July 2013 Bar Examination Sample Answers

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Question 1 - Sample Answer # 1

Possible defenses that Beachfront LLC can raise to the lawsuit by SMDG, including the merits of those defenses and likelihood of success.

The following defense would apply to the claim for breach of contract:

Beachfront could raise the defense that no contract was formed for lack of consideration. A contract requires an offer, acceptance and consideration. Consideration is bargained for exchange. Beachfront could argue that this agreement was merely a proposal for terms to be included in a future contract and that this proposal lacked any actual consideration to be deemed valid. Beachfront would argue that since no money changed hands, this was merely a promise to buy in the future and thus lacked consideration. This defense has very little merit and almost certainly would fail. Consideration is very broad in the eyes of the court and the court will not require an exchange of money to achieve consideration. Instead, the court will only look to whether there was a bargained for exchange, or in other words, whether a party faced a detriment in exchange for a promise. Here, SMDG offered to sell the island, along with the promise to waive and release any potential suit by its members, in exchange for Beachfront LLC's promise to pay 12,000,000 dollars by March 1, 2009. This would very likely be deemed suitable consideration and the court would not require money to change hands at the time the agreement was entered into.

Another defense would be the statute of frauds. The statute of frauds requires all land contracts to be in writing. This defense has very little merit as this agreement was in writing.

Beachfront could also raise the defense that the contract was not enforceable because Beachfront's LLC was not actually a proper LLC. Beachfront could argue that because a member of an LLC owes its fellow members a fiduciary duty and the duty of care and loyalty, that when Beachfront LLC was created it was in violation of these duties and was not an actual entity. Additionally, members of an LLC need the consent of all the members to leave the LLC. Without this consent, Beachfront could argue that it actually did not exist and thus could not be party to a contract. This would also fail and has little

merit because the court is not likely to find in favor of Beachfront if it has unclean hands. Unclean hands is the doctrine that a party who comes to the court as a wrongdoer seeking justice from the one is wronged, the court is unlikely to find in that petitioning parties favor.

Beachfront could argue that it had not breached the agreement at the time of the suit, thus the suit is not ripe. For a court to rule, there must be a case in controversy. SMDG will argue that Beachfront committed an anticipatory repudiation, which is informing the party you definitely intend to breach. This permits them to initiate suit without waiting for the actual closing date. Beachfront's advisement to SMDG that it would not be able to close and refusal to extend the closing date would likely be deemed an anticipatory repudiation, and thus this defense also has little merit and the cause of action would be deemed ripe at the time the suit was filed.

The strongest defense is that SMDG created a fraudulent material misrepresentation when it entered into the contract. A fraudulent material misrepresentation occurs when:

1. A party intentionally informs or conceals another party of a material fact; 2. The party relies on that material fact; and 3. Based on that material fact, the party enters into a contract. Here, SMDG knew of a potential problem with the title that could require an action to quiet title. SMDG failed to disclose this to Beachfront when it entered into this agreement. Beachfront could argue that it relied on SMDG's misrepresentation, when it failed to disclose, that the title to Beachfront was not encumbered. Beachfront would be arguing that there was no meeting of the minds because of this fraudulent material misrepresentation. The doctrine of equitable conversion merges a land sale contract into the actual deed. Equitable conversion acts to shift the risk of loss to the buyer once he enters a land sale agreement, even prior to the actual closing. This doctrine could be damaging to this defense because the agreement is silent as to the quality of title SMDG will convey, thus absent any warranties.

Specific Performance

While the above-mentioned defenses would be argued in the breach of contract allegation, the claim for specific performance should be discussed separately because of its unique nature. Specific performance is an equitable remedy that the courts have power to grant only in certain specific situation. These situations include when monetary damages will not suffice to remedy the harm and often times when land is involved because of the unique nature of land. Thus, since land is involved in this breach of contract claim, the idea of specific performance is often times raised, but those cases usually involve the breaching party having possession over the land. Here, the specific performance would be forcing Beachfront to pay 12,000,000 dollars to purchase the property. This remedy would not be just nor does it adhere to the policy reasons behind specific performance. A proper remedy at law exists, and thus the equitable remedy of specific performance is unnecessary. The court can substitute the provision of the agreement allowing for specific performance and find a more just remedy.

2. The Measure of Damages

As discussed above, the equitable remedy of specific performance is too harsh and unjust because it would be imposed on a party who cannot afford specific performance and would convey to it property it does not want. Instead the court would first look to whether the agreement contains an earnest money provision and determine if that earnest money is a fair assessment of the potential damages. Here, there is no adequate earnest money clause. The court would then look to determine the losses SMDG would face, to avoid unjust enrichment. Unjust enrichment occurs when a party ends up better off from the breach than it would have been if the contract was performed. Money damages would likely be 12,000,000 minus the fair market value of the property at the date of the closing plus any incidental costs. If SMDG were able to sell the property prior to a judgment, the likely award would be 12,000,000 minus the selling price plus any incidental costs resulting from the breach.

Question 1 - Sample Answer # 2

To: Supervising Attorney
From: Examinee
Date: July 30, 2013
RE: SMDG v. Beachfront

In response to your inquiries about the Beachfront litigation I have set out the possible defenses that Beachfront may raise and the likelihood of their success on the merits. I have also addressed the possible damages that Beachfront will face if they are unsuccessful in their case. Please let me know if you have any additional questions.

(1) The first defense that Beachfront could raise is that SMDG did not have marketable title because they knowingly hid a title defect that Beachfront was not aware of. All property conveyances and sales contract have an implied warranty of title. This warranty exists until the actual closing where the deed to the property is conveyed to the purchaser. Beachfront could attempt to raise this defense and allege unclean hands. This could have possibly been meritorious because in a sales contract because each party makes concurrent promises. This means that one party is not bound to perform until the other party is, barring a time is of the essence clause. There appears to be a time is of the essence provision as it would require closing ***on or before*** March 1, 2009. This however still gave Beachfront the opportunity to hold its performance until March 1, 2009. This is important because in a sales contract the seller does not have to provide marketable title until the closing date. If Beachfront had waited, then it is wholly possible that SMDG could not have provided marketable title and therefore would be in breach.

Beachfront however anticipatorily repudiated the sales contract with SMDG when it told them that it would not perform. Anticipatory repudiation arises when the breaching party unequivocally expresses its refusal to perform the contract. Upon this repudiation the non-breaching party may treat this as a total breach and sue immediately. Based on the facts repudiation is clear because SMDG even offered to extend the closing date and Beachfront refused. The defense for lack of marketable title will likely fail because Beachfront repudiated.

The second defense that Beachfront could attempt to bring is the statute of frauds defense. This a provision that requires that the contract be in writing, contain all essential terms and the parties, and be signed by the party to be charged. The statute of frauds requires that contracts involving the transfer of land to be in writing. Here we are not given the facts of whether the March 1, 2009 Agreement was in writing. If there is no signed writing then the defense would be meriticious. A land contract will be taken out of the Statute of Frauds when 2 of the following three elements are met: (1) a full or partial payment, (2) the purchasing party is in possession, and/or (3) the purchasing party has made improvements in reliance of the contract. There are again no facts that show that this exception would apply.

The final defense that Beachfront could raise would be impossibility or impracticability.

These arise when the (1)nonoccurrence of a situation was assumption for entering the contract, (2) there is substantial hardship to one party, and (3) neither party assumed the risk of the situation. The problem with impossibility is that it is an objective standard. Therefore if anybody could perform the contract then it will not be deemed impossible. Typically, must parties will not be discharged of liability by this offense. Beachfront could argue that nobody could get financing, but this is again unlikely.

Lastly, Beachfront could attempt to argue that there was no consideration to the contract by arguing that SMDG did not have a valid claim or a reasonable belief that they did. This is likely to fail. Consideration is bargained for exchange and imposition of legal detriment, which in Georgia the promisor need not suffer. Courts will not look into the adequacy of consideration so this is not a good defense.

(2) If Beachfront loses the lawsuit against SMDG then there will be two options for damages. The first option would be to sue Beachfront for specific performance. Specific performance is an equitable defense. Equitable defenses are typically used when a monetary remedy is inadequate to compensate the aggrieved party. Specific performance will in many cases be granted whenever it involves unique, special, or rare good, or when it is for the conveyance of land. Here we are dealing with a specific parcel of land that had been owned for years by the East family. Land is always considered unique and is always susceptible to specific performance. If a defense does not apply to this case and SMDG succeeds on its merits then it is a great possibility that they could request specific performance. Beachfront could attempt raise an equitable defense to specific performance alleging that SMDG had unclean hands by failing to disclose the title defect, but as discussed above this is not likely to be meritorious. If specific performance is granted, SMDG will not be entitled to damages.

If the court were to decide that SMDG had an adequate remedy at law then it would entitle SMDG to monetary damages. The non-breaching party (SMDG) would be entitled to expectation damages. These are damages that put the non-breaching party in the position they would have been in had the contract been performed. Within these damages the court would also consider consequential damages and incidental damages. Incidental damages are those that are typically administrative and nominal. Consequential damages are those that are contemplated at the time the contract is entered into and are foreseeable. Hadley v. Baxendale. In the case at bar there are not likely to be consequential damages because there were no foreseeable injuries that were contemplated at the time that the parties entered into their March 1, 2008 agreement.

The non-breaching party has a duty to mitigate the damages as well upon the breach of the other party. It appears that to the extent of the situation they have. Because we are dealing with real property in this breach of contract the measure of damages will be the contract price - the fair market value (FMV) of the property at the time of breach. Here we are not presented with the FMV of the land since the real estate market collapse and as such we can only assume it will be less than $12,000,000. SMDG should hope that the court will offer specific performance.

Question 1 - Sample Answer # 3

TO: Partner
FROM: Applicant
RE: Beachfront Development, LLC

1. DEFENSES TO THE LAWSUIT AND LIKELIHOOD OF SUCCESS

There are several defenses Beachfront will be able to assert in defense to this breach of contract claim by Saint Mary's (SDMG). First, Beachfront will be able to assert the defense of commercial impracticability. Commercial impracticability requires a change in circumstances that renders the cost of performance by a party prohibitively expensive or burdensome. The nonoccurrence of the change in circumstances must be a basic assumption of the contract, unforeseeable at the time the contract is entered into. Here, the parties contracted for the land sale on March 1, 2008, shortly before the market crash. It is a stretch to argue that a dip in the real estate market is so "unforeseeable" that it would relieve a party of the contractual obligation, although it does appear that a sales price of $12 million dollars for a plot of land after the market crash is prohibitively expensive. The defense has a low likelihood of success for both the general breach of contract claim and the specific performance claim because the crash was not unforeseeable.

The second defense of impossibility is also available. Impossibility requires that performance be "objectively" impossible- not merely made more difficult or even temporarily impossible. The event making performance impossible must be unforeseeable at the time of contracting. The defense generally applies in situations where the goods under contract have been destroyed or a trade embargo prevents there import. This defense will have a low likelihood of success against a general breach of contract claim and the specific performance claim. Beachfront has stated it is unable to obtain the financing for the property, but this does not mean it is objectively impossible to close. Presumably they could shake down investors and pursue other methods of obtaining the financing. Because the performance is not objectively impossible, it will not be a defense to the breach of contract claim or claim for specific performance.

The third defense is that no breach has actually occurred. Generally, if the contract sets a date for performance, a party that performs before that date will not be in breach. The date set for closing is "on or before March 1, 2009," which has not yet arrived. This would mean Beachfront has almost a full year to obtain financing or otherwise perform its obligation under the contract. However, the doctrine of anticipatory repudiation will apply. Anticipatory repudiation is where one party indicates to the other, or gives it reasonable grounds to believe, that it will not perform under the contract. Anticipatory repudiation may also occur when the promisor requests that the promisee give adequate assurances that it will perform under the contract and the promisee fails to give the promises. When a party anticipatorily repudiates a contract, the innocent party does not have to wait until the time specified in the contract for performance in order to sue; it may sue immediately rather than wait for the actual breach. Here, Beachfront told SDMG specifically that they were financially unable to close and they would not be able to close. This will constitute an anticipatory repudiation,

entitling SDMG to sue for breach immediately. The defense probably will not work for either specific performance or general breach of contract.

However, Beachfront can assert a defense to the claim for specific performance that has a fairly strong likelihood of success because SDMG had "unclean hands." In Georgia, to be entitled to a form of equitable relief, a party must not act with unclean hands in connection to the transaction. The maxim goes, "to receive equity, one must do equity." Here, it appears that SMDG acted with some unfairness and dishonesty with regards to the transaction because it failed to disclose a potential problem with title that could require an action to quiet title. If SMDG is deemed to have acted unequitably in connection with the land sale, Beachfront may be able defeat the claim for specific performance. This defense won't defeat the general breach of contract claim.

2. MEASURE OF DAMAGES THAT WILL BE APPLIED BY THE COURT

There are three general forms of damages in a breach of contract action: expectation damages, reliance damages, and restitutionary damages. Equitable damages may also be claimed, like specific performance.

First, SMDG probably will not be able to obtain specific performance. Specific performance, as all equitable damages, is only granted where the party does not have an adequate remedy at law, i.e., where money damages will not suffice. Here, it appears that money damages will make SMDG whole- simply calculate the difference in price between the current market value of the land and the price for which it would have sold under the contract.

It should be noted that the contract specifically provides for the right of the parties to seek specific performance in event of breach. In Georgia, generally parties are permitted to establish the amount of damages in contract for a breach as long as the damages are not a penalty. The damages amount must be a reasonable estimate of the likely harm of the breach and be reasonable in relation to the actual harm of the breach. Here, the provision fails because $12 million is not reasonable in relation to the actual amount of SDMG's harm, which is only the difference between the $12 million and the current market value of the land.

The court will most likely use expectation damages. Expectation damages are damages which place the innocent party in the position it would have occupied had the contract not been breach. Here, this would be the difference between the sales price of the land in the contract and the current market value of the land (probably established by the sale of the land under current market conditions).

The court could use reliance damages, which are proper when the harm caused by breach is not easily ascertainable. Reliance damages compensate a party for harm suffered by relying on the contract. However, it appears that the expectation damages are easily ascertainable, so the court probably won't use reliance damages.

Last, is restitutionary damages. Restitution is generally proper where one party confers a benefit on the other for which the other should be required to pay. It does not appear SDMG conferred a benefit.

Question 2 - Sample Answer # 1

1. Assets passed if will found valid

If the will were found valid, the main factor in which of her assets would pass through probate is the Preacher's act in adding himself to Sally's bank accounts. If the Preacher's act were found valid, he would inherit the $1,000,000 bank funds as a joint tenant with right of survivorship; those funds would not pass through probate. Accordingly, the remaining assets of the home, life insurance policy, and marketable securities would pass through to 40% John, 20% Preacher, 20% Mr. Zee, and 20% church. If the Preacher's act were found invalid or fraudulent, the bank funds would pass through probate without having gone directly to a joint tenant with rights of survivorship.

2. Entire will voided

If the entire will were voided through the caveat, the estate would be distributed as if Sally had died intestate. Given that Sally left no surviving spouse, descendants, or parents, Georgia's laws of intestacy dictate that Sally's estate would pass equally to her three siblings. For each sibling who predeceased Sally, Georgia's anti-lapse statute would provide for that sibling's share to pass per stirpes to her descendants. In this case, Sally's estate would pass 1/3 to Cindy (alive), 1/3 to Abby (so 1/6 to Terry and 1/6 to Berry), then 1/3 to Brenda (so 1/3 to John). Under this distribution, John would receive 1/3 of Sally's estate. In light of this result, John would be better served financially to not contest the will. He would receive 40% of Sally's estate under the will if it were not contested whereas he would receive 33% if he did contest it. That said, depending on how close John was to his Aunt Sally, the inequity of the Preacher and Mr. Zee's conduct may prompt his to make financial benefit a secondary concern.

3. In terrorem clause

In Georgia, an *in terrorem* clause providing that party forfeits an inheritance right if he contests the will is valid only if the will specifies what happens to the bequest if forfeited. Here, the will does not state what would happen to the forfeited inheritance so the clause is invalid. If John was unsuccessful with his caveat, the *in terrorem* clause would not affect his inheritance under the will.

4. Caveat's effect on relatives

If the will were upheld and probated as-is, John's relatives would not receive any funds from Sally's estate. If John successfully sought a caveat, as discussed in (2) above, Cindy would receive 1/3, Terry would receive 1/6, Berry would receive 1/6, and John would receive 1/3. Cindy's children would not receive anything.

5. Ethical concerns

Mr. Zee should not have drafted the will as a Georgia attorney for Sally, as a non-relative. The Georgia Rules of Professional Conduct do not allow attorneys to write wills for persons who are not close relatives and who receive a bequest under the will. Mr. Zee acting as a co-executor would pose fewer issues if he had not also been a beneficiary, because he was also acting a fiduciary as her lawyer. The will naming Mr. Zee as both a co-executor and a beneficiary, however, adds to the impropriety of the situation because it made Sally even more vulnerable and increased the potential abuse of power and influence. If Mr. Zee was determined to accept a bequest from Sally, he should have advised her seek counsel from another attorney. The facts do not suggest that emergency prevented him from so counseling her. If Sally insisted on Mr. Zee's services, he should have provided a written notice that detailed his interest in plain language, explained that it was fair to her interests (if possible), and gotten her written consent after consultation. Although this treatment is more typical for a lawyer entering into a business transaction with a client, their more stringent requirements seem more appropriate to the vulnerable position Sally is placed in the instant situation. If Mr. Zee decided that the situation warranted only an explanation to avoid a conflict of interest, he might explain his potential conflict of interest verbally and obtain her consent after consultation.

6. Power of Attorney

The Power of Attorney that Sally signed empowered the Preacher to act as her agent and fiduciary so, in a way, gave his express authority to act on her behalf. However, as an agent and fiduciary of Sally, the Preacher would have been subject to a strict duty of loyalty that should have prevented him from acting to benefit himself at her expense or against her wishes. Here, the Preacher removing assets from the will (which Sally supposedly intended to make) would be violating his duty of loyalty as her agent. A court could require him to transfer the bank account funds to a constructive trust, a remedy often employed when a fiduciary has violated his duties and received an improper benefit. If the Preacher had, instead, added his name to the bank accounts as Sally's attorney-in-fact, he would not become a beneficiary or inherit the funds without passing through probate as a joint tenant with right of survivorship. His status as attorney-in-fact would only allow him to act as her agent as to accounts without being the beneficiary himself and, in any event, the court would supervise any distributions through probate. Probate presumptively halts transfers of assets with certain exceptions.

7. Charitable bequest

Georgia courts interpret charitable bequests broadly and favorably. Sally would need to identify the church with particularity. Although the facts only state that the bequest was to Sally's church, a court could probably determine with reasonable certainty which church Sally intended to reference presuming that Sally only belonged to one church. If a will leaves a bequest to an unspecified entity but the court can determine the entity, the

bequest will remain valid, e.g. Sally's "beloved childhood friend" when she only has one childhood friend. The other problem that might arise with this charitable bequest is that it does not express a more general charitable intent. Should Sally's church dissolve or otherwise cease to exist, the court could not apply the cy pres doctrine to give the funds to a similar charitable cause without a more general charitable intent expressed.

Question 2 - Sample Answer # 2

1) When deciding which of Sally's assets would pass under the terms of her Will were it found valid and probated, the first issue is to decide what property would be testamentary, that is, not disposed of during life. The facts state that Sally had a gross estate of about $4 million which included a $400,000.00 home, a $600,000.00 life insurance policy and $1 million dollars in checking and savings accounts which was recently converted to joint accounts with rights of survivorship.

Assuming that the power of attorney held up, the $1 million in the joint bank account with a right to survivorship would not pass through the estate and the preacher would take title to the bank accounts. However, the power of attorney will not hold up, even if the will is valid, for this purpose. A power of attorney may be used to add someone to a bank account but only for the purposes of spending money for the well being of the person who is the true owner of the bank account. Even if the will is valid, a joint bank account is a non-testamentary disposition of property, and a person with a power of attorney not only would breach a fiduciary duty by granting himself a right of survivorship, he would also not have the authority. Thus, the $1million dollars will pass through the estate (what is not used to pay off any debts).

The $400k home as real property would pass through the estate as well as the life insurance policy. The life insurance policy would typically pass outside of the estate, however, without a named beneficiary, the proceeds would revert to the estate. Here however, the life insurance policy is payable to the estate, so there is not much question. The rest of the assets in marketable securities would also be estate assets.

2) If John's caveat were successful and the will were invalid, the entire $4million dollars would pass intestate (again, assuming the power of attorney does not allow creating of a right to survivorship in the bank account). However, for the sake of math, lets assume that the $1 million dollars passes through joint tenancy to the pastor leaving $3 million in the estate. Under Georgia's intestacy laws, when a decedent dies without a valid will, usually the surviving spouse and heirs take equal shares per stirpes with the spouse taking no less than 1/3. But, when there is no surviving spouse or children/grandchildren/etc, the estate passes first to the decedent's parents. If the decedent is not survived by a parent, then it passes to any sisters or brothers and nieces and nephews. While John will still recover under the intestacy statute as a surviving nephew of one of Sally's deceased sisters, the issue is whether it is better for John to take under the Will or by intestacy. Here, the decedent Sally was survived by 1 sister C. The other 2 sisters have passed away. When an heir predeceases the decedent and the gift lapses, however, GA's antilapse statute will save John's gift. Thus John will take his mother's 1/3 share of the estate. Cindy (living sister) will inherit 1/3. And Terry and Berry the children of Abby (other deceased sister) will take and split Abby's share 1/6 each. Thus, under intestacy, John will inherit $1 million. Under the Will, John was set to inherit 40% of the 3 million dollars. Thus it may be undesirable for John to file the caveat to the will.

Note: If Cindy had not survived Sally, John would not have taken 1/3, his mothers share, instead he would have had to split the estate equally with all 8 nieces and nephews.

3) The In Terrerom Clause would have no effect on Sally's will. At issue is whether an in terrerom clause will keep a beneficiary who challenges the will from receiving an interest. In GA, in terrerom clauses are enforceable, however, they MUST state what would happen with the forfeited interest of the beneficiary who challenged the will. Absent such a provision the clause is not valid and will not be enforced. They are not looked upon favorably. Thus, John's inheritance will not be effected in spite of losing the challenge.

4) As stated earlier in (2), they would not receive a share under the will were the will found to be valid. Were the will invalid, and the estate passed through intestacy, the surviving sister would receive 1/3, John would get 1/3 and the sons of the other dead sister would split that sisters share and each take 1/6.

5) The issue is whether a GA attorney should execute a will which also names him as a beneficiary. In GA, attorneys should never execute a will for someone in which they are a beneficiary unless it is for a close family member and they have received the consent of the other heirs. In GA, attorneys should avoid conflicts of interest with clients and this is a clear conflict of interest as well as it puts out an appearance of impropriety. Also, Zee should have known that neither he nor the Pastor should have served as co executors especially both being beneficiaries. He needed the consent of the heirs, and should have gone to the probate court to be appointed executor in the absence of one, or had the probate court appoint someone else to serve as executor.

6) The problem with the preacher using the power of attorney to add his name to the bank accounts is that a power of attorney does not grant a person authority to do such. The power of attorney does not grant the preacher the right to grant himself an ownership interest in the bank account. The right to survivorship would grant the preacher with the money after Sally dies. A power of attorney merely gives rights to sign and act on behalf of the individual. Had the preacher added his name as attorney in fact, he would have had the authority to add his names to the account in order to spend the money in the persons interests and has discretion with how to spend the money, but cannot grant himself an ownership interest in the account .

7) Charitable bequests are valid under GA law, however, here, the bequest to the church is arguably invalid on undue influence grounds. Undue influence voids a gift under a will if the gift was the product of coersion by one who had a position of influence over the decedent. Here, the Preacher will benefit from the bequest and his position of authority and the circumstances of the will are questionable, but unless invalidated on these grounds, the charitable bequest is valid. There is no Rule Against Perpetuities issue.

Question 2 - Sample Answer # 3

1. At issue in determining which of Sally's assets would pass under the terms of her Will is a determination of what is probate property and what is nonprobate property. Probate property is property that will pass under the will and cumulatively makes up the gross estate. When a person dies testate and their will is validly probated, the probate property is distributed accordingly. Of Sally's $4,000,000 estate, $2,000,000 is in marketable securities, $400,000 is her home, $600,000 is her life insurance policy, and $1,000,000 is in her checking and savings account. Life insurance is a common nonprobate transfer since it is governed by contract law, however, here it is payable to the estate so it would be included in the gross estate. The checking and savings account will be deemed nonprobate property and will pass outside the will. Property that is held in joint tenancy the with right of survivorship is not probate property because it automatically goes to the other joint tenant on the testator's death. Therefore, the $1,000,000 that is held in the joint bank account by the Preacher will pass outside the will (assuming it is valid).

2. Under Georgia law, property passes under the intestacy laws if a will is found invalid. The intestacy laws strive to stay as close to the testator's wishes as possible by following the lines of consanguinity. At issue is who would receive under the per stirpes distributions. In Georgia, intestate property is distributed per stirpes. This means that the first distribution is made at the children if there is no surviving spouse. If there are no children, the first distribution is made at parents or siblings. Here the initial distribution would be made at Sally's three sisters. Assuming that the savings account remains a nonprobate account, as discussed above, there would be $3,000,000 to be distributed. Since only one of Sally's sisters is living, Cindy, she would take 1/3 of the distribution, or $1,000,000. Her five children would not receive, because their portion is given to their mother under the assumption that they will later inherit it. Another 1/3 of the property would go to John, so he would receive $1,000,000. Finally, Terry and Berry would receive 1/6 of the total property, or $500,000 each. This is done because they share the portion that their mother would have received. This means that John would receive $200,000.00 less under intestacy than what he is set to receive under the will (since he is to receive 40% of the $3,000,000 net probate estate that equals $1,200,000). I would advise him of this, so he knows what he is giving up.

3. An *in terrorem* clause in a will is also known as a no contest clause. At issue is whether the lack of alternative beneficiaries in case of a contest voids the clause. An *in terrorem* clause causes a beneficiary under the will not to receive their distribution if they contest the will for anything other than an omitted child or omitted spouse. A valid *in terrorem* clause must state to whom the property should go if there is a contest. Here, there is a no contest clause which would normally void John's bequest if he contests the validity of the will. However, since there is no alternate beneficiary in case of a contest, the *in terrorem* clause is void.

4. At issue is whether the aunt and seven cousins will be affected by a successful caveat of the Will. Under the intestacy laws, the closest heirs at law receive the distributions. If a will is found invalid or if a will is found not to be a complete bequest of the property, the

estate is distributed according to the intestacy laws. Under the will, John's aunt and cousins receive nothing since it leaves 40% to John and the remainder to the church, Preacher, and Mr. Zee. However, as discussed above, Terry, Berry, and Cindy would receive through intestacy.

5. Under the GA Rules of Professional Conduct (RPC), an attorney must uphold the duties of the profession. At issue is whether Mr. Zee violated the RPC by including himself and his friend in the will from Sally. An attorney who drafts a will is able to be an executor named in the will. However, if the attorney is not a family member of the testator, he is unable to be given a bequest in the will. This creates a conflict. There are no special steps that can be taken to cure that conflict. Therefore, when Mr. Zee gave himself a portion of Ms. Smith's estate, he violated the GARPC.

Mr. Zee also violated his duty to intended beneficiaries when he gave himself and Preacher a portion of the estate and made themselves co-executors. An attorney who drafts a will has a duty to the intended beneficiaries of a testator. Here, the intestate beneficiaries would be able to sue for malpractice since he excluded them from the will if they can prove they would have been included. Mr. Zee owed a duty to check for his client's mental capacity at the time of executing the will. To find a testator mentally competent, she must know the property she owns, know the natural objects of her bounty, and know the distributions she is making. There is no evidence that Mr. Zee checked for Ms. Smith's mental capacity and since she was on numerous pain pills, this is a concern.

6. At issue is whether Preacher abused his power of attorney (POA) status in giving himself a property interest in the bank accounts. A power of attorney allows a person to act on behalf of another and in Georgia we have a presumption that all POA are durable which means that they survive incompetency. When Preacher used his POA to give himself a property interest, he violated his duty to Sally. Naming himself on her accounts as attorney-in-fact would have been allowed since one of the main purposes of the Financial POA is to write checks and maintain the accounts of another.

7. Under Georgia law, a testator has the ability to distribute their property as they see fit. At issue is whether property may be given outright to a charity or if it must be held in trust. A charitable bequest is allowed under Georgia law. Here, the bequest to the church should be upheld unless the court were to find the will void for undue influence or fraud.

Question 3 - Sample Answer # 1

1. Corner of Troll's Land

(a) Interests

Troll owns the corner of his land that Elf is using to make left-hand turns, while Elf has a license to use that portion of Troll's land. Because Troll gave Elf permission to use that portion of his land, Troll attempted to create an express easement for the use of his land. However, because that permission was given orally, rather than in writing, a license was created instead. Elf and his guests have permission to use Troll's property for the purposes of making a left-hand turn. That permission in the form of a license can be revoked by Troll at any time.

(b) Convert Interest

Elf can independently convert his interest to an irrevocable license. A license, normally revocable, will be converted to an irrevocable license if the person with the license spends money to make improvements to the land. Here, although the license is revocable, Elf can take actions to convert the license to be irrevocable. For example, Elf could pave that portion of the land, or otherwise improve it, to convert the interest to an irrevocable license.

2. Trail to National Forest

(a) Before 1990

Before 1990, the public accessing National Forest had a prescriptive easement through Troll's property to access the trail. Although Troll still owns the property, the public has the right to use the property to access the trail to National Forest. To create a prescriptive easement under Georgia law, four requirements must be met. First, the use must be exclusive. Here, there are no facts indicating that anyone else was using the trail other than the public seeking access to National Trail. Therefore, the public's use of the trail before 1990 was likely exclusive. Second, the use must be hostile. Here, Troll did not give the public permission to access his land. The public took it upon themselves to access his land for their own benefit - to access National Forest. Therefore, the use of this land was likely hostile to that of the true owner (Troll). Third, the use of the property must be visible. Here, the public used off-road vehicles and horses to access National Forest via Troll's property. Although it is unlikely that he did not see an off-road vehicle or horse crossing his property, he certainly *could* have seen the public access his property. There is no indication that the public's use of the property was anything but visible and out in the open. Fourth, the use of the property must be continuous and uninterrupted for the statutory period. In Georgia, the statutory period for establishing a prescriptive easement is 7 years for improved lands and 20 years for wild lands. Because Troll's property contained a cabin, it is likely considered to be improved land. Therefore, the public must have continuously accessed this property for 7 years. The facts indicate that the public was using this trail before Troll purchased the property in 1983. That would constitute at least 7 years use

before 1990.

(b) Now

Now, the public no longer has a prescriptive easement to access National Forest over Troll's land. Although non-use alone will not constitute abandonment of a prescriptive easement, steps taken to prevent the public from accessing the trail will be sufficient to terminate the easement. Here, Troll constructed a fence around his property in 1995. It is likely that the easement terminated at that time, because he prevented the public from using his property by establishing that his fence marked the outline of his property. In addition, the land was not used for many years by the off-road vehicles, and it was rarely used by horseback riders or hikers since 1995. Troll likely terminated the easement by prescription by reacquiring the use and possession of his own land.

3. Buckeye Creek

(a) Interest

Troll owns the portion of Buckeye Creek that runs through his property. Because Buckeye Creek is a non-navigable and non-tidal stream, Troll owns the portion of the stream that is on his property. He possesses the title to the property, which includes the stream, as long as this was included in the deed itself and there were no previous claims to title of the stream. His possession of the property extends to the land under it and adjacent to it, again as long as that property is included in the portion of the land he owns. A landowner has right to the land below, above and on the sides of the ground that is owned by title. Therefore, Troll owns the land underneath, above and on the sides of the creek as long as he has valid title to the land surrounding it.

(b) Floating

As the owner of the property, Troll may prevent the public from floating through his property on Buckeye Creek. Because he is the owner of the property, he is able to restrict the public's use as he wishes unless the public has obtained an easement or other right to access the property. Because Troll has not given the public express permission to float down the stream, and the public has only been using the stream for a few years, it is unlikely that an easement has been created. Therefore, Troll may restrict the public's use of his property.

© Fishing

As the owner of the property, Troll may also prevent the public from fishing in the stream. There is no indication that the public has gained a profit to fish on Troll's land, either expressly, impliedly or by prescription. Therefore, as the owner of the property, Troll may prevent the public from fishing in his stream.

Question 3 - Sample Answer # 2

1 (A).
The issue is what interest might Troll and Elf have in the corner of Troll's property that is being used by Elf to make left hand turns onto Hobgoblin Road? Here, Elf has a license to make left hand turns on Troll's land. In Georgia, there are different types of interests one may have in land and two of those types are easements and licenses. It seems like Elf might have an express easement (sounding in easement appruent) over Troll's land, but he does not. To have an express easement, one must follow the deed requirements to gain an interest in land. This requires having a writing, signed by the parties, identifying the land, and identifying the easement. When an easement fails for a lack of formality, usually a license is created. While an easement is an interest in land, a license is not an interest in land but sounds in contracts. A license is revocable by the licensor until it becomes irrevocable. This occurs when the licensee invests a substantial amount of money into the licensed area of land.

In the present case, Elf has not spent any money on the portion of Troll's land that he uses to make left hand turns and therefore, because there is no writing between Elf and Troll concerning the ability to use the land, Elf has a revocable license. Troll can revoke this license at any time he deems fit unless, in the future, the license becomes irrevocable.

1 (B).
Elf could attempt to make the license an irrevocable license by paving the portion of Troll's lot that he uses to make his left hand turn onto Hobgoblin Road. By doing this, the expenditure of money towards the license, Troll would not be able to revoke it at any time he saw fit, it would be non-revocable and therefore, if Troll did anything to prevent Elf from using the paved portion of his land, Elf could sue for breach of contract.

Elf could independently convert this license to an easement by perscription which is very much like adverse possession. To have an easement by perscription one must be open and notorious in the use of the land, continuous and lasting for a statutory period of time, with knowledge of the true owner, and hostile. Elf would have to use this land, without the permission, but with the knowledge of Troll for the statutory period of time prescribed in Georgia for the license to run into an easement.

2(A).
The issue here is what interest do the visitors of the forest and Troll have in the property? The individuals that crossed over Troll's land onto the land of the National Forest in 1990 might have acquired a perscriptive easement in the trial. A perscriptive easement is one that open and notorious, continuous, with knowledge of the owner and adverse to the owner's possessory rights. In this case, Troll would have had the land for seven years (from 1983 to 1990) and the statutory period for perscriptive easement in a developed area is 7 years in Georgia (in wild land - it is 20 years). If the travelers and visitors had been using the land continuously for 7 years to get into the forest, with Troll's knowledge, they would be able to continue to use the worn path to get into the National Forest through a perscriptive easement. Troll would still own the property but would have to allow visitors to

cross the path to reach the National Forest. The individuals would most likely be able to use the means they had been using to get into the park (via the horses and motor vehicles)

2(B).
Since 2000, because the individuals are no longer allowed to use the horses and motor vehicles in the park, it is most likely that they cannot use these means to get into the park as well. Also, because the gates to the horse pasture were unlocked and Troll made no effort to obstruct the path in which visitors had taken to reach the land, the visitors most likely can still enter the property and the worn path to reach the National Forest. This is because there are a few ways to terminate an easement. An easement may be terminated by an elapsed time that was specified in the easement - not the case here. It can be terminated by the detrimental reliance of one party based on the statements of another which is also not the case here. Also, an easement cannot be terminated by mere non-use. There has to be something else accompanying this non-use to release the serviant estate. This is also not present based upon the facts.

3(A).
The issue here is what rights does Troll have in Buckeye Creek and the land under and adjacent to it. In Georgia, land owners have the right to the land of their property, and supporting rights - meaning the support of the land from underneath their property along with the support from the sides of their property. Furthermore, a landowner in Georgia, has the rights to the land and water on the land, but cannot stop the natural flow of the water which might run through his land.

Here, Troll has a fee simple absolute interest in his land and Buckeye Creek (or merely the portion that runs through his land). However, he does not have a right to contain all of the water that is in the creek. This means that he has a right to use the water for natural uses but he cannot divert the natural flow of the water. Neighbors who also use the water will prevail over Troll if the Troll used the water for not a natural and domestic use.

3(B).
Because this is a non-navigable and non-tidal stream, and because it runs right through the middle of Troll's land, Troll can prevent others from swimming or rafting down the stream on his property. This is partially because Troll has a right to own and possess his land, the land below his property and the land to the sides of his property, he can exclude whomever he wishes.

3©.
Here, yes, Troll can prevent others from fishing in his stream. This is because those individuals do not have a "profit" in the land given by Troll. A profit is a grant in the right to go onto property of another take from that property the natural resources that might be present such as game, fish and minerals. In this case, that is not present. The facts indicate that this is a recent event and that in recent summer months people have been fishing while rafting down the stream, it is not long enough time period, presumably, to remove natural resources from the land without the permission of the landowner. While seasonal

visitation can allow individuals to gain rights to land, those seasonal visitations must last the statutory period of time.

Question 3 - Sample Answer # 3

1a. At issue is whether Elf has acquired an express easement, a prescriptive easement, or a license in the area where Elf makes the left-hand turns. An easement is the right to use the property of another. If there was an easement appurtenant (which as discussed below is unlikely), Troll's property would be the servient estate because it is the burdened estate and Elf's property would be the dominant estate because it is the one benefitting. Elf never received an express easement from Troll, because an express easement of more than one year must be in writing to satisfy the statute of frauds. Here, an easement agreement was oral when Troll said that Elf could pull off Gnome's old rebar and use the corner until Troll told Elf otherwise. Because no express easement has been created, Elf may try to argue that he acquired the easement through prescription, as he has been using the corner since 1992 (21 years). The statute of limitations in Georgia is 7 years for developed land, which is applicable here, and 20 years for wild land. To acquire a prescriptive easement, Elf's use had to be (1) hostile, (2) continuous, (3) adverse, (4) apparent, and (5) uninterrupted. There is no exclusivity requirement, so Elf and Troll could both use the corner of the driveway without defeating Elf's claim. Here, the use was apparent and he used the corner continuously, as did his guests. However, the use was not hostile and adverse because Troll gave Elf permission to use the driveway for the purpose of the turn. Lastly, Elf could argue that he has a license to use the corner of the driveway. This argument would likely be successful, because a license results when an express easement fails because it is oral. However, licenses are revocable by Troll unless certain events occur, which are discussed in part 1b below.

1b. At issue is whether a license, which is usually revocable, can be converted to an irrevocable license. Irrevocable licenses are created when permission is granted to use land and the dominant estate spends large sums of money in reliance on this grant. Here, Elf could independently convert his use into an irrevocable license interest in Troll's land if he spent a large sum of money repairing that corner of the driveway, making it wider, or expending some other expense that would show reliance. If this was the case, Troll would then be estopped from revoking the license.

2a. In 1990, it was likely that members of the public and Troll had developed an interest to walk through Troll's land to get to the national forest based on prescriptive easement. As discussed above in 1(a), the elements required to obtain a prescriptive easement require the use to be: (1) hostile, (2) adverse, (3) continuous, (4) uninterrupted and (5) apparent and visible in order to put the landowner on notice. The facts state that the land had been used for some time, so if it was for more than 7 years there is a claim for prescriptive easement. The use was hostile and adverse because no permission appears to have been given, people hiked and used vehicles, horses continuously and without interruption, and the use of vehicles and horses would be apparent to a prudent landowner.

2b. At issue is whether a landowner can reacquire land that was once subject to an easement by taking action to keep people from using the easement during the entire statutory period for a prescriptive easement. In 1996, Troll built a horse pasture and fenced it in with unlocked gates. He did not clear the land from Troll's land into the National Forest

other than to cut two-foot sections of logs crossing these trails. Since 1995, very few people have used the trails. It is likely that Troll's fence and horse stable together with the trees strewn throughout the property and trail, all of which was in existence for more than 7 years as required for a prescriptive easement (1995-2013), would eliminate any easement that existed to access the national forest. The facts state that no vehicles and very few horseback riders or hikers accessed the National Forest through Troll's land after he put up the fence.

3a. At issue is what rights Troll has to a non-navigable and non-tidal mountain stream that runs through his property. Georgia follows the riparian rights doctrine for water rights. This doctrine focuses on reasonable use and allows domestic use of the water as priority over commercial use or irrigation uses. Georgia does not follow the first to appropriate doctrine, which would allow Troll the right to claim the water if he used it first. Here, Troll likely owns the stream bed of the stream that runs through his property and he owns the property on each side of the stream as it runs on his property.

3b. As discussed in part 3© below, Troll could try to bring a trespass action, but it is unlikely to be successful. The public could try to argue that they have an easement by prescription, as they've been using it continuously during the summer season for tubing, which is sufficient as long as the use is sufficiently continuous for seasonal use, and that it was adverse, apparent, and hostile. He could try to obtain an injunction, but this is likely to be unsuccessful because he would have to show (1) irreparable harm, (2) no remedy at law exists, (3) the harm to Troll outweighs the harm to the public, (4) feasibility of enforcement, and (5) probable success on the merits. The public could argue that the water itself is not owned by Troll and is instead owned by the public.

3c. Troll may be able to prevent people from fishing in Buckeye Creek because he has not granted a profit in gross to any of the people who are fishing where it passes through his land. A profit in gross is a profit that does not benefit a particular piece of land. A profit in gross is permission to come and take something off of the land of another (such as lumber, hunting rights, or fishing rights). Here, Troll could try to argue that he did not grant this permission and that the fish contained on his property in the water are his. He may be able to claim some sort of trespass action: which requires (1) that the person physically enter the land, (2) the person intended to perform the act, and (3) causation.

Question 4 - Sample Answer # 1

TO: Partner
FROM: Applicant
DATE: July 30, 2013
RE: Plaintiff v. Big Mart Appeal

Memorandum

I. Facts

Our client is a regular shopper at his local Big Mart. One day while shopping Plaintiff fell on a banana peel in front of the butcher's counter in the store. The peel was not noticed by Plaintiff or the Butcher he was talking to. The store manager came over to Plaintiff to check on him and noticed a piece of the banana peel on the floor and on Plaintiff's shoe. Manager filled out an incident report while Plaintiff continued shopping. When Plaintiff was leaving Manager gave a copy of the report to Plaintiff. One week later Plaintiff told Manager that he had been in pain since he fell and that he was worried about his medical bills. Manager sent a copy of the report to Big Mart's corporate risk management office the same day. Big Mart has a video surveillance system that records 24 hours a day and saves three weeks worth of material at one time, and when the memory is full the system records over the oldest existing material. The store must remove the material before it is recorded over or it is lost forever. After properly filing suit against Big Mart, defendant filed a 12(b)(6) motion to dismiss, arguing plaintiff assumed the risk for his injury. During discovery it was found that Big Mart did not preserve the video from the relevant time period and that the camera would have in fact shown the incident had it been saved. We then filed a spoliation motion, which was heard along with the motion to dismiss. The trial court found Big Mart spoliated the evidence but denied sanction, treated the motion to dismiss as a motion for summary judgment, which it granted based on the assumption of the risk argument. This memo addresses whether the evidence at the hearing showed spoliation, whether the judge was correct to treat the 12(b)(6) motion as a motion for summary judgment, and whether the court properly granted the summary judgment.

II. Evidence of Spoliation

There was sufficient evidence at the spoliation hearing to support the finding that Big Mart committed spoliation. Spoliation occurs where evidence is destroyed or a party in possession of the evidence fails to preserve evidence necessary to pending or contemplated litigation. At the hearing, deposition testimony was introduced establishing that Manager filed his incident report with Big Mart Risk Management within a week of the fall after being informed of Plaintiff's injuries and worries about medical bills. Evidence also showed that a camera at the store was pointed directly at the area Plaintiff fell, even though Manager initially testified no camera showed such an angle. Further, the evidence showed that Big Mart had two full weeks after being notified that a suit could occur to pull the video of the fall off of the system before it was deleted. However, Big Mart took no action to remove the video, even though it would show the events that gave rise to Plaintiffs foreseeable claims. As such, once the Manager knew of the injuries he could contemplate litigation, and he informed Big Mart of his concern by filing the report. As such, the

evidence showed Big Mart failed to take action to preserve evidence necessary to contemplated litigation and it was lost, which is spoliation.

III. Motion to Dismiss or Motion for Summary Judgment

The Court was correct in its treatment of the judgment. Under Georgia law, a court may interpret a motion in the manner that it functions rather than the title provided. Under the Georgia Civil Practice Act, a party answering a complaint files a Rule 12(b)(6) motion asserting that the plaintiff has failed to state a claim for which relief can be granted and the Court should thus dismiss. This kind of motion is decided on the sufficiency of the pleadings rather than the merits of the evidence. A party files a motion for summary judgment after discovery and argues that based on the evidence there is no dispute of a material fact and that the evidence can lead only to one conclusion, a judgment for the defendant. This motion seeks a judgment from the court finding that the evidence could only lead to a victory for the defendant and prevents the issue from going to a jury. Here, Big Mart's motion was titled a 12(b)(6) motion, but argued that based on the evidence the Plaintiff assumed the risk. Big Mart was not arguing that the pleadings were insufficient, which is the purpose of a 12(b)(6) motion. Big Mart's argument was based on the evidence and sought to have the case dismissed, which is the function of a motion for summary judgment. As such, the Court was right to use its power to interpret the motion as a motion for summary judgment.

IV. Court Improperly Applied the Summary Judgment Standard

Under the Georgia Civil Practice Act, where a party proves spoliation occurred, a rebuttable presumption is raised against the spoliator that the missing evidence favored the spoliator's opponent, which normally renders summary judgment inappropriate. Summary judgment after a finding of spoliation is valid only where the party moving for a spoliation ruling cannot establish a meaningful link between the underlying claims and the spoliation. Here, as explained above, Plaintiff successfully established that spoliation occurred. As such, the presumption was raised in favor of Plaintiff and summary judgment would be valid only if Plaintiff cannot show a meaningful link. Here, Plaintiff can show that the spoliated evidence, the video of the incident itself, was a direct recording of the incident that gave rise to Plaintiff's claims. There is a meaningful link between such a video and plaintiff's claims. In fact, it is essentially a direct link. As such, the Court was wrong to grant summary judgment because the presumption was in place in Plaintiff's favor.

Question 4 - Sample Answer # 2

Memo
To: Senior Partner
From: Applicant
Re: Plaintiff v. Big Mart
Date: July 30, 2013

1. The trial court's finding that Big Mart engaged in Spoliation was proper. As mentioned in the question, "[s]poliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation." In other words, spoliation arises when a party either destroys evidence that is necessary for litigation or fails to preserve it. Here, since Big Mart did not destroy the video tapes in question, the question is whether Big Mart failed to preserve the evidence in violation of a duty to preserve evidence that is necessary to litigation. The questions here are: 1) was the evidence necessary to litigation, 2) did Big Mart have a duty to preserve the evidence at the time it was destroyed, and 3) did Big Mart violate that duty?

The evidence was clearly necessary to litigation. Evidence is necessary to litigation when it is relevant to a claim or defense of either party. Here, the high definition video cameras were pointed directly at the location of the Plaintiff's fall, and so would have properly identified the location of the banana and whether the Plaintiff assumed the risk of slipping on it because the cameras would have shown whether the Plaintiff was looking up or down.

Further, Big Mart had a duty to preserve the evidence when it was destroyed. A party has a duty to preserve necessary evidence when litigation is either on-going or when that party has notice of contemplated (or possible) litigation. Here, Big Mart had notice of possible litigation one week after the slip and fall when the Plaintiff contacted the store manager, mentioned his troubles with medical bills, and his pain. The Store Manager clearly was aware of the potential litigation, since he faxed an incident report to the corporate office the same day, a week after the incident. Since the cameras cycled over previously recorded video every three weeks (i.e. they delete any content as soon as it becomes three weeks old), Big Mart had two weeks where it could have acted to preserve evidence, and it had a duty to act in those two weeks to preserve the footage of the accident.

Finally, since Big Mart did not act to preserve the tapes, it breached its duty to preserve evidence. Thus, Big Mart failed to preserve evidence necessary to contemplated litigation and committed spoliation.

2. The trial court properly treated the motion to dismiss as a motion for summary judgment. In ruling on a 12(b)(6) motion for failure to state a claim upon which relief may be granted, a court may only rule on the legal sufficiency of the allegations in the complaint. Here, the court did not rule on whether the Plaintiff sufficiently pled alleged negligence. Instead, the court ruled on whether the affirmative defense raised by Big Mart, that the Plaintiff assumed the risk, barred Plaintiff's claims. Thus, because a court was ruling on an affirmative defense in the answer, treating the motion as a motion to dismiss would have been

improper. A court could look at both the complaint and the answer, and rule that the plaintiff assumed the risk, and this would be treated as a motion for judgment on the pleadings. However, the court here also looked at the affidavits of the butcher and the store manager. A motion for judgment on the pleadings rests solely on the sufficiency of the factual allegations of the pleadings themselves (and in some cases, attachments to pleadings that are central to the complaint, like expert affidavits in professional malpractice cases. Here, however, relying on the factual allegations contained in the affidavits, meant that a court would have to look at the factual issues in the case itself. While whether a plaintiff assumed the risk is a question of law, the defense involves two questions of fact: whether the plaintiff was aware of the risk, and whether the plaintiff consciously assumed the risk? Since a court ruling on a dispository motion involving assumption of the risk can only hold that the Plaintiff assumed the risk if there was no genuine issue of material fact on both fact questions, a court here had to look at facts outside the pleadings, namely the affidavits of the butcher and store manager. Thus, the court had to consider whether issues of material fact existed on both elements of assumption of the risk, and thus a court would have to treat the motion as a motion for summary judgment. The distinction here matters a lot because spoliation is in issue: if it was granted as a motion to dismiss, factual issues would be irrelevant and the Plaintiff would be out of court regardless.

3. The trial court did not properly apply the summary judgment standard. While a grant of summary judgment for a spoliator is appropriate if the moving party establishes that there is no meaningful link between the underlying claims and the spoliation, summary judgment is inappropriate if such a link does exist. Here, such a link did exist, because the videotapes in question filmed the events at issue: Plaintiff's slip and fall. Because the videotapes filmed the accident in high resolution, they could easily have identified whether Plaintiff knew of the risk of falling, whether Plaintiff failed to look down while walking, and whether the defendant was negligent in cleaning its floor. Thus, the spoliation is directly linked to the underlying claims, because the video tapes will either directly corroborate what the manager and butcher said, that Plaintiff was not looking down and so assumed the risk of falling, or directly controvert it, by showing that he was looking down but fell anyway, thereby establishing Big Mart's negligence. Thus, the spoliation is directly linked to the issues on summary judgment. Since spoliation raises a presumption against the spoliator that the missing evidence supported the spoliator's opponent (meaning that the spoliated evidence would create an inference against the spoliating party on a motion for summary judgment), that means that so long as spoliated evidence is about an issue at summary judgment, a grant is clearly inappropriate. Here, that means that a court should infer that Plaintiff did in fact look down, but fell anyway, and so could not have assumed the risk. Thus, a grant of summary judgment was inappropriate.

Question 4 - Sample Answer # 3

1. The issue is whether Big Mart engaged in spoliation by not preserving the videotapes. The rule is that spoliation is the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Applying this rule to these facts, Plaintiff slipped and fell in Big Mart's store. Big Mart filled out a standard incident report, which does not alone indicate anticipated litigation. However, Plaintiff returned to the store a week later and notified the manager that he was still in a lot of pain. Once the manager was notified of this, he faxed that standard incident report to the Big Mart corporate risk management office. It can be inferred that this indicated some degree of knowledge that the manager knew litigation was at least anticipated. The store knew that videos were lost after the hard drive was filled, and the store failed to take copies of the video when they had a camera pointing at the necessary spot. Based on these facts that were in the record, the court made an appropriate finding that Big Mart had engaged in spoliation.

2. The issue is whether attaching affidavits to the 12(b)(6) motion to dismiss transformed the motion to dismiss into a motion for summary judgment. The rule is that a 12(b)(6) motion to dismiss is a determination made on the pleadings. However, Big Mart attached affidavits of the butcher and the store manager to the motion to dismiss, thus putting the merits of the case at issue. A 12(b)(6) motion cannot address the merits of the case. Therefore, the motion to dismiss was transformed into a motion for summary judgment, which does consider the merits of the case. The trial court was proper in treating the motion to dismiss as a motion for summary judgment.

3. The issue here is if the trial court's grant of summary judgment to Big Mart based on the fact that Plaintiff should have seen the banana and Plaintiff assuming the risk because he failed to look at the floor as he walked upon it was proper in light of the court's finding of spoliation. The rule is that proof of spoliation raises a rebuttable presumption against the spoliator that the missing evidence favored the spoliator's opponent. This presumption would render summary judgment inappropriate. There must be a meaningful link between the spoliation and the claims of the spoliator's opponent. As stated above, the motion for summary judgment was granted on the grounds that Plaintiff should have seen the banana and assumed the risk by not looking at the floor while he was walking. These two findings almost go directly to the spoiled evidence. All Plaintiff said is that he was talking with the butcher and slipped. The butcher and the manager contended that Plaintiff would have seen the banana had he been paying attention. It stands to reason that whether the Plaintiff should have recognized a danger on the premises could most easily be determined by viewing the video of the Plaintiff actually slipping on the banana and falling. However, there is no indication that Plaintiff contends he was actually watching where he was going. The connection between seeing the actual incident and determining how Plaintiff should have acted combined with the rebuttable presumption the spoliation created against Big Mart appears to be too strong though. The trial court improperly granted Big Mart's motion for summary judgment.

MPT 1 - Sample Answer # 1

BRIEF IN SUPPORT OF DEFENDANT FRANKLIN FLAGS AMUSEMENT PARK'S MOTION FOR SUMMARY JUDGMENT

Legal Argument

I. Because Franklin Flags Amusement Park adequately provided supervision and safety personnel beyond the duty required by law, the Defendant is not liable to the Plaintiff for her unpredictable reaction inside the Haunted House and is entitled to summary judgment on her claim for damages for her broken nose

The first issue in considering Vera Monroe ("Plaintiff") and her negligence claim against Franklin Flags Amusement Park ("Park") is to determine what duty Park owed and whether there was a breach of that duty. In Franklin, the duty is to act reasonably under the circumstances and not put others in a position of risk. Larson v. Franklin Hi Club,Inc. (distinguishing Dozer). The court will consider this as the first part of any tort analysis and ask the question of whether a defendant acted unreasonably under the circumstances relating to the plaintiff. Id. Further, in situations where a Defendant operates an event such as a theme park or haunted house, where individuals are expected to be startled or frightened, the operator does not have a duty to guard against the bizarre or unpredictable reactions of patrons. Id. Patrons at such establishments are considered *invitees* and the operator impliedly represents to those patrons that he has reasonably inspected and maintained the premises and equipment, and that the premises are safe for the purposes intended. Id. The court will grant summary judgment when there is not material issue of fact as to whether factors such as adequate provision of personnel and supervision are not disputed. **Id. (**In Larson, the court focused on the possibility of a *lack* of supervision in denying the defendant's motion for summary judgment).

Here, Park is entitled to summary judgment because there is not genuine issue of material fact as to whether the operator adequately satisfied the duty owed to invitees by providing adequate supervision and personnel. Unlike Larson, where the court focused on the lack of supervision and personnel provided at a haunted house, the Park has shown through discovery that there were adequate safety precautions in place. *Deposition of Mike Matson*. The owner hired individuals--who were a part of the haunted house--to supervise the safety of the attraction. *Id.* Similarly, the owner went beyond providing a reasonably safe environment for invitees such as the Plaintiff by providing a doctor on-site. *Id.* While there is no question that Park owed the Plaintiff a duty, the presence of personnel and a medical expert on the scene show that the operator's duty was adequately satisfied. A reasonable person in the Plaintiff's position would not have run into a wall when frightened by employee. Further, the facts show that the employee dressed as a zombie immediately asked the Plaintiff for assistance. *Deposition of Camille Brewster*. It was the Plaintiff's unpredictable reaction and immediate exit from the House that prevented the employee from providing adequate and immediate medical assistance. *Deposition of Camille Brewster* (noting that the Plaintiff immediately left the House). It is likely that the Plaintiff will contend that the personnel and safety precautions were inadequate, as the safety personnel were a part of the Haunted House and not readily identifiable. However, given the purpose of the haunted house and the employee's instructions to help patrons to

whatever extent might be necessary, the supervision and personnel were reasonable and adequate. Because the Park provided reasonable personnel for supervision, as well as the added precaution of an on-site physician, there is no genuine issue of fact as to whether Park satisfied it's duty under the law.

II. Because Franklin Flags Amusement Park did not fail to exercise reasonable care over any known and unreasonably dangerous conditions of the graveyard outside the Haunted House at the Park, the Defendant did not breach a duty to the Plaintiff causing her sprained ankle and is entitled to summary judgment on that issue

In analyzing the Plaintiff's negligence claim against Park, the second prong in the analysis is to consider whether there was a breach of duty that resulted in injury or loss. Larson. Franklin law provides that an owner or custodian of property is answerable for damage caused by dangerous conditions, provided that the unreasonably dangerous condition is known to the owner (or easily discoverable) and that the damage could have been prevented by an exercise of reasonable care. Parker. Furthermore, in situations involving amusement parks, the court will consider what the *plaintiff* knew about the condition of a premises from previous experiences to determine whether the owner could be liable for an injury. Costello v. Shadowland Amusements,Inc. Where a prudent person in the Plaintiff's same circumstances, using ordinary care, would not have incurred an injury on the premises, the court will not impose liability. Id.

In the case at hand, Park is not liable to the Plaintiff for her sprained ankle that she incurred after slipping in the graveyard. The owner of the Park has noted that while most of his theme park is paved, the graveyard area was left in its natural condition for realism. *Deposition of Mike Matson.* While the Plaintiff will likely argue that this natural condition was "unreasonably dangerous", the facts show that the Plaintiff was the only injury in the park that year. *Deposition of Camille Brewster*. Similar to the case in Parker, the Plaintiff was aware of the natural condition of the graveyard, the purpose of the park (to frighten and entertain customers), and the startling nature of the event. *Deposition of Vera Monroe.* The facts also indicate that the Plaintiff had been to the park on several occasions and was aware that it had been raining in Franklin for the previous three days. *Id.* Looking objectively at the Plaintiff's circumstances, a prudent person using ordinary care in exiting the graveyard would not have incurred a sprained ankle on the premises. The owner of the Park ensured that all known and unreasonably dangerous conditions were made safe for patrons and, similar to Parker, should not be held liable for injuries occur when the Plaintiff knew of the muddy terrain. There is no genuine issue of material fact as the Park's due care to protect patrons, and summary judgment should be granted for the Defendant on the Plaintiff's claim for a sprained ankle.

III. Because the Defendant provided adequate safety personnel and reasonably kept the premises safe from known dangerous conditions, the Defendant is entitled to summary judgment as to the Plaintiff's claims for damages for a broken wrist

In analyzing the Plaintiff's final claim for damages due to broken wrist, the issue is whether Park breached the duty of reasonable care and that breach caused the Plaintiff's injury. As

mentioned above, there is no question that Park owed the defendant a duty of reasonable care while on the Park premises. Larson, Dozer. Beyond the requirement of providing adequate safety personnel and reasonably keeping the premises free from known unreasonable dangers, the Franklin courts will consider the plaintiff's conduct and knowledge in determining causation and awarding damages. Larson. Where the defendant knows of the purpose and nature of an event such as a haunted house, the court will consider that knowledge and voluntary participation in analyzing tort claims. Id.

Here, there is no genuine issue as to whether the Plaintiff voluntarily encountered the scares at the Haunted House. The Plaintiff admitted in her deposition that she and her husband thought it would be a fun event on Halloween. *Deposition of Vera Monroe*. The Plaintiff's husband was amused by her shrieks in the haunted house and did not seem concerned by her fear. *Id.* Further, by the time the Plaintiff encountered the employee in the parking lot, she had experienced several frightening events in the park (the zombie and vampire). Id. While opposing counsel will likely note that the Plaintiff thought the scares were over, a prudent person in the Plaintiff's circumstances would not have reacted to the masked man at the park's exist in a manner similar to the Plaintiff. Further, the facts note that the operator instructed the employees--both the zombie in the House and the masked man at the exit--to offer assistance to any patron in need, while creating a fun atmosphere. *Deposition of Owner, Camille Brewster.* After the Plaintiff had already sustained injuries in the house and the graveyard, a reasonable prudent person in the Plaintiff's position would have known not to be frightened and to ask the employee for assistance. Thus, because the Park provided adequate safety personnel and made the premises safe from unreasonable, known dangers, the Defendant is entitled to summary judgment on the Plaintiff's claim for a broken wrist.

Conclusion

As there is no genuine issue of material fact, the Defendant is entitled to summary judgment as a matter of law on all of the Plaintiff's claims for relief.

MPT 1 - Sample Answer # 2

III. Legal Argument

A. The Court should grant the Defendant's Motion for Summary Judgment because there no is genuine issue of material fact and the party is entitled to judgment as a matter of law.

Under *Larson* (2002) a court should grant a Motion for Summary Judgment when there no is genuine issue of material fact and the party is entitled to judgment as a matter of law. A material fact is a fact that would influence the outcome of the controversy. Here the Defendant does not dispute the facts as alleged in the three depositions, so no issue of fact is need to be determined by the jury. Even so, with the facts as alleged, the Plaintiff does not succeed on the merits of either her negligence cause of actions. As a result the court should grant the Defendant's motion.

B. The defendant did not act unreasonably under the circumstances when the Plaintiff was frightened and injured herself by running into a wall in the last room of the Defendant's haunted house.

Under *Larson* (2002) a negligence action must consider (1) if there is a duty, (2) if so what is the duty on the particular defendant given the particular circumstances, (3) whether there was a breach of that duty, and whether the injury was within the scope of the protection extended. It should be noted that Assumption of the Risk is no longer a viable defense but instead is a factor to be considered to determine the plaintiff's comparative negligence.

In *Larson* the Plaintiff entered a local club's haunted house, and upon being startled in the attraction tripped over himself and broke his arm and dislocated his shoulder. There court placed a heavy emphasis on the fact that patrons that enter such an attraction are expected to be surprised, and the owners do not have a duty "to guard against patrons reacting in bizarre...or unpredictable ways." The patron must realize that they are "accepting the rules of the game" when they enter.

Here the Defendant had no duty to protect against the bizarre reaction of the Plaintiff. The employee stated that the Plaintiff's severe reaction was the only one of its kind that night. Turning and running full steam into a wall in an attraction known to be fake and for the very purpose of be scared, the reaction of the Plaintiff was beyond the duty imposed on the Defendant to prevent risk of harm.

This case can be contrasted to *Costello* where the Defendant placed a bench in the middle of a darkened room for which the Plaintiff was injured. In this case there was no unseen hazard in the room that might not have been expected but instead the Plaintiff ran directly into one of the room's walls. Obviously the walls should be expected to be there and do not present an unknown or unforeseeable hazard.

Furthermore, *Larson* looks to the adequate training and presence of staff members to indicate whether the areas was reasonably safe under an invitee status. Here the Defendant posting a staff member in every room, had a doctor on site, and the staffers were trained to contact the doctor if any medical need arose. In fact the staff member where the Plaintiff was hurt tried to aid following the stated policy, however, due to the

Plaintiff's bizarre reaction, she was unable to help.

C. As an invitee the Plaintiff was treated reasonably safe path in the graveyard free from unreasonably dangerous conditions.

Under *Parker* (2005) the custodian of a property is answerable for dangerous conditions but only upon the showing that the owner knew, and that could have been prevented had reasonable care been exercised. Factors to be considered are the past accident history and the degree to which the danger could have been observed by the potential victim. Furthermore the condition must constitute a danger that would be reasonably expected to cause injury to a prudent person.

In the case of *Parker* the Plaintiff entered into a corn maze which she knew was very rocky and posed a risk for tripping. She entered the maze and tripped over a said rock injuring herself. She was the only reported accident. The Court found that mere presence of rocks on the path did not impose liability. The Plaintiff was denied relief.

The *Parker* case is very similar to the case as it relates to the Plaintiffs slip and fall in the mock graveyard. Like *Parker* this was an outdoor venue for which patrons were led down an earthen path to a destination. Like *Parker* the path was not paved and could easily be seen as not being paved. In fact the path was purposefully not paved in the current case because a dirt path is more consistent with a real graveyard thus better simulating the experience according to Mr. Matson's deposition.

The graveyard path was muddy which resulted in the Plaintiff's fall. However, this is exactly what the Plaintiff should has expected on an outdoor dirt path. The Plaintiff in her own deposition recalled the weather leading up to Halloween as "really raining a lot, without letup for the previous three days." Just like the Plaintiff in *Parker* knowing of the obvious risk of rocks, the Plaintiff in this case knew of the rain, and thus knew the dirt path was subject to be muddy. Thus just as *Parker* stated "any reasonable person would not be surprised" to find the injurious condition. The Plaintiff here could not be surprised, and in fact should have expected the path to be muddy. Furthermore, no amount of reasonable care can make a dirt path dry after three full days of rain as was here in this case. Finally, even if the muddy conditions were not to be expected, there was ground lighting illuminating the path so the condition could be known by the Plaintiff.

Finally, there was no breach of a duty imposed on the Defendant under the particular circumstances in relation to no posting of staff by the Defendant in the graveyard. As Mr. Matson stated in his deposition no staff was assigned there because the graveyard was simply a pass through with no active park activity taking place in the area.

D. The Defendant acted reasonably under the particular circumstances at the end of the haunted house attraction where the Plaintiff fell and injured her wrist.

Under the *Larson* test as stated above, given the particular circumstances of the haunted house environment there was no breach of duty by the Defendant. Here the Defendant's worker, in costume, at the end of the attraction offered one more "scare" opportunity to its patrons. Given that this was at the end of a mock graveyard, this type of act may be reasonably expected by patrons. And again, the unforseen reaction by the Plaintiff, after

she accepted the "rules of the game" (*Larson*) the Defendant acted reasonably.

MPT 1 - Sample Answer # 3

DEFENDANT FRANKLIN FLAGS AMUSEMENT PARK'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

III. LEGAL ARGUMENT

Summary judgment is appropriate and must be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Larson. Here, the facts clearly show that Defendant Franklin Flags Amusement Park acted with reasonable care in conducting the haunted house attraction, keeping the premises reasonably safe, and adequately instructing its personnel. For the reasons set out below, this court should grant the defendant's motion for summary judgment.

A. Because the plaintiff was in a setting where she expected to be scared, the defendant's actions of scaring the plaintiff were reasonable under the circumstances.

Individuals have a duty to act reasonably under the circumstances and to avoid putting others at risk. Larson. The precise duty owed depends on the particular setting and circumstances. Id. The operator of an event that is expected to be surprising or startling does not act unreasonably by fulfilling those expectations. Id. For example, in Larson, the plaintiff was a patron at a "House of Horrors" designed to scare patrons. Id. The plaintiff voluntarily entered the warehouse, knowing that frightening exhibits were to be expected. Id. The Court reversed summary judgment in favor of the plaintiff, finding that the operator of the haunted house did not breach its duty to act reasonably. Id.

Larson is distinguishable from a situation where someone is not expecting to be scared. In that instance, it may not be reasonable to frighten someone. For example, in Dozer, the plaintiff was afraid of spiders, and the defendant knew of the plaintiff's particular fear. While the plaintiff was at work--a place where one does not normally expect to be frightened--the defendant placed spiders on the plaintiff's desk, which led to the plaintiff sustaining injuries. Id. Under those circumstances, the court found the defendant's conduct to be unreasonable. Id.

This case is much more similar to Larson than it is to Dozer. Like the plaintiff in Larson, Ms. Monroe was in a haunted house, a setting where she and the other patrons expected to be scared. Ms. Monroe even admitted in her deposition that she went into the Haunted House with the expectation of being scared. (Monroe Dep.) When Ms. Brewster, dressed as a zombie, frightened Ms. Monroe, Ms. Monroe had already walked through the entire haunted house and reached the last room. (Id.) At that point in time, she had already seen that the haunted house was spooky, and had already seen other people dressed in costumes designed to frighten her. (Id.) By the time Ms. Monroe reached the parking lot and encountered the staff member with the chainsaw, Ms. Monroe was even more aware that staff members dressed in costumes would be present. (Id.) In light of these facts, the defendant, acting through its staff members, did not act unreasonably under the circumstances. In this setting, a haunted house attraction on Halloween, the defendant's actions were reasonable. The defendant clearly did not breach its duty of care by frightening Ms. Monroe as she expected to be frightened.

B. The defendant satisfied its duty to protect the plaintiff from unreasonably dangerous conditions on the premises because any dangerous conditions were easily observable by patrons and a reasonably prudent person would have avoided being injured by them.

A landowner that opens its land to the public has a duty to protect patrons from unreasonably dangerous conditions on the land. Larson. If a property owner knows or should reasonably know of an unreasonably dangerous condition, the owner has a duty to exercise reasonable care to prevent injury or damage from that condition. Costello. In determining whether a condition is unreasonably dangerous, a court will consider the past accident history of the premises and whether the danger was observable by a reasonably prudent person. Id. In addition to being unreasonably dangerous, the condition must be reasonably expected to cause injury to a prudent person. Costello.

In Parker, the plaintiff visited a cornfield maze that she had visited at least twice before. Parker. The maze was very rocky, but the plaintiff was aware of that fact and even warned her friends that they should be careful because of the rocky terrain. Id. However, the plaintiff tripped on a rock and injured herself. Id. The court found that because the plaintiff was aware of the danger and a reasonably prudent person would not be surprised to find rocks on the path, the condition was not unreasonably dangerous and no liability was imposed on the defendant. Id.

Parker is distinguishable from Costello, where the plaintiff entered a dimly lit room with a bench placed in the center of it. Costello. When the plaintiff was startled, she stepped back and tripped over the bench, injuring herself. Id. The plaintiff was not aware of the placement of the bench, and the bench placement could not be observed because of the dim lighting. Id. Under those conditions, the court found that the defendant unreasonably placed the plaintiff at risk. Id.

This case is much more similar to Parker than it is to Costello. Ms. Monroe was injured by two conditions on the defendant's land--the wall in the haunted house and the muddy path in the graveyard--but neither condition was unreasonably dangerous because both were observable to a reasonably prudent person, and Ms. Monroe did in fact observe each condition. Although the room in which Ms. Monroe ran into the wall was dimly lit, the condition was not unreasonably dangerous. First, all rooms have walls. This is different from the bench placed in the middle of the room in Costello. Whereas a reasonably prudent person may not have been aware of the bench, a reasonably prudent person would have been aware of the wall in the room where Ms. Monroe was injured. In addition, the room where Ms. Monroe was injured, although dimly lit, had an illuminated exit sign showing where the wall was located. Ms. Monroe admitted that she saw the exit sign before she ran into the wall. (Monroe Dep.) Thus, it is clear that the placement of the wall and the dim lighting of the room did not create an unreasonably dangerous condition.

Likewise, the muddy path in the graveyard was not unreasonably dangerous. Ms. Monroe saw the muddy path before she slipped in the mud. (Monroe Dep.) She was also aware that it had been raining for the past several days. (Id.) Any reasonably prudent person would realize that rain would cause dirt to become slippery mud. This is similar to the rocks in Parker, where the plaintiff was aware of their existence, and the court found they were not unreasonably dangerous. Because any reasonably prudent person would be aware of

the conditions that led to Ms. Monroe's injuries, they were not unreasonably dangerous, and the defendant did not breach its duty to Ms. Monroe.

C. The defendant fulfilled its duty to provide adequate personnel and supervision for patrons by placing staff members throughout the amusement park and instructing those employees.

An operator of an amusement attraction has a duty to provide adequate personnel and supervision in order to protect patrons from unreasonably dangerous conditions. Larson. The defendant here clearly fulfilled that duty. Staff members were placed in each room of the Haunted House, as well as in the parking lot. (Matson Dep.) Each of these employees was instructed to offer to assist patrons, and to call the doctor, who was also stationed at the amusement park, in the case of an emergency. (Id.) Ms. Brewster, an employee of the defendant, tried to help Ms. Monroe after Ms. Monroe ran into the wall. (Brewster Dep.) Ms. Brewster was first aid certified, and she asked Ms. Monroe if she was okay. (Id.) Ms. Monroe did not respond and instead left the room. (Id.) The defendant's employees were adequately instructed and did all they could do to help the plaintiff. They are not to blame for the fact that Ms. Monroe did not accept their help.

The facts of this case make it clear that Defendant Franklin Flags Amusement Park is entitled to judgment as a matter of law. Franklin Flags did not breach any duty of care owed to the plaintiff. In light of the foregoing, the defendant respectfully asks that this court grant its motion for summary judgment against the plaintiff, Ms. Monroe.

Dated this the 30th day of July, 2013.

Respectfully Submitted,

/s/ Applicant

Applicant

Teasdale, Gottlieb & Lasparri, P.C.

MPT 2 - Sample Answer # 1

MEMORANDUM

TO: Levi Morris

FROM: Examinee

RE: Palindrome Recording Contract

This memorandum identifies contract provisions that need to be redrafted, redrafts those provisions, and includes explanations for each change. *Asterisks* are used to identify inserted or replaced text. Bracketed ellipses [. . .] are used to identify where language has been deleted.

1. Definitions

"Artist" or "you" shall mean *Palindrome Partnership* [. . .]

The artist definition was altered to properly identify the legal entity of Palindrome Partnership as the entity entering into the contract. This alteration was based on Smyth's interview and the Agreement Among Members of Palindrome provided by Smyth. Furthermore, the reference to individual members of the band was deleted in order to make it clear that the members are not liable to the contract as individuals but as members of the Palindrome Partnership.

There are no changes to the Album, Contract Period, or Master definitions.

3. Term and Delivery Obligations

3.01 - No Change

3.02 - No Change

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon *two (2)* separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled. *The total time of the Initial Contract Period and any additional Option Periods shall not exceed four (4) years.*

This provision was altered so that the contract is limited to a maximum of three albums (the initial contract period plus two potential option periods) and a maximum of four years. These changes were made based on the Smyth interview and the band's concern with being locked into one recording contract for too long of a time period. Furthermore, by limiting the time period in this manner, we ensure that the total contract period will be less than the statutory maximum. Franklin Labor Code § 2855(b) states that a contract for the production of audio merchandise shall not be enforceable beyond ten years form the commencement of first fixing sounds under the contract. Under the previous language,

Polyphon could have extended the options resulting in a contract period of more than ten years if an album was not produced timely.

4. Approvals

4.01 *Artist* shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with *Artist* on the production of each Master and each Album.

This contract provision was simply changed to give Palindrome Partners the sole decision making authority involving artistic direction. This authority is clearly an important issue of concern based on the interview with Smyth.

8. Merchandise, Marketing, and Other Rights

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby *grant a nonexclusive license* in that trademark to Polyphon. Polyphon may use the trademark on such products [. . .] it sees fit to produce. *All products, however, must use high quality materials, including the use of high-quality fabrics for all clothing merchandise. Twenty-five (25) percent of all the revenue derived from such product shall belong to Polyphon and seventy-five (75) percent shall belong to Artist. Artist expressly retains ownership of the trademark and the right to further license the use of the trademark to other entities.*

This provision was altered significantly. The first change was to make clear that the band was granting a nonexclusive license. Under the original wording, the band retained no interest in the trademark. Furthermore, the original language may have been construed by the courts as a "naked assignment in gross." See Panama Hats of Franklin. Such an assignment is where a trademark is transferred but no other assets of the business, such as the associated good will, are also transferred. A naked assignment in gross of a trademark is not valid. Therefore, the trademark is open for acquisition by a subsequent user of the trademark. Such a result is clearly contrary to the band's wishes and would be devastating for their business.

The second change was to require that high quality materials be used by Polypon in creating band merchandise. This has the effect of meeting the band's wishes for the quality of the merchandise associated with the band but also has important legal significance. A trademark holder has not only the right to control the quality of licensed goods, but also the duty to control quality. M&P Sportswear. Therefore, in the license agreement, the trademark holder must establish the standards of quality of the trademarked goods. Failure to due so results in uncontrolled licensing, and the failure to assure the public of any standard of quality can result in the loss of the right to the trademark. Therefore, it is imperative that the quality of the goods be stated in the licensing agreement.

Thirdly, this provision was altered to change language that originally granted all of the income from Polypon's use of the trademark to Polypon. The new provision meets the band's wishes identified by Smyth that the band should receive 75 percent of the revenue from Polypon's use of the trademark.

Finally, an additional sentence was added to make it clear that the band retained ownership of the trademark and could license its use to other entities.

8.02 Artist hereby authorizes Polyphon [. . .] to use Artist's, and each *partner* of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services. *All such marketing and promotional efforts by Polyphon must receive prior approval from Artist and Artist retains the right to veto any proposal for marketing and promotion.*

This provision was altered to limit Polyphon's use of the band's name and image by requiring prior approval from the band. I decided to leave the contract language broad and not specifically mention the band's concern regarding alcoholic beverages in order to allow such advertising to occur in the future if the band changes its mind.

MPT 2 - Sample Answer # 2

To: Levi Morris

From: Examinee

Re: Palindrome Recording Contract

Below I have identified the portions of Palindrome's recording contract with Polyphon that need to be redrafted so that they can better meet the band's wishes and comply with the law. According to the band, its most important goals are: 1) to make sure they can leave the label if they want to; 2) to keep control of all artistic decisions; 3) to have final approval of the band's marketing and promotional material--particularly to prevent the band's name from being used to advertise alcohol; and 4) to keep control over their merchandise and trademark. My changes from the original contractual language are indicated in bold.

I. Term and Delivery Obligations

1. Contract Period: 3.03: The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon **two (2) separate options**, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill you Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period shall not begin until the Recording Commitment in question has been fulfilled, **with the exception that the total time of the initial Contract Period and any Option Period shall not exceed four (4) years from the date of the this Agreement.**

Since Otto indicated that the band would not want to be locked into a contract with Polyphon for more than three albums or four years, I changed Polyphon's number of options from eight to two. The contract period and each option will run one year each, so that is a total of three years. Additionally, the band is required per the current contract to produce one album per contract period, so the total number of albums the band would produce for Polyphon would be three. I also placed an outer limit of four years on the extension time of the contract, which provides that the contract and option periods may extend if the band fails to produce an album in the year time frame. This way, the most the band could be bound to Polyphon is four years.

Franklin's Personal Services Contracts statute does not help us on this matter. Section 2855(a) provides that no contract to render personal services may be enforced against the person contracting to render the services may be enforced beyond five years, which is one year longer than Otto expressed a desire to be bound. Additionally, § 2855(b) provides that contracts to render personal services in the production of phonorecords may not be enforced beyond the person contracting to render the services may not be enforced beyond ten years. The band's services appear to fall under the definition of "phonorecord:" " all forms of audio-only reproduction, now or hereafter known, manufactured, and distributed for home use." That means that the way the contract is now written, the band could be bound for as many as ten years--the initial year contract, the eight years of options, and any extension of the contract for not producing the required albums on time. Therefore, I have changed the language above.

II. Approvals

1. Artistic Discretion: **Artist** shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and have the sole authority to **selec**t one or more producers to who shall collaborate with **Artist** on the production of each Master and each Album.

Since Otto indicated the band wants to make all artistic decisions relating to song selection and producers, I have changed the language to give the discretion to the band instead of Polyphon.

III. Merchandise, Marketing, and Other Rights

1. Trademark Clause: 8.01 Artist warrants that it owns the federally registered trademark PALINDROME and hereby **grants Polyphon a limited license to use the trademark. This license entitles Polyphon the right to manufacture and sell T-shirts and other merchandise using the trademark. The merchandise Polyphon manufactures must meet the standards of quality of the trademarked goods established by Artist. Artist retains the right of final approval on all merchandise items Polyphon manufactures Polyphon using the trademark. Artist retains the right to terminate the license if the quality control conditions are not met. In exchange for the license, Artist is entitled to three-quarters of the revenue from the merchandise manufactured and sold using the trademark.**

In order to comply with the band's desire to keep ownership of the trademark and to comply with trademark law, I have changed the right granted to Polyphon from a flat-out title transfer to a license. In *Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC*, the District Court of Franklin stated that a "naked" assignment of a trademark is not valid and may also cause the assignor of the trademark to lose all rights in the trademark. The court explained that a trademark is an assurance to the customer of the goods and thus cannot be divorced from the goods themselves--it must be transferred along with other assets of a business or at least the business's goodwill. In *Panama Hats*, the contract only transferred Allied Hat Co's trademark in a certain name for a hat with no other assets of the business. The court found that this assignment was invalid. Since the current contract only purports to transfer the title to the band's trademark and none of the partnership's other assets, the result would probably be similar. Since the band wants to keep ownership of the trademark, I did not redraft the clause to include a transfer of assets to validate assignment of the trademark; instead I gave Polyphon a limited license to use the trademark for specified purposes. It is especially important this provision not be left as in because it might cause the band to lose all the rights in the trademark and allow the first subsequent user of the trademark to acquire rights in it.

I also included a quality control provision both to meet the band's goal of continuing to assure the band's name is only on quality products and to comply with applicable law. The District Court of Franklin made it clear in *M&P Sportswear, Inc. v. Tops Clothing Co.* that a license to use a trademark without any specific provisions for quality control may cause a trademark owner to lose all rights in the trademark because a trademark is an indication of the source of the goods that will cause the public to expect a certain quality. If the

trademark owner fails to take steps to ensure quality by putting a quality control provision in the trademark licensing agreement, the trademark might be considered "abandoned" if the quality of the goods bearing it declines and causes the mark to lose its significance. *M&P Sportswear*. Therefore, this contractual provision needs to be changed to include a quality control provision as I have done above so that the band will not lose its rights in the trademark and will able to keep its ownership interest as it wishes.

To meet the band's goal of retaining most of the revenue of the merchandise produced with its trademark, I included the three-quarter percentage of revenue from the merchandise as the licensing fee. Otto indicated that the band would be willing give Polyphon a quarter of the revenue on the items they produce and sell, so this provision accomplishes that while also serving as the price for the license.

2. Marketing Clause: 8.02 Artist hereby authorizes Polyphon to use Artist's, and each member of Artist's, name, image, and likeness in connection with marketing or promotional efforts and to use Masters in conjunction with the advertising, promotion, or sale of any goods or services, **subject to Artist's final approval.**

Since Otto indicated that the band wants to be able to control how it is portrayed in advertisements and other marketing, I changed this clause to make all marketing decisions subject to the band's final approval. This way, the band can veto any marketing decisions it finds unsavory, such as those relating to alcohol sales.