover, although a Joint Tenancy may unilaterally be severed by an intervivos conveyance of one of the tenants' interest, a Joint Tenancy interest that is purported to be conveyed by the testator's will is invalid because his interest passes automatically to the other tenant upon death.

As a general matter, if a conveyance of real property to co-tenants is ambiguous as to the type of conveyance, Georgia courts will interpret in favor of a conveyance of a tenancy in common as opposed to a joint tenancy with the right of survivorship. However, words of "with the right of survivorship" will properly create a joint tenancy.

In our case, Martha and John received the property as joint tenants with a right of survivorship. As such, this language was sufficient to create a joint tenancy, and they received the property at the same time from the same title, and they presumably shared an equal interest in the property, and an equal right to possess the property. Therefore, this was a valid Joint Tenancy interest between Martha and John, and although John could unilaterally sever his Joint Tenancy interest during his life, his will made an invalid devise of his interest because his interest passed to Martha automatically at his death.

Therefore, Martha has a valid interest in the property. However, in order to sell it she should seek a quiet title action in an attempt to obtain judicial recognition that her interest extends passed Nick's boundaries.

Sample Answer 2

To: Martha and Sarah

From: Seth Cowan

Date: 2/27/24

Re: Martha's rights and claims as it relates the property dispute

1. Martha does not have a valid claim that she gained ownership over the three-foot subject area belonging to Nick. The first issue is whether Martha obtained the three-foot area of Nick's land by virtue mistaken boundary and adverse possession. In Georgia, adverse possession requires the adverse possessor's possession be: Public, Exclusive, Peaceful, uninterrupted, continuous, under a claim of right and in good faith, The adverse possessor must have "clean hands" or rather, the claim cannot originate under fraud. Generally, the statutory period is 20 years, unless the claimant has written evidence of title, then the period is only 7 years. Martha does not have written title to the subject area, so statutory period is is 20 years. The fence was built in 2007, and nick objected to the possession in 2023. Thus, the statutory period was not met. Even more so, in Georgia, mistaken boundaries will not suffice in an adverse possession claim when the true owner surveys the land and finds out of the adverse possession.

2. No, Martha does not have a duty to mitigate damages by virtue of seeking another tenant under these circumstances. The first issue is whether Martha has a duty to mitigate damages by finding a new tenant to replace Tyler. If Tyler had breach the lease by ending the lease earlier, and vacating, the Martha would have had a duty to mitigate damages by virtue of seeking another tenant. This is not the case as it relates to Tyler. Tyler and Martha originally entered into a term for years lease, which has a definite starting and ending date. No notice required when ending the lease pursuant to its terms. Tyler breached the lease starting June 1, 2023, with 5 months left on his lease. The lease period started on December 1, 2022, and ran until December 1, 2023. Since Tyler refuses to pay rent and to vacate.

Martha may collect damages for unpaid rents June 1 through December 1, and additionally all unpaid rent up through Tyler's current occupancy. The second issue what damages is Martha entitled to recover pursuant to the lease. Because it is a term for years tenancy, Martha is entitled to collect all rent payable under the lease, which includes June 1 through December 1. She is also entitled to the reasonable rental value of her property by virtue of tyler's refusal to vacate.

Tyler is a hold over tenant, or rather, a tenancy at sufferance was created. The third issue what type of lease was created by virtue of Tyler's failure to vacate. Once the original lease period expired on December 1, 2023, and Tyler refused to vacate, a tenancy at suffrage was created. If tyler would have made payments and Martha would have accepted those

payments after the original lease expired, the tenancy would have turned into a periodic tenancy. Since Tyler did not make payments, Tyler turned into a holdover tenant. Be virtue of the holdover tenancy, Martha was entitled to damages equal to the reasonable value of rent payments that Tyler owed during his time as a holdover tenant.

The issue is whether Martha could remove Tyler from the property by means of "self-help." In Georgia, landlords are not permitted to use means of self-help to evict a tenant. Martha must petition the court to end Tyler's tenancy and remove Tyler from the premises. If not, Martha may be held liable to Tyler for damages.

3. Yes, Martha has valid title to the property. The issue is whether Martha has valid title to the property so that she may sell it. John and Martha owned the property as joint tenants with rights of survivorship, which is the default tenancy in Georgia. Georgia does recognize tenancy by the entirety, which is generally reserved for such married persons. Once John died, Martha owned the property in fee simple by operation of law. The fact that John devised half his interest in the property to his brother, Brandon, is irrelevant. Moreover, Martha must resolve the dispute with Nick, as a pre-requisite to the ability to sell her land. Thus, she should institute an action to quiet title, or alternatively, cease occupying the three-foot area owned by Nick.

The second issue is whether Martha will be able to sell the property to the real estate developer. Although she owns title, the developer will not have to follow through which any such sale because zoning ordinance on in place outlaws the construction of a home on the property that is less than 1 acre. This is a restriction on the property that may encumber title. Martha should seek to receive a variance grant from the local government. She will support her argument for the variance because otherwise, the property is per se in violation of the ordinance. The ordinance requires one acre of land to construct a new home, and because Martha's plot does not meet the requirements without including the land owned by Nick, she cannot establish compliance with the building ordinance. So, she just petition for a variance waiving the one acre requirement. Additionally, Martha will have to wait to sell the property until the court orders the removal of tyler from the residence. Otherwise, she will not be able to establish marketable title.

Sample Answer 3

1. The issue is whether Martha has a valid claim that she obtained title to the three-foot tract of land on Nick's property through adverse possession.

Martha does not have a valid claim that she obtained title to the three-foot tract of land on Nick's property through adverse possession.

Adverse possession is a method by which one may obtain the rights and title to another's land. Adverse possession requires the possession be adverse, hostile, exclusive, continuous, and open and notorious. In Georgia, there is no knowledge requirement; ie., the adverse possessor is not required to know that they are possessing the property adversely. In Georgia, the statutory period for adverse possession is 7 years by color of title, and 20 years without color of title.

Here, because the encroachment onto Nick's land by the fence was not under color of title, the requisite statutory period for Martha to adversely possess Nick's tract of land is 20 years. Therefore, Martha has not yet met the requirements for adverse possession in Georgia.

Had Martha satisfied the statutory period, then Martha would have an argument for adverse possession. Here, the possession was adverse, as Martha and John constructed a fence around the property, and thus, over Nick's land. The possession was hostile, as it was without Nick's consent. The possession was also exclusive, as the fence enclosed what John and Martha believed to be their property and therefore kept out any others with a claim to the land, and it was open and notorious, as evidenced by the fence and what it demonstrates to others.

Therefore, because Martha did not possess the tract for the requisite 20 years, Martha does not have a claim to Nick's land under the doctrine of adverse possession.

2. i) The issue is whether Martha has the duty to mitigate damages caused by Tyler's failure to pay rent.

Martha does not have a duty to mitigate damages caused by Tyler's failure to pay rent.

In Georgia, a landlord is not required to mitigate damages caused by a tenant's breach of the lease by failure to pay rent. While a landlord is free to find a new tenant, the landlord may also allow the remainder of the lease to run and upon the termination of such lease, may sue for damages, or the landlord may choose to evict and sue for damages immediately. The tenant's two duties are the duty not to commit waste and the duty to pay rent. Where a tenant materially breaches such duties, as here, the tenant may be evicted.

Here, Martha, as landlord, is not required to mitigate the damages suffered by Tyler's failure to pay rent. Martha may choose to find a new tenant, but if she does not desire to take this course of action, Martha may choose to allow the lease to run and sue for the lost rent, or

may evict Tyler now and sue for damages for the months Tyler failed to pay rent. These courses of action are acceptable because Tyler violated one of the two duties of tenants in Georgia by failing to pay rent.

ii) The issue is what damages Tyler is liable for as a result of his failure to pay rent or vacate the premises.

When a tenant fails to pay rent, the tenant is liable for the monthly rent payments that he failed to pay. A landlord may not sue on the remainder of the lease term and may only recover for those payments that have actually been missed.

Assuming that Martha sues now, Tyler is liable for all rents owed starting with June 1, 2023, until the present. If Tyler continues to remain on the property without paying, Tyler will be liable for each additional month that he does so.

iii) The issue is what type of tenancy Tyler has created by virtue of his failure to vacate the premises.

A periodic tenancy exists where a landlord and tenant enter into a lease for a specific period of time.

A tenancy at sufferance is created when a tenant breaches the lease and holds over. Holding over is the term used to refer to a tenant staying in a property after a lease has terminated, either due to the passage of time or due to material breach.

Here, Tyler has breached the lease by his failure to pay rent. If Martha acts to evict Tyler, and Tyler refuses to leave the premises, Tyler will have created a tenancy at sufferance. However, if Martha allows Tyler to carry on with the lease, the periodic tenancy will remain until the termination of the contract, at which point Tyler would be liable for all rents owed on the lease.

iv) The issue is whether Martha is permitted to use self-help to evict Tyler, and if not, how Martha must proceed in evicting Tyler.

In Georgia, landlords are not permitted to remove tenants by self-help. In other words, a landlord may not evict a tenant themselves, and must do so through a court process.

Reasonable time must be given to allow the tenant to collect their things and evacuate the premises. In Georgia, a tenant is allowed 14 days after receiving a notice of eviction.

Martha may request Tyler leave the property voluntarily, but this does not seem likely, as it is already evident that Tyler demonstrates no intention of leaving. Therefore, Martha will need to go through the court system and have the sheriff's office evict Tyler. Once the sheriff's

office notifies Tyler of the eviction, Tyler must leave the premises within the statutory amount of time.

3. The issue is whether Martha owns valid title to the property so that she can sell it, and if not, how she can acquire it.

A joint tenancy with rights of survivorship arises when the parties expressly contract for such in their deed. Upon the death of one of the joint tenants, the rights to the property automatically pass to the surviving joint tenant. To officially obtain title to the property, the surviving party must file an affidavit of survivorship with the probate court.

Here, John and Martha owned the property in joint tenancy with rights of survivorship. When John passed, the title automatically passed to Martha, as the survivor of the two of them. Martha need only record an updated affidavit of survivorship so that the local county records reflect this update in the deed, and Martha will then have valid title to the property such that she will be able to sell it.

Further, it should be noted that regarding the additional three foot tract of Nick's land encompassed by the fence built by John and Martha's contractor, if a party successfully asserts that they have a claim to land by way of adverse possession, as discussed above, the party must bring a quiet title action to free the property of any cloud of title, and to put the world on notice that they have gained title to the property. To do so, the parties must file a petition for a quiet title action with the court and allow anyone in opposition of the motion to come forward and dispute.

Had Martha satisfied the statutory requirements for adverse possession, Martha's next step to obtain title would have been to file a quiet title action to officially gain title to the three feet of land subject to dispute between herself and Nick.

MPT ITEM 1

Sample Answer 1

To: Deanna Gray, District Attorney

From: Examinee

RE: State v. Iris Logan

Memorandum

I. Whether we should charge Iris Logan (hereafter Logan or the Defendant) with Robbery?

Under the Franklin Criminal Code § 901 (hereafter the Code), Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear. Robbery is a felony.

Robbery requires proof of four elements: (1) intentional or knowing non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force, whether actual or constructive. *Driscoll.* (stating that under Franklin law, violence is coextensive with force); *See also* Schmidt (holding the force necessary to constitute robbery is the posing of an immediate danger to the owner of the property). And further, the immediacy of the danger can be demonstrated either by putting the victim in fear or by bodily injury to the victim. *Driscoll.* Ultimately, the distinction between theft and robbery is the use of force or threat of physical harm because taking something stealthily without the owner's knowledge is simply theft, but shaking the owner or struggling with the owner while trying to take the item from the owner is robbery. *Id*.

In our case, the Office of the District Attorney (hereafter the DA's Office) should probably charge the Defendant with Robbery. As stated by Ms. Tara Owens, the Defendant took Ms. Owens' purse from her person, intentionally did so by coming up behind Ms. Owens and demanding Ms. Owens to "Let [the Defendant] have that purse." Likewise, the Defendant did not have consent, and moreover, the Defendant put Ms. Owens in immediate danger by the bodily injury (she sprained her wrist as the Defendant pulled the purse off of her). Therefore, the Defendant committed Robbery and should likely be charged accordingly.

You should note, however, that the Defendant will probably try to argue that she did not commit robbery considering the dispatcher did not use the word Robbery, but rather, purse snatching, over the BOLO. However, for the reasons stated above, this argument will probably not prevail because the defendant has satisfied the requirements to be convicted for Robbery.

II. Whether we should charge the Defendant with Felony Murder?

On the other hand, the DA's office should probably not charge the Defendant with Felony Murder due to the unforeseeable of the death of Mr. Jeremy Stewart. For the following reasons, the Defendant likely would satisfy the requirements of the killing of another during the commission or immediate flight from the perpetration of a robbery; but the death of Mr. Stewart will likely be deemed to have been caused by an independent intervening cause, which would thwart the likelihood of conviction of the Defendant. Moreover, as our policy is to refrain from overcharging where the evidence is weak, relieving the Defendant of liability arising from felony murder would probably advance our initiatives.

A. Statutory Requirements

Under the Code § 970, First-degree felony murder is a killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy.

Moreover, even if it is clear beyond question that the crime was completed before the killing, the felony murder rule still applies if the killing occurs during the defendant's flight. *State v. Clark*. In determining whether the defendant is still engaged in the immediate flight from the felony, it is critical to determine whether the fleeing felon has reached a place of temporary safety. *See Clark*.

For example, in *Id*., the defendant had just completed her burglary, left the residence, and was driving away from it when she hit a pedestrian. The Franklin Court of Appeal determined she had not yet reached her place of temporary safety yet, and therefore, could be convicted of felony murder. *But see Lowery* (illustrating an example of a defendant not engaging in felony murder when he robbed a store, left the store, and arrived at home when a police officer came to the front door to arrest him and the officer's gun went off, killing the defendant's wife).

In our case, it is clear that the defendant committed Robbery for the reasons stated in answer 1. And further, although the Defendant's crime had been completed at the time of Mr. Stewart's death, this would not in and of itself absolve her of liability for felony murder because the Death of Mr. Stewart occurred while he and the Defendant were in the immediate flight from the felony considering they were in the car driving home and had not yet reached a place of temporary safety as described in *Clark*.

However, for the reasons stated below, the Defendant has a strong argument that she should not be convicted of Felony Murder; and further, because our evidence is weak as it pertains to the issue of proximate cause, not charging her of Felony Murder might advance our internal policy.

B. Causation

In addition to the statutory requirements as interpreted by the Franklin courts, to be properly charged with Felony Murder, a defendant must be the actual and proximate cause of death of the alleged victim. *Finch*. Cause in fact is often referred to as "but for causation" - meaning, but for the acts of the defendant, the death would not have resulted. Cause in fact, although essential, is not in and of itself sufficient to establish guilt. *Id.* The defendants act must also be the proximate cause of the victim's death, which adds the requirement of foreseeability. *Id*.

In our case, the Defendant is probably the but-for cause of Mr. Stewart's death considering, but for the robbery of Ms. Owens, the Defendant and Mr. Stewart would probably not have been traveling at that time on that road, and in turn, Mr. Stewart would not have died.

However, to be the legal cause of the victim's death, the relevant inquiry is whether the death is of a type that a reasonable person would see as a likely result of that person's felonious conduct. *Id*. This requirement is added due to the prejudice to the defendant that would arise for holding him or her responsible for outcomes that were totally outside his contemplation when committing the crime. *Id*. Therefore, when a felon's attempt to commit a forcible felony sets in motion a chain of events that were or should have been within his contemplation when it was initiated, he should be held responsible for *any* death that by direct and near inevitable sequence results from the initial criminal act. *Id.; See also State v. Lamb* (holding the intent behind the felony-murder doctrine would be thwarted if felons were not held responsible for the foreseeable consequences of their actions).

Similarly, if there is a sufficient superseding cause - in other words - an intervening independent cause that breaks the causal chain between the defendant's actions and the death, the defendant may be absolved of criminal responsibility. *Finch*. For a cause to be sufficiently superseding and in turn, relieving the defendant from criminal liability due to a break in the causal chain, the following four requirements must be present: 1. the harmful effects of the superseding cause must have occurred before the original criminal acts; 2. the superseding cause must not have been brought about by the original criminal acts; 3. the superseding cause must have actively worked to bring about a result that would not have followed from the original criminal acts; and 4. the superseding cause must not have been reasonably foreseen by the defendant. *Finch*. *See also Craig v. Bottoms*.

Additionally, although the Franklin Supreme Court has not had occasion to analyze superseding cause in the context of felony murder, the Olympia Supreme Court has - in *State v. Knowles*, the Olympia Supreme Court determined that gross negligence should generally be deemed a superseding cause but ordinary negligence should not be considering ordinary negligence is reasonably foreseeable. Gross negligence means a defendant has acted with "wantonness and disregard of the consequences to others that may ensue." *Finch*. (quoting *Knowles*).

For example, in *Knowles,* the defendant stabbed a victim during an armed robbery and subsequently died in the hospital due to an infection in the wounds. However, it was later learned

that the surgeon who operated on the victim was intoxicated at the time of operation and the infection was a direct result of the surgeon's failure to follow disinfection procedures. *Id*. The Olympia Supreme Court held that the surgeon's intoxication constituted a superseding cause absolving the defendant of felony murder.

Here, as the Defendant an Mr. Stewart were driving back after the Robbery of Ms. Owens, Mr. Stewart was driving the speed limit and was struck at an intersection on Route 75. Moreover, despite Mr. Stewart's absence of a seat belt, the fact that all lights were green at the intersection of the accident is probably not sufficient gross negligence to break the causal chain.

Unlike the defendant in *Finch* who killed a co-robber during a tussle with the security guard in an attempt to remove the defendant's firearm, in our case, the harmful effects of the superseding cause of Mr. Stewart's death - the unwavering green lights at all four cross lights had occurred prior to the Robbery of Ms. Owens; and the stop lights were not in any way connected to the Robbery of Ms. Owens; and finally, the death of Mr. Stewart would probably not have been reasonably foreseeable by the Defendant despite a car wreck being reasonably foreseeable considering the fact that stop lights being improperly placed on green at all corners of an intersection is probably sufficiently unforeseeable. However, the green lights might not be deemed to have actively worked to bring about a result that would not have followed by the Robbery considering even if the Defendant had not Robbed Ms. Owens, the lights would still have been malfunctioned. Therefore, the absence of this factor might weigh in favor of charging the Defendant with Felony Murder because the *Finch* Court required the presence of all four elements to break the causal chain. And further, considering there were no complaints of the light prior to the day in question would weigh in favor of the failure to properly maintain the lights being deemed to be foreseeable negligence as opposed to gross negligence because the City had no reason to know of the lights' malfunction.

Nevertheless, the evidence against the Defendant for Felony Murder is shaky, and it might best advance our internal policy to not charge her of Felony Murder considering the unforeseeability of Mr. Stewart's death during the flight from the Robbery. However, the Defendant should probably be charged with Robbery, and we do have at least a good faith basis to charge him with Felony Murder should we choose.

Sample Answer 2

To: Deanna Gray, District Attorney

From: Examinee

Date: February 27, 2024

Re: State v. Iris Logan

MEMORANDUM

Introduction

At issue here is whether indictments should be sought regarding defendant Iris Logan's (hereinafter referred to as "defendant") charges of robbery and felony murder. Here, the charge for robbery should be brought, because defendant acted with the requisite level of force to constitute "violence" as required by the Franklin Criminal Code. However, the charge for felony-murder should not be brought, because the defendant has a strong argument that defendant's conduct in the underlying robbery was neither the cause in fact nor the legal cause of the death of Stewart.

1. **The charge of robbery should be brought against the defendant.**

Defendant's conduct is sufficient to meet the elements of robbery, and therefore, the charge of robbery should be brought against defendant.

Robbery is defined by the Franklin Criminal Code as the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." In Franklin, robbery is a felony. FCC Section 901. A conviction for robbery requires four elements: "1) intentional or knowing nonconsensual taking of 2) money or other personal property 3) from the person or presence of another 4) by means of force, whether actual or constructive."

a. Defendant committed robbery by means of force, whether actual or constructive.

While it is clear from the facts that defendant a) intentionally and knowingly took 2) Owens' purse 3) from Owens, while Owens was wearing the purse over her shoulder, defendant will likely argue that defendant did not act with the requisite level of force such as to constitute violence. However, because defendant taking the purse off of Owens' shoulder such that, in shaking Owens, the motion caused an injury, defendant's argument should not preclude a charge for robbery.

In defining robbery, "while the Franklin statute requires 'violence,' Franklin case law has clarified that, for purposes of defining robbery, 'violence' is coextensive with 'force.'" State v.

Driscoll. Force will constitute the "violence" necessary for robbery when it poses an "immediate danger to the owner of the property." Id., citing State v. Schmidt. Such immediacy may be demonstrated by "putting the victim in fear or by bodily injury to the victim." Id.

In State v. Driscoll, the Franklin Court of Appeal affirmed defendant Driscoll's conviction for robbery where Driscoll struggled with the victim over the theft of a laptop. There, "the owner of the laptop tried to prevent Driscoll from taking her property," grabbing his arm after he picked up the laptop, resulting in Driscoll responsively pushing her away. This struggle was held to be a "sufficient use of force to constitute robbery under 901 of the Franklin Criminal Code. State v. Driscoll. As the court explained, "taking something stealthily without the owner's knowledge is simply theft, but shaking the owner or struggling with the owner while trying to take the item from the owner is robbery." Id.

Here, when asked on direct examination whether defendant threatened Owens, Owens responded that the defendant said, "Let me take your purse," and Owens complied due to an unwillingness to fight. Upon defendant's pulling the purse off of Owens' arm, Owens "got twisted up" and sprained her wrist. As such, defendant will likely argue that defendant did not act with the requisite violence, nor did defendant put Owens in fear of harm, as evidenced by Owens' responses on direct examination. However, this argument will not be likely to overcome the fact that a reasonable jury or trier of fact may find otherwise, given that in the physical taking of the purse, while it does not appear that Owens fought back, there was an entanglement, and thus some resistance, that shook Owens such that Owens sprained her wrist.

Therefore, because defendant's argument that she lacked the requisite force or violence to constitute robbery under Franklin law may fail when presented at trial, the court should proceed with the indictment for robbery.

2. The charge of felony murder should not be brought against the defendant.

Defendant will be able to assert strong arguments that she is not criminally responsible for the death of Stewart because cause in fact and legal cause exist, demonstrating that defendant's actions were not the but-for cause of Stewart's death, and Stewart's death was not reasonably foreseeable to defendant at the time of the robbery.

First-degree felony murder is defined by the Franklin Criminal Code as the "killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate any first-degree murder, act of terrorism, arson, rape, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy." FCC Section 970.

a. Defendant was still in immediate flight from the felony because defendant did not reach a temporary place of safety.

Defendant's possible argument that the defendant was not in immediate flight from the underlying felony will not suffice, for defendant did not reach a temporary place of safety.

As evidenced by the Franklin Criminal Code, a felony-murder may occur while the defendant is in "immediate flight" from the crime, even if the crime was already completed. FCC Section 970; State v. Clark. The determination of whether a defendant is in flight from the underlying felony is dependent upon "whether the fleeing felon has reached a 'place of temporary safety'"; in other words, there can be no "break in the chain of events." Id.

In the case at hand, driver Jeremy Stewart and defendant, passenger, were driving away from the scene of the purse snatching in a sedan when Officer Torres activated her blue lights in an effort to stop the vehicle pursuant to the information obtained from the BOLO notification, at which time an oncoming SUV entered the intersection, striking the sedan and injuring Stewart. According to the direct examination of Officer Torres, Stewart died from his injuries.

Here, the first argument that defendant may assert against the charge for felony-murder is that defendant and Stewart were not in immediate flight from the underlying felony. In State v. Clark, the Franklin Court of Appeal sustained a conviction where defendant Clark, who had driven away from a residence after burglarizing it, hit a pedestrian who was crossing the street. There was "no evidence that Clark was driving recklessly." State v. Clark. Because Clark had left the burglary and was "on her way to a place of temporary safety," but was still driving her vehicle and "had not yet reached that place," the court found that the requisite break in the chain of events was absent. Id. The court distinguished this case from State v. Lowery, in which the defendant returned home after robbing a store, the police arrived at his house, and the "officer's gun went off, killing the defendant's wife." Id., citing State v. Lowery. There, the defendant was not found to be guilty of felony-murder because he had reached his point of safety. Id.

As such, defendant's argument that she was not in immediate flight from the underlying felony will likely not suffice, as defendant and Stewart were still traveling in their car on the highway at the time the accident occurred, causing the death of Stewart.

b. Defendant's actions during the underlying felony do not satisfy cause in fact or legal cause between the robbery and the death of Stewart.

Franklin's felony-murder rule requires both "cause in fact" and "legal cause" between the defendant's actions in the underlying felony and the resulting death to establish sufficient facts for a conviction. State v. Finch. "Cause in fact" exists when, "but for the acts of the defendant, the death would not have resulted." Id. Limiting cause in fact is "legal cause," for which the relevant inquiry is "whether the death is of a type that a reasonable person would see as a likely result of that person's felonious conduct." Id. A superseding cause may serve to break the causal chain between the underlying felonious conduct and the death resulting from the alleged felony-murder. To demonstrate a superseding cause, the following factors are required: "1) the harmful effects of the superseding cause must have occurred after the original criminal acts, 2) the superseding cause must not have been brought about by the original criminal acts, 3) the superseding cause must have actively worked to bring about a result that would not have

followed from the original criminal acts, and 4) the superseding cause must not have been reasonably foreseen by the defendant." Id., citing Craig v. Bottoms. While "gross negligence will generally be considered a superseding cause," ordinary negligence will not due to its foreseeability. Id., citing State v. Knowles.

i) Cause in fact

As defined by the Franklin Supreme Court in State v. Finch, cause in fact exists where there is but-for causation that the defendant's acts led to the death of the victim. While cause in fact is not sufficient to establish causation, it is a necessary element. Here, defendant will likely argue that the purse snatching and the death of Stewart were too attenuated for there to exist but-for causation. However, it may also be argued that but for defendant's conduct in robbing Owens, defendant and Stewart would not have fled the scene of the robbery, and Stewart would not have died as a result of the collision. Because cause in fact "must be limited by proximate or 'legal cause,'" the inquiry cannot stop here, and must continue into the determination of legal cause.

ii) Legal cause

Foreseeability

Defendant will likely argue that it was unforeseeable at the time of the robbery that Stewart would die from a vehicular collision.

As further defined by the Franklin Supreme Court in State v. Finch, legal cause requires foreseeability, for "it would be unfair to hold a defendant responsible for outcomes that were totally outside his contemplation when committing the offense." State v. Finch. This aligns with Franklin's public policy in ensuring charges are only brought where evidence is strong and sufficient. Only "when a felon's attempt to commit a forcible felony sets in motion a chain of events that were or should have been within his contemplation when the motion was initiated" should he or she "be held responsible for any death" resulting from the criminal act. Id.

In State v. Finch, defendant Finch argued that when Finch and his accomplice attempted to rob a convenience store, the arrival of a security guard constituted an "intervening independent cause that broke the causal chain between his actions in robbing the store and the death of his accomplice." State v. Finch. However, in applying the above-mentioned four factors required to establish a superseding cause, ("1) the harmful effects of the superseding cause must have occurred after the original criminal acts, 2) the superseding cause must not have been brought about by the original criminal acts, 3) the superseding cause must have actively worked to bring about a result that would not have followed from the original criminal acts, and 4) the superseding cause must not have been reasonably foreseen by the defendant") the court found that "the security guard's actions were not a superseding cause of [accomplice's] death" because a reasonable person would foresee a security guard may intervene during the commission or attempted commission of a felony. Id.

Here, defendant may argue that the collision was a superseding cause that broke the chain of causation between the underlying felony and the flight therefrom, and the death of Stewart, for the following reasons: 1) the motor vehicle collision occurred after the robbery, 2) the robbery did not directly bring about the collision, because the two had already left the scene of the robbery, gotten into the sedan, and were in the process of being pulled over by Officer Torres when the vehicle struck them in the intersection, 3) the collision with said vehicle in the intersection was the direct cause of Stewart's death, which had not occurred as a result of the prior robbery, and 4) defendant could not have reasonably foreseen that in driving away from the purse snatching and obeying traffic laws, the two would be struck by an oncoming car in an intersection such that Stewart would be fatally injured.

Because defendant has a strong argument that the four elements of a superseding cause are met here, and therefore foreseeability can be found under the facts, defendant has a strong argument against a charge for felony-murder.

Negligence

While the above demonstrates a strong argument that the requirements for both cause in fact and legal cause are met, defendant may also argue that the driver of the SUV was grossly negligent in entering the intersection and striking the SUV. This is an issue that should be submitted to the jury for a determination of the facts, and should not in and of itself discourage the felony-murder charge from being brought.

Also in State v. Finch, the Franklin Supreme Court discussed that, as held by the Olympia Supreme Court in State v. Knowles, while ordinary negligence will not constitute a superseding cause, gross negligence may, for while ordinary negligence is reasonably foreseeable, gross negligence is not. State v. Finch, citing State v. Knowles. Gross negligence requires "wantonness and disregard of the consequences to others that may ensue." Id. In State v. Knowles, after defendant committed an armed robbery, stabbing the victim twice, the victim was transported to the hospital, where the victim died due to a surgeon's failure to follow disinfection procedures. Id. There, the surgeon's conduct was held to be "gross negligence and therefore was a superseding cause that broke the causal chain between the defendant's felonious acts and the death of the victim." Id.

In arguing that there was insufficient causation between the underlying felony and the death of Stewart, defendant is also likely to further argue that the SUV's conduct in entering the intersection and striking the sedan constituted gross negligence and was therefore a superseding cause sufficient to break the causal chain. Officer Torres states under direct examination that both the sedan and the SUV were traveling within the legal speed limits. However, it is unclear from the facts which vehicle failed to yield at the intersection, and a reasonable jury or trier of fact may find that, under the right circumstances, the SUV was grossly negligent in wrongfully entering the intersection and striking the sedan.

Due to the factual ambiguity in the specifics of the collision, the issue of gross negligence, in and of itself, is insufficient to prevent a felony-murder charge from being brought.

While the defendant was still in immediate flight from the felony, and while it is uncertain whether the driver of the SUV acted in gross negligence, because the defendant will likely assert strong arguments against the presence of cause in fact and legal cause, a charge for felony-murder should not be brought. The question of gross negligence is certainly a question that could be decided by a jury, but Franklin's strong policy of declining to pursue an indictment where evidence is weak tilts the analysis in favor of only pursuing the robbery charge in this case.

Conclusion

Because defendant acted sufficiently to meet the requirements of a robbery conviction in Franklin, but did not act such that the required cause in fact and legal cause may be found to justify a conviction under the felony-murder rule, only the charge for robbery should be brought against defendant.

Sample Answer 3

To: Deanna Gray, District Attorney

From: Examinee

Date: February 27, 2014

Re: State v. Iris Logan

INTRODUCTION

It was been requested that I provide a memo on the Logan case. Below you will find my anaylsis to the following issues: (1) Whether we can charge Logan with robbery; and (2) Whether we can charge Logan with felony murder. My analysis goes into the definition of robbery and the causation standards of felony murder. It also explains any potential defenses and how they do not apply to the facts of the case.

Whether we can charge Logan with Robbery.

Under Franklin law, robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Robbery requires proof of four elements: (1) intentional or knowing nonconsensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force, whether actual or constructive. State v. Driscoll (Fr. Ct. App. 2019). Here, the elements are satisfied.

Logan, the defendant, intentionally grabbed the purse of Owens, the victim. She told Owens to "let me have that purse," which she did, satisfying the intentional taking of another's personal property. Additionally, the purse was a shoulder bag, located on Owens' person. Defense counsel may argue that element (4) is not satisfied as the taking was not done by "force." In fact, Owens allowed Logan to take her purse without a fight.

However, for purposes of defining robbery, "violence is coextensive with force." The force necessary to constitute robbery is the posing of an immediate danger to the owner of the property. State v. Schmidt (F.r Ct. App. 2009). The immediacy of the danger can be demonstrated whether by putting the victim in fear or by bodily injury to the victim. Defense counsel is likely to argue that Owens was not "put in fear" of Logan, and that the police reported the incident as a "purse snatching" not a robbery. However, the purse snatching resulted in bodily injury to the victim. Owens's wrist was sprained when Logan pulled the purse off her arm. Although reporting officer, Officer Torres did not know the extent of Owens's injury, bodily injury nor force has to be excessive. In Driscoll, the defendant grabbed the victims arm and pushed her away. The victim was not injured, but the struggle for control alone was sufficient use of force. In this case, although there was no "fight", there was an injury that resulted from Owens getting "twisted up"

when she removed the bag from her shoulder. That injury is sufficient to satisfy the bodily injury requirement. Thus, Logan can be charged with robbery.

Defense counsel is also likely to argue that there is limited evidence to whether Logan was the actual perpetrator. However, an eyewitness, Rogers, saw the perpetrator, describing her as "white, medium height, and skinny, with blonde hair. She was waring jeans and a gray T-shirt." He also saw her hand the purse to a man that was standing 10 feet away from him. Rogers immediately provided this description to the police upon the perpetrator running away. Additionally, immediately following the incident, Officer Torres observed a woman matching the description of the BOLO in a green sedan with a man. The defense counsel will claim that Jeremy Stewart, Logan's accomplice, may have been the actual perpetrator. However, Rogers detailed that he saw a woman "ran up behind [Owens] and grabbed her purse." Upon an accident, Officer Torres was able to immediately identify Stewart and Owens as the assailants, as she quickly discovered Owens's purse on the shoulder of the road, thrown out of the vehicle by Stewart. Therefore, there is sufficient evidence to prove Logan was the robber during the accused incident.

Whether we can charge Logan with Felony Murder.

In general, Franklin law provides that a defendant may be charged with felony murder when the defendant's actions in the course of committing, attempting to commit, or fleeing from certain felonies were the cause of the death. The causation required by the felony-murder statute encompasses two distinct requirements: "cause in fact" and "legal cause" (a.k.a. "proximate cause"). State v. Finch (Fr. Sup. Ct. 2008).

Cause in fact: Commonly referred to as "but-for causation": but for the acts of the defendant, the death would not have resulted. "Cause in fact" is not by itself sufficient to establish guilt; it must be limited by proximate cause which adds the requirement of foreseeability. Here, the cause in fact is easily satisfied. But for the parties attempting to flee the scene of the robbery, Stewart's death would not have resulted. However, as stated previously, cause in fact is not sufficient alone to establish guilt. Therefore, legal cause must also be proven.

Legal cause (Proximate cause): The inquiry is whether the death is of a type that a reasonable person would see as a likely result of that person's felonious conduct. It is consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony set in motion a chain of events that were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death that by direct and almost inevitable sequence results from the initial criminal act. It is arguable that Logan's robbery set in motion "a chain of events" that should have been within contemplation as a foreseeable consequence. It is foreseeable that attempting to flee a crime scene in a vehicle may result in a car accident. Defense counsel is likely to argue that the car accident was not foreseeable, that an inspection determined that the traffic lights were in good working order; thus, the resulting car accident was a superseding cause, not the proximate cause to an attempt to flee the scene.

Therefore, the analysis must now fall into whether the car accident that resulted in Stewart's death was a superseding cause that can be used as a defense to felony murder.

The factors necessary to demonstrate a superseding cause are (1) the harmful effects of the superseding cause must have occurred after the original criminal acts, (2) the superseding cause must not have been brought about by the original criminal acts, (3) the superseding cause must have actively worked to bring about a result that would not have followed from the original criminal acts, and (4) the superseding cause must not have been reasonably foreseen by the defendant. Here, "the harmful effect," i.e., Stewart's death occurred after the original criminal acts, Logan's robbery of Owen's purse. Stewart's death did not result from the robbery, but resulted in a car accident after the parties fled the scene. Stewart's death would not have occurred during the purse snatching as the parties were walking down the street on Broadway. However, it is arguable whether a car accident occurring would not be reasonably foreseeable to Logan. Anytime a person is driving on the highway, there is always a risk that one may get into a car accident. Defense counsel will argue that the parties were driving within the speed limit (45 mph) as they traveled through the intersection of State Rouse 50 and State Route 75. Defense counsel will claim that because the car accident "supplants" the Logan's robbery as the legal cause of the Stewart's death, Logan is not legally responsible for the death. Craig v. Bottoms (Fr. Sup. Ct. 1996).

There are arguments to elements (1) and (4): In regards to (1): Even if it is clear beyond question that the crime was completed before the killing, the felony-murder rule still applies if the killing occurs during the defendant's flight. The Franklin statute extends liability for felony murder to deaths occurring "in immediate flight from" the felony. State v. Clark (Fr. Ct. App. 2007). In assessing whether a defendant is still engaged in fleeing from the felony, it is critical to determine whether the fleeing felon has reached "a place of temporary safety." Here, the events occurred "in immediate flight from" the robbery. The parties had not reached a place of "temporary safety" as they were still attempting to flee the scene. Additionally, there was a BOLO that resulted in officers immediately ascertaining the defendant's location.

In regards to (4): Gross negligence will generally be considered a superseding cause, but ordinary negligence will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable. State v. Knowles (Olympia Sup. Ct. 2000). "Gross negligence" means wantonness and disregard of the consequences to others that may ensue. Here, Officer Torres claims that the traffic lights were malfunctioning because she observed "they were green in all directions." It is for a jury to decide whether they believe that the traffic lights were malfunctioning or not. However, it is ordinarily negligent that a person may die if they proceed on to an intersection where the lights may be malfunctioning without a seat belt on. A car accident occurs on a typical basis, malfunction or no malfunction. It is reasonably foreseeable that one may get into a car accident on the highway, regardless of whether he follows the speed limit. Additionally, it is reasonably foreseeable that one may die from a car accident if he does not wear a seat belt. Thus, the car accident was ordinary negligence, not gross negligence, and not a superseding cause.

CONCLUSION

There is sufficient evidence to prove Logan was the robber during the accused incident. But for the parties attempting to flee the scene of the robbery, Stewart's death would not have resulted. However, as stated previously, cause in fact is not sufficient alone to establish guilt. The parties had not reached a place of "temporary safety" as they were still attempting to flee the scene. Additionally, there was a BOLO that resulted in officers immediately ascertaining the defendant's location. Additionally, it is reasonably foreseeable that one may die from a car accident if he does not wear a seat belt. Thus, the car accident was ordinary negligence, not gross negligence, and not a superseding cause. Thus, the elements are satisfied to charge Logan of robbery and felony murder.

MPT ITEM 2

Sample Answer 1

To: Michael Carter

From: 24004

Date: 2/27/24

RE: Motion for Summary Judgement 1st Amendment Section - Randall v Bristol County

Please find the section for the supporting brief arguing that the county violated Ms. Randall's 1st Amendment Rights by suspending her. The section addresses all elements engaging in protected speech as part of her claim as well as potential responses.

III. Legal Argument

To show that speech is protected under the 1st Amendment, a public employee must show that the employee made the speech as a private citizen and the speech addressed a matter of public concern. (Dunn v City of Shelton Fire Department). After demonstrating both, courts will apply a balancing test between the employee's interest in speech and the employer's interest in promoting effective and efficient public service (Id.)

A. Ms. Randall's posts were made as a private citizen because her employment duties do not include making decisions on renewing financial grants

There are no genuine issues of fact. Ms. Randall's posts were made as a private citizen. When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for the 1st Amendment (Dunn v City of Shelton Fire Department). In other words, there is no protected speech when that speech is made pursuant to the employee's ordinary job duties. Speech is not necessarily made as an employee just because it focuses on a topic related to the workplace (Smith v Milton School District).

Ms. Randall's job duties as the program's director included curriculum and lesson plans, creating materials for eligibility, scheduling, training, procedures for connecting participants with other services, and creating reports to comply with grant requirements. Ms. Randall states that posting on Facebook about the program was not part of her job duties. Nor was making any financial decisions about the program including the decision to renew it. The county will claim that the ability to accept the county's decision is apart of her job duties and posting on Facebook about the decision made the speech as an employee. However, topics related to the workplace do not necessarily made the speech non-private. Marie Cook, county executive, concedes that the decision to renew the grant and financial decisions are her responsibility not Ms. Randall's. Mr. Randall's situation is akin to Pickering v Bd. of Education where a court found that employee's

letter to a newspaper criticizing the her employer's financial decisions was private speech. It cannot be argued that by merely being an employee, there must be absolute agreement on the employer's decisions. Like the employee in Pickering, Ms. Randall has a right to speak out and inform the public about the county's decisions and financial matters. Because the content of the Facebook posts, renewing the grants, were outside of Ms. Randall's ordinary job duties, the posts were made by a private citizen.

B. Ms. Randall's speech is a public concern because they were made in a public setting, alerted citizens of change, and those citizens responded

There is no genuine issue of fact. Ms. Randall's speech was addressing a matter of public concern. Courts will consider three things: the speech's content, the speech's nature (how the employee spoke and to whom, and the context in which the speech occurred (motive and situation).

The content of Ms. Randall's posts addressed a matter of public concern. In Smith, the court found that policies, finances, and decisions are public concern. Complaints about employment situations and work conditions are not public concerns (Smith). The facts of Ms. Randall are different than in Dunn where Mr. Dunn was simply a disgruntled employee. Rather, she was alerting the public of an issue. The county will claim that Ms. Randall was complaining about her employment situation because she would lose her job but this is false. Ms. Randall stated that the loss of her job was not her concern because she would simply go back to her duties at the library. Rather, the motive was so that more citizens could get jobs under the program. The posts were made in a "public square" as in Smith. In Smith, the employee set the posts to public allowing everyone to see them. In Dunn, the posts were only available to internal employees. Ms. Randall's posts were seen by many people, evidenced by the fact that at least a dozen people called the county office. The channel of communication was available to citizens generally (Dunn). As stated, Ms. Randall was motivated by alerting the community about a great program that would not be renewed rather than a selfish desire to keep her post. Her posts clearly outlined the effect on the public and the effects achieved under the program. It is clear that Ms. Randall's speech addressed an issue of public concern.

C. Balancing Test

In proving the two elements of protected speech above, the court should apply the balancing test in favor of Ms. Randall. Courts will consider an employee's interest in expressing speech versus the employer's interest in promoting effective and efficient public service. In Pickering, the court held that calling attention to an important matter of public concern tilts the test in favor of the employee. An employer may have interest in the efficient operation of county government and good morale, Ms. Randall did nothing to affect morale or operation.

While the county's counsel claims that Ms. Randall's conduct may have done so, there is no evidence provided that Ms. Randall's comments affected the county's operations or that morale was hurt. Ms. Cook admits that there was no disruption in the county office. Annoyance

is not enough to favor the employer in the balancing test (Smith). While Ms. Randall did state that the decision not to renew was a "bad call" and that the county executive needed to "get her priorities straight", this alone does not rise to the type of morale damage as in Dunn. In Dunn, Mr. Dunn directly criticized a large portion of firefighters in a field where teamwork and unity are critical. The embarrassment claimed by Ms. Cook is not enough to favor the employer either. Almost all public speech criticizing the government will incur some annoyance or embarrassment (Smith). Ms. Randall's speech engaged citizens of her community about an issue which outweighs the county's concern over operation and morale. Ms. Cook admits that at least a dozen members of the public called about the grant. Whatever trouble Ms. Cook claims to have faced, it does not outweigh Ms. Randall's 1st Amendment rights.

Lastly, the county and Ms. Cook admit that the facebook posts were the only motivating factor behind the suspension. Bristol County violated Ms. Randall's 1st Amendment rights by suspending her.

Sample Answer 2

To: Michael Carter

From: Examinee

Date: February 27, 2023

RE: Randall v. Bristol County Motion for Summary Judgment

III. Legal Argument

A public employee does not surrender all First Amendment rights merely because of their employment status. *Garcetti v. Ceballos*. To show that the speech is protected under the First Amendment, a public employee must demonstrate that (1) the employee made the speech as a private citizen, and (2) the speech addressed a matter of public concern.

A. Plaintiff's Facebook posts were made on her personal Facebook page as a private citizen, and thus are protected under the First Amendment

When a public employees makes statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. The question is whether the employee made the speech pursuant to [her] ordinary job duties. *Lane v. Franks.* As stated in *Smith v. Milton School District*, speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. There, the court found that just because a teacher tweeted about teaching a lesson in a classroom, which is a part of a teacher's ordinary duties, posting on a personal social media account was not within his duties. Similarly, here, while Plaintiff's posts were about the Work-Force Readiness Program ("the program" or "the grant"), which was a part of her ordinary duties, posting on her personal Facebook page was not. Further, nowhere in County Executive Marie Cook's ("Cook") deposition does she state that posting on her personal facebook page was within Plaintiff's duties.

Plaintiff's speech is easily distinguished from the speech in *Dunn v. City of Shelton Fire Department*. There, the court held that Dunn's speech was made as an employee. The court reasoned that Dunn posted about firefighter education requirements in a Facebook page for first responders. This Facebook page was known among the first responders as a sounding board for gripes and complaints. There is no such evidence to suggest Plaintiff's personal page is a place for employment gripes and complaints.

Further, Dunn's speech was made pursuant to his duties as fire chief because he was consulting with the chief and others on continuing education requirements. The other cases cited in *Dunn* refer to police officers discussing an arrest with prosecutors (*Morales v. Jones*) and an assistant district attorney criticizing a search warrant in an internal memo to a supervisor

(*Garcetti*). In *Dunn*, and its cited authority, the communications were made in a closed group and limited to specific people.

Here, as Plaintiff states in her deposition, these posts were made public and able to be seen by anyone. Plaintiff wanted and intended to reach a wide audience with her statements. Like, in *Pickering v. Bd. of Education*, Plaintiff wanted her thoughts published. There, the letters were posted in the local newspaper, where most citizens at the time got news about local issues. Here, and today, citizens get their news about local issues from Facebook. The Facebook posts, like in *Pickering*, "bore similarities to letters submitted by numerous citizens every day." In fact, based on Cook's deposition, the resulting communications from private citizens were extremely similar in nature, asking to keep the grant.

Based on the above-analysis, it is clear that Plaintiff was speaking as a private citizen. Therefore, her statements in her posts should be given First Amendment protection.

B. Plaintiff's Facebook posts addressed an important matter of public concern, the renewal of the Work-Place Readiness Program, and thus are protected under the First Amendment

To determine whether speech is on a matter of public concern, the court should consider three things: the speech's content (what the employee was saying); the speech's nature (how the employee spoke and to whom); and the context in which the speech occurred (the employee's motive and the situation surrounding the speech).

First, the content of the posts were of a public nature. Matters such as school district financing, public corruption, discrimination, and sexual harassment by public employees have all been found to be matters of public concern. However, complaints about work conditions have not been found to be public concerns. Here the content of the speech focuses on policy, not personal complaints. Both posts describe the grant program and tell citizens how to take action. Further, the only reference to Plaintiff's personal work situation is identifying herself as working on this specific project and the results she has seen from it. Similarly to an instance of school district financing, the content of the speech here is clearly focused on policy, wanting the program to be kept.

Regarding the nature and context of her speech, *Garcetti* held that "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because it is the kind of activity engaged in by citizens who do not work for the government. Plaintiff was speaking to the public. As stated in *Smith*, social medias can be a modern-day "public square." Plaintiff could reach the entire community and inform them of the importance of this program. Further, the nature of Plaintiff's speech changed from personal to public when she intentionally made these posts public. As she stated in her deposition, Plaintiff made the post public so "anyone could read them." Unlike in *Dunn*, Plaintiff's posts were not limited in any way. Further, Plaintiff stated in her deposition that she "thought the public should know that the application deadline was about to pass, and this program would

end if the county did not apply to renew it." Again, Plaintiff's motives were for the public, not any personal vendetta or personal gain. Like in *Pickering*, Plaintiff's posts and complaints regarding the grant had no official significance and bore similarities to citizen complaints.

Based on the above-analysis, Plaintiff was clearly speaking on a matter of public concern, and thus her speech should be given First Amendment protection.

C. Plaintiff's interests in informing the public of the Work-force Readiness Program being cut greatly outweigh any annoyance or embarrassment to the County

If it is determined that the employee spoke as a citizen on a matter of public concern, the inquiry moves to a balancing test. As stated above, Plaintiff has spoken as a citizen on a matter of public concern. Therefore, we move to the balancing test.

The court must weigh the interests of the employee in expressing the speech against the employer's interest in promoting an effective and efficient public service.

Next, in important matters of public concerns such as a school districts budget or use of tax revenue, the balance tilts in favor of an employee calling attention to such matters. Here, as stated above, the renewal or non-renewal of this grant will effect whether citizens are able to be prepared for the workforce or get their GED. This is clearly in line with cases where the court has found in favor of the employee such as a school districts budget or use of tax revenue.

Additionally, unlike in Dunn, there are not large concerns with promoting an effective and efficient public service or undermining teamwork needed for the job. Cook's only complaints were having to "deal with the public" which is her job. Cook complains that Plaintiff "stirred up the public" and Cook had her "time wasted" responding to citizen inquiries. Further, Cook states that she was embarrassed. As stated in *Smith*, "annoyance is not enough to favor the employer. Almost all public speech criticizing the government will incur some annoyance or embarrassment." Therefore, Cook's annoyance and embarrassment is not enough to tilt the balance in the employer's favor.

Responding to the public is clearly not an interest to protect public employers from. In fact, public employers are *more* efficient in their public service when they are in contact with the public. As in Smith, there is no evidence here of any slip in productivity or workplace hostility. As Cook stated in her deposition, there have been no disruptions or problems of any kind in any county office since Plaintiff's posts. Cook further admits that she was able to respond to all inquiries made to her and satisfy the citizens.

Since the public employer is not suffering any harm, the balance clearly weighs in favor of the Plaintiff.

D. Upon admission, Plaintiff was suspended because of her Facebook posts, thus her peech was a motivating factor in her suspension

Finally, the employee must show that the speech was a motivating factor in the adverse employment action.

It is undisputed that Plaintiff was suspended because of her Facebook posts. Specifically, Assistant Corporation Counsel for Bristol County, Susan Burns stated in a November 2, 2023, letter to Plaintiff's counsel, "[Plaintiff] was suspended because of her Facebook posts." Therefore, by the COunty's own admission, the causation requirement for the adverse action is met.

Sample Answer 3

III. Legal Argument

Public employees do not give up all of their First Amendment Rights simply because of the nature of their employment. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). An employee who has been improperly retaliated against or disciplined by a public employer for exercising their First Amendment rights as a private citizen is entitled to bring a civil rights action pursuant to 42 U.S.S Section 1983. In bringing such a claim, the burden lies on the plaintiff-employee to demonstrate that the statement was made (1) in the plaintiff's position as a private citizen rather than in their official job duties and (2) that the context and motive for their statements was to address a matter of public concern. If the employee can show this, they must then proceed to show that (1) that the balance of the employee's expression of speech outweighs the public employer's interest in promoting effective and efficient public service and (2) that the speech was a motivating factor in the adverse employment action. Because the plaintiff-employee, Olivia Randall, can demonstrate through undisputed facts that she made statements in her position as a private citizen, that the context and motive of her statements was to bring public attention to an important matter of public concern, that her interest in exercising her speech is greater than Bristol County's interest in promoting effective and efficient public service, and that her suspension was a direct result of her protected First Amendment speech, granting Ms. Randall summary judgment is appropriate in this case.

1. **Randall made statements as a private citizen because she made the posts on her public social media account to a general public audience.**

In order for a public employee's speech to be protected under the First Amendment, it must be made in the employee's role as a public citizen and not in the performance of official duties. The US Supreme Court has established that a public employee making statements pursuant to his or her official duties is not speaking as a citizen for First Amendment purposes. See *Lane v. Franks*, 573 U.S. 228 (2014); *Dunn v. City of Shelton Fire Department (15th Cir. 2018)*. However, just because an employee speaks in a way that focuses on a topic related to an employee's workplace does not mean that the employee is not speaking as a private citizen. See *Smith v. Milton School District* (15th Cir. 2015). To determine whether a statement is made as by the employee as a private citizen or pursuant to their official duties when the speech relates generally to an employee's job, the Court looks to the substance of the speech being made and whether the speech is directly related to the situation or experience of the employee in performance of their job duties or place of employment or whether the speech concerns a matter of public policy that effects the place of employment generally but is ultimately aimed at broader public considerations. See *Smith; Dunn; Garcetti.* The 15th Circuit in Smith acknowledged that the statements made by a school teacher regarding state testing requirements was related to his job duties and ultimately the performance of his job. However, the Court further made clear that the teacher's job duties did not involve posting on social media and that he did not make the statements in connection with his teaching job, but rather to alert the public to his concerns about mandatory state testing through public Facebook posts. This decision was contrasted with

the decision in Dunn. In *Dunn* the Court decided reviewed posts made by an assistant fire chief on a private social media group consisting of all first responders where he was responsible for posting about continuing education requirements. Dunn's posts were gripes aimed at younger generations he viewed as soft and in the Court's view could more clearly be seen as directed criticisms of other first responders that could be taken in Dunn's official duties as chief fire assistant in providing knowledge on continuing education. Unlike Smith, there was no broader issue of public concern and the statements were made in a forum where he was recognized in his official capacities. Because of these reasons, the 15th Circuit determined that Smith's statements were made in his role as a private citizen, while Dunn's were made in his official capacity.

Randall's statements more closely resemble those statements of Smith than Dunn. Randall's statements were made on her Facebook profile, which she made available to a public audience. Randall's statements were made in relation to a grant program that she was the director for. However, like Smith, these statements were not made in her capacity as director of the program. While she also made allusions to the fact that she was director of the grant program, similar to the way that Smith noted he was a teacher, her critiques were at the overall policy decision to make funding available for the grant moving forward. Unlike Dunn, she did not attempt to make the statements to a private audience of others in a similar profession or line of work, but, like Smith, instead sought to bring public awareness to a matter that involves spending of public funds. Therefore, her speech should properly be considered as that of a private citizen.

2. **The content, nature, and context of Randall's speech supports a finding that it addressed a public concern because it involved a matter of public policy that was intended for consideration by members of the general public.**

In order for a public employee's speech to be protected under the First Amendment it must also address a matter of public concern. The Supreme Court in *Garcetti* determined that whether speech addresses a matter of public concern is determined by considering the content, nature, and context of the speech. In determining whether the content of the speech supports a finding that it addresses a matter of public concern, courts have looked at whether the speech appears to address the speakers personal concerns or whether the content of the speech is aimed at broader issues that would be more applicable to general members of the public. The 15th Circuit has examined this differently in *Dunn* and *Smith*. In *Dunn,* the Court observed that Dunn's speech involved his personal views that the younger generations are soft. In the Court's view, these concerns sounded more like those of a disgruntled employee than those of an individual trying to alert the public to a broader public issue. In Smith, on the other hand, the court noted that while Smith may have personal concerns with the policies at issue, the complaints raised were common to other members of the public and were relevant not only to teachers, but to parents, and other members of the public. In determining the nature of the speech, the Court looks at whether the statements appear to be made to the broader public or to a close group that a person might vent their individual frustrations or share an individual view. In *Smith,* the Court acknowledged that social media is becoming the new "town square" similar to how newspapers or local television use to act in public discourse. See *Pickering v. Bd. of Education*,

391 U.S. 563 (1968). On the other hand, while Smith's comments were made on a private page, similar to the private page in *Dunn*, the speech was not protected. Finally, in determining the application of the context of the statement, the Courts have looked at the interplay of the nature and content of the posts. Both Smith and Pickering involved cases in which the speaker made comments in a forum considered to be a public forum or "town square" and related to issues of policy substance rather than workplace conditions. The Supreme Court and 15th Circuit both acknowledged this supports a contextual finding that the intent was to make a statement protected by the First Amendment for the good of the general public, as opposed to criticisms of the personal decisions of superiors or lower employees or general shifts in the workplace.

Here, Randall's statements support a finding that the content, nature, and context support that her statements were made on an issue of public concern and are protected by the First Amendment. Here, Randall's statements were made regarding the policy impacts of the grant program, including the number of people it has helped and the overall community benefits. When asked in her deposition, Randall further acknowledged that her posts had nothing to do with the personal end of her position as director if the grant was not renewed. Instead, she restated that her focus was on helping others get GED and jobs and that she only took this action when calls to discuss the matter and policy objectives failed and it seemed the COunty was seeking to avoid comment. Ms. Cook in her deposition further stated she does not personally know and has not interacted with Randall and there is no personal animus. This looks far more like the policy arguments put forward in Smith than the personal gripes about "softies" in Dunn. In terms of the nature of the communications, Dunn posted publicly on Facebook like Smith and acknowledged in her deposition that anyone could read them. Finally, in considering the context, including these factors, it appears clear that Randall's interest was in raising the issue for public concern and that she did so in a space where the public would be expected to see it. It is also a matter that appeals to public concerns. This is evidenced by the fact that Ms. Cook in her deposition acknowledged that around a dozen citizens called in to the county to discuss the program and advocate for it continuing. Therefore, Ms. Randall's speech should be considered protected by the First Amendment.

3. **Under the balancing test applied to a private citizen speaking on a matter of public concern, Randall's interest in expressing her First Amendment rights outweighed the library's interest in workplace efficiency and employee discipline.**

If a public employee can show they have protected speech, they must then show that the balancing of that interest with the employer's interest in maintaining workplace efficiency and employee discipline favors the employee. Garcetti. In determining this balance the Courts look to see whether the employee's speech was directed at others in the workplace or at the general institution more generally, whether it adversely impacted the business of the employment location, and whether the issue is a matter of public concern. If the matter is one of public concern, the presumption is that the balance favors the employee. Smith. Criticism of other employees may be a factor in favor of the employer, however, mere annoyance of the employer that the employer itself as an institution is criticized is not enough.

Here, Randall's statements are a matter of public concern and the balance therefore presumptively favors her. Ms. Randall did make a direct statement to call Ms. Cook. However, Ms. Randall does not know Ms. Cook and it does not appear this affected moreale. While peiple did respond to the calls, it allowed Ms. Cook a chance to explain department changes to policy towards a new program and was within the limits of the County to effectively handle. Ms. Randall's statements did not affect the overall morale at the library from what we can tell such that her return would cause discord. Ms. Rqndall has also testified that her intent was to bring public concern to the issue, not to embarrass the County, the library, or Ms. Cook. Therefore, the balance reasonably weighs in Ms. Randall's favor and summary judgment would be appropriate to grant in Ms. Randall's favor.

4. **Ms. Randall's suspension at work was clearly due to her comments and therefore is protected in a First Amendment action.**

If a public employee can show that they had protected rights and that the balance of exercising those rights outweighed those of the employer, they must show the adverse action was a result of the comments. In this case Ms. Cook has not disputed that the suspension was a direct result of the comments and this prong is therefore met.

IV. Conclusion

Since Ms. Randall as a public employee can show that she had protected rights under the First Amendment and that the balance of exercising those rights outweighed those of the employer, and that the adverse action was a result of the comments, summary judgment in favor of Ms. Randall is appropriate.