

**FEBRUARY 2013 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 1

Buyer will argue that the handwritten agreement constituted a contract of sale. It included all the elements of a contract – offer, acceptance, consideration, definite terms. It was signed by both parties. Owner will argue that the handwritten agreement was merely a letter of intent to contract. Owner will assert that the “agreement” was not binding as a real estate sales contract because the “agreement” required that the parties execute a final contractual agreement on the standard form Maryland Association of Realtors contract. Owner will assert that both parties expected that a meeting of the minds on the myriad of terms in the Realtors contract would be necessary to consummate a binding real estate sales contract.

Alternatively, Buyer, provided that he learned that Owner had signed the standard form Realtors contract, could assert that Owner accepted his offer. Owner will point out that she refused to return the signed contract, showing that she did not accept Buyer’s offer and that there was not a “meeting of the minds.” Owner made it clear that she required a higher price. Owner will likely prevail since the parties’ handwritten agreement contemplated a contract on the Realtors form, which was to include terms not detailed in the handwritten agreement. *Cochran v. Norkunas*, 398 Md. 1, 919 A. 2d 700 (2007).

The \$1,000 check was “earnest money” and was intended to show the Buyer’s seriousness in seeking to buy the house. Owner’s failure to cash the check was not material to the issue of contract formation. Buyer’s promise to pay the sale price would have been sufficient consideration to form a contract without any earnest money. Furthermore, Owner maintained possession of the check and could have negotiated and cashed the check at any time; hence, Owner had the benefit of the \$1,000 despite not cashing the check.

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QUESTION 2

Question 2 of the February 2013 General Bar Exam, testing Maryland Civil Procedure, was found to be confusing because of a conflict between the Question as printed (which referred to procedures in "District Court") and the Extract (which referred to procedures in "Circuit Court"). Because of this conflict, the Board, in the interest of fairness assigned all applicants the highest raw score of 6 for that question.

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QUESTION 3

For Boaters to have a right to use the areas of the beach above the mean high water mark they must establish a prescriptive easement. While the public has the right to use the beach up to the high water line, that does not address the issue of removing the fence placed above the high water line.

To establish a prescriptive easement Boaters must show an exclusive, adverse and uninterrupted use of the real property of another for twenty years. Banks v. Pusey, 393 Md. 688 (2006).

Boaters can show the public has used the beach and would be trying to establish a public prescriptive easement. The exclusivity element is interpreted differently for public easements. In these situation “all persons must have an equal right to the use and it must be in common, upon the same terms, however few the number who avail themselves of it.” Garret[t] v. Gray, 250 Md. 363, 378 (1970).

Boaters can establish the common use of the beach by the public at large.

To satisfy the adverse element, the use must be without license or permission. Boaters used the beach openly, continuously and without explanation for twenty years. It would generally be presumed that the use has been adverse under a claim of right. Cox v. Forrest, 60 Md. 74 (1883). In this case the land was unimproved and uninhabited and would fall under the “woodlands exception.” Day v. Allender, 22 Md. 511 (1865). The finding that the property is unimproved and in a general state of nature subject to the “woodlands exception” would render the use of the beach permissive. Dep't of Natural Res. V. Cropper, 274 Md. 25, 28 (1975).

The application of the “woodlands exception” would establish a presumption of permission Boaters would have to overcome. If unable to overcome the presumption, the use of the beach by the public was under license subject to revocation by Andy. Clickner v. Magothy River Assoc., et al., 424 Md. 252 (2012).

From these facts it is unlikely that Boaters could prevail. Substantial credit was be given to applicants that discuss and apply the elements of prescriptive easements without discussing the “woodlands exception”.

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QUESTION 4

Buildstrong will recover against Investments for losses sustained as a result of Investment's failure to pay as agreed under its contract with Buildstrong. If there are insufficient assets for a full recovery by Buildstrong, it will not receive contribution from others or John towards the payment of those losses.

With regard to John's personal liability, Section 4A-301 of the Corporations and Associations Article states that "[e]xcept as otherwise provided by this title, no member shall be personally liable for the obligations of the limited liability company, whether arising in contract, tort or otherwise, solely by being a member of the limited liability company." While courts have recognized that the limited liability entity protections can be disregarded similar to the remedy of piercing the corporate veil, it will not do so to enforce a paramount equity absent fraud. See, Serio v. Baystate Properties, LLC, 209 Md. App., 545, 60 A.3d 475 (2012). The courts are reluctant to pierce the veil of protection from personal liability afforded by a properly formed entity when the parties have dealt with each other in the course of its business dealings through the entities. See, Hildreth v. Tidewater, 378 Md. 724, 838 A.2d 1204 (2003).

There are no facts presented in the Question which would reasonably lead a court to hold that the veil should be pierced based on fraudulent conduct of John. See, Bart Arconti & Sons, Inc. v. Ames Ennis, Inc. 275 Md. 295, 340 A.2d 225 (1975), wherein the Court of Appeals refused to pierce the corporate veil despite conduct the trial court described as clearly designed to evade a legal obligation and create a corporate insolvency.

Investments paid Buildstrong until it could no longer do so due to market conditions and lower sales prices. Buildstrong was an established contractor that understood its business transaction with Investments. All payments made to Buildstrong were written on the Investments general operating account, so Buildstrong knew that the separate account was not established. It cannot now obtain a personal judgment against John.

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QUESTION 5

In order to succeed in a negligence action, the plaintiff must establish the following: “(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant’s breach of the duty.” *Hemmings v. Pelham Wood Ltd. LLP, et al*, 375 Md. 522, 535 (2003).

In *Rivas v. Oxon Hill Joint Venture*, the court stated that “In Maryland it is well established premises liability law that the duty of care that is owed by the owner of property to one who enters on the property depends upon the entrant’s legal status. *Baltimore Gas & Elec. V. Lane*, 338 Md. 34, 44 (1995) (“[A] possessor owes a certain duty to a person who comes into contact with the property. The extent of this duty depends upon the person’s status while on the property.”). Ordinarily, one entering onto the property of another will occupy the status of invitee, licensee by invitation, bare licensee, or trespasser. *Baltimore Gas & Elec. V. Flippo*, 348 Md. 680, 688 (1998). “An invitee is a person on the property for a purpose related to the possessor’s business.” *Id.* (quoting *Lane*, 338 Md. At 44). He is owed a duty of ordinary care to keep the property safe. A licensee by invitation is a social guest to whom is owed the “duty to exercise reasonable care to warn... of dangerous conditions that are known to the possessor but not easily discoverable.” *Id.* At 689 (quoting *Lane*, 338 Md. At 44). A bare licensee is one who enters the property of another with the possessor’s knowledge and consent, but for the licensee’s own purpose or interest. He is owed a “duty to refrain from willfully or wantonly injuring him” and from creating new and undisclosed sources of danger without warning” him. *Flippo*, 348 Md. At 689. He is owed the most limited duty: to refrain from willfully or wantonly injuring or entrapping. *M. Rivas v. Oxon Hill Joint Venture*, 130 Md. App. 101., 110 (2000).

In the question at hand, the better argument is that Paul is a bare licensee as to Larry in that he is on the property with Larry’s permission but for his own use and pleasure. While he is being paid a small fee each time he rides on Larry’s property, it is not for a purpose related to the owner’s business. As such, Larry has no duty to Paul except to refrain from willfully or wantonly causing him harm. If there is no duty, there is no liability.

It could also be argued that Paul’s status on the land was as an invitee since Paul paid Larry for the privilege of riding the motor cycle. As stated above, Paul’s use of the property was certainly not a part of the possessor’s business but he paid a fee nevertheless. A land owner owes an invitee a duty to warn of hidden dangers of which the land owner is aware or would be aware of with reasonable inspection. The facts do not indicate that the spool of cable was hidden in any way, nor do they indicate that Larry was aware of it. It is arguable that a reasonable inspection would have led to the discovery of the spool of cable, but it is unclear that even if he had discovered it he would have realized that it would pose a danger to Paul. Thus, there might still not be a breach of duty of care owed to Paul in which case Larry would not likely be held liable for Paul’s injuries. Paul was driving his motor cycle at a high rate of speed, at dusk, which would reduce visibility. Should an applicant determine that Larry “should” have discovered the spool of cable and warn Paul of the danger, then the defense of contributory negligence would be raised. A finding of contributory negligence would bar Paul from recovering against Larry.

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Digger does not have any ownership or estate interest in the surface of the land and did not give Paul permission of any kind. In fact, it is apparent that Digger was unaware of Paul's presence on the property. Digger had only a lease hold interest in the minerals and an easement to construct a power line across a portion of the property. Thus, Digger has no duty to Paul and therefore no liability for Paul's injuries.

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QUESTION 6

- a) The attorney general of the State of Spendthrift can argue that the state law is valid as it does not regulate disclosure and therefore is not within the field occupied by the federal law. The federal law “preempts the field” with regard to disclosure requirements but not with regard to the field of protecting underage applicants for credit.
- b) Piranha will probably not succeed on its due process claim because courts apply a deferential version of the rational basis test to economic regulation challenged under the Due Process Clause. The Supreme Court at one time made broad use of the due Process Clause to strike down economic regulation.

Munn v. Illinois, 94 U.S. 113 (1877), which the Court used to strike down state regulation of private business on the ground that the type of business was not a common carrier nor a natural monopoly and thus not a business affected with a public interest. The Supreme Court applied an “economic due process” doctrine to strike down state laws on the grounds that the end of the state to achieve with its economic regulation was itself illegitimate, regardless of the means or process chosen to achieve that end. *See Lochner v. New York*, 198 U.S. 45 (1905)

Lochner was replaced by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and *United States v. Carolene Products*, 304 U.S. 144 (1938) where the Court dispensed entirely with the *Lochner* doctrine and replaced it with an extremely deferential standard of judicial review of economic regulation by government; state or federal. The new “rational basis” standard, which is still in effect, was stated in *Carolene Products*: “where the legislative judgment is drawn in question, [the Court’s inquiry] must be restricted to the issue of whether any state of facts either known or *which could reasonably be assumed* affords support of [the legislation.] *Carolene* at 154, emphasis added.

- c) Piranha could argue that although the law is neutral, it imposes a burden on interstate commerce that outweighs local benefits because conflicting state credit card regulations impede interstate transactions. Piranha could also argue that courts should give less deference to Spendthrift’s asserted interest because there are no in state credit card companies in the State of Spendthrift to provide a check on the political process of the Spendthrift legislature.
- d) Carr might challenge the law on 1) the Privileges and Immunities Clause of Article IV, 2) equal protection, because young people are a politically powerless class and burdening them is therefore subject to heightened scrutiny, or 3) the Contracts Clause because the law prevents him from entering a contract. He is unlikely to be successful with any of these arguments. The right to contract under the Privileges and Immunities Clause prohibits discrimination against nonresidents and therefore Carr cannot assert it against his own state. Although minors are politically powerless, age has been rejected as a suspect classification (see *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)). There is no caselaw to suggest that minority (underage) status is a suspect classification.

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QUESTION 7

Buyer's purchase order constitutes an offer to buy goods. Commercial Code, § 2-206(a), Seller's acceptance added an Additional Term i.e. interest charged on past due balances. As the Buyer and Seller are merchants, this Additional Term became part of the contract because a clause providing for interest on past due balances does not "materially alter" the contract and Buyer did not object to this Additional Term "within a reasonable time after notice" of the interest charge was received. § 2-207.

Seller made a timely delivery of tires in accordance with C&F term (cost and freight) on January 15, 2013. § 2-320. However, as noted by Buyer's warehouse manager on the Delivery Receipt, Size B was "20 over" and Size C was "20 short". Because the goods did not conform to the contract, Buyer had a right to reject the whole, accept the whole, or accept any commercial unit or units and reject the whole, accept the whole, or accept any commercial unit or units and reject the rest. § 2-601.

Rejection of goods must be within a "reasonable time after delivery." § 2-602. In this case, Buyer waited more than 30 days (until February 16, 2013) to notify Seller that the goods were non-conforming. Acceptance of goods occurs when a buyer having a reasonable opportunity to inspect the goods, fails to make an effective rejection. § 2-606(1)(b).

Under the facts stated, however, the goods were destroyed on January 15, 2013, and thereafter were not available for Buyer to reject. Because the tires were destroyed, the rights of the parties depend on whether Seller or Buyer bears the risk of loss. Since the goods failed to conform to the contract, the risk of loss remains on the Seller "until cure or acceptance." § 2-510. Buyer did not accept non-conforming goods before they were destroyed. Therefore, risk of loss remained on Seller.

Some candidates may discuss the applicability of § 2-602(b) which requires the Buyer who has physical possession of rightfully rejected goods to hold them with reasonable care to permit seller time to remove them. This section is not applicable.

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QUESTION 8

1. May Mack Petition for Sole Custody:

A court retains jurisdiction over custody issues involving minor children and may modify custody or visitation even where these matters are incorporated within a judgment. *Frase v. Barnhart*, 379 Md. 100, 840 A. 2d 114 (2003). Pursuant to Section 5-203 of the Maryland Family Law Code Annotated neither parent is presumed to have any right to custody superior to that of the other parent. Courts will also not allow the sex of the parent seeking custody of the child to be the determining factor. *Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984). Instead, it has been held that the best interest of the child is the controlling factor.

In determining what is the best interest of the child the court may consider such factors as the parents' character/reputation, suitability of the parent's home, whether or not the child has been separated from the parent for any length of time, the parent's failure to care for the child, the relationship of each parent to the child, and the chance that a child's life will be improved in one parent's home versus the other's. See, *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977).

In his pursuit of sole custody Mack can make the following arguments:

1. Celeste has abandoned Tony for nearly a year to pursue a carefree, jet-set life with Donald;
2. Celeste wishes to permanently move to Nevada, tearing Tony away from the only life he has enjoyed; and
3. Celeste wishes to reside in a hotel – a residence that will not offer as much comfort and stability as Tony's home.

2. May Mack stop paying alimony to Celeste?

Poor Mack! Although alimony generally terminates upon the remarriage of the recipient, he is bound by the terms of the agreement he made with Celeste.

The facts indicate that the agreement concerning alimony was incorporated into the final divorce decree. Maryland law provides that the court may modify any provision of an agreement that is incorporated within a divorce decree, whether or not said agreement is merged, if the agreement is subject to modification. Maryland Annotated Code, Family Law, Section 8-105(b). However, Section 8-103 (c) of the Family Law Article prohibits modification if there is "a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to court modification." The agreement at issue provides that spousal support continues until his or her death and that such support is non-modifiable by any court. He is therefore bound by the agreement.

He would most likely be bound even if the agreement had not been incorporated. Under those circumstances the agreement would have been subject to the general tenets of contract law.

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Shacter v. Shacter, 251 Md. 304, 247 A. 2d 268 (1968); *Moore v. Moore*, 144 Md. App. 288, 792 A.2d 839 (2002). There is also a provision in the Family Law Article that states that the court is bound by the terms of the separation agreement entered into by the parties in the event that the agreement is not incorporated. Maryland Family Law Code Annotated, Section 11-101(c). Again, the agreement clearly states the parties' intent so they will be bound

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QUESTION 9

Removal is automatic when requested by either party in a capital case pursuant to Maryland Rule 4-254 and Article IV, Section VIII of the State Constitution.

Extensive pre-trial publicity justifies a change of venue in the event it is reasonably necessary to ensure a fair trial for the defendant. *Hoffman v. Stamper*, 943 A.2d 153, 155 Md. App. 247 (2004), cert. granted 851 A.2d 593, 381 Md. 673 (2004), *aff'd in part, rev'd in part, and remanded*, 867 A.2d 276, 385 Md. 1 (2005); *Stouffer v. State*, 703 A.2d 861, 118 Md. App. 590 (1997), *reconsideration denied, cert. granted*, 709 A.2d 141, 349 Md. 497, *aff'd in part and rev'd in part*, 721 A.2d 207, 352 Md. 97 (1998).

The Supreme Court of the United States has established that the use of preemptory strikes to eliminate jurors on the basis of race or gender is presumptively unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. 127 (1994). However, the Court has not ruled upon strikes based on the presence of tattoos, body art, or other elective physical alterations. Therefore, such strikes are permissible. In addition, the voir dire process should presumably strike for cause any jurors categorically unwilling to apply the law (*i.e.*, impose the death penalty).

Withholding potentially exculpatory evidence violates the due process guarantees of the United States Constitution "where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Exculpatory evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the material(s) at issue been disclosed. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted). An unidentified individual having had contact with the victim on the night of the murder would clearly have been relevant and potentially helpful to Michael's defense. In addition, his lack of appreciation between right and wrong would impact any potential sentence, or even the conviction itself, as it would open the door to a finding of not criminally responsible. No request is needed from the defense; the state is presumptively obligated to turn over the potentially exculpatory evidence under *Brady*. For both of these reasons, the court should grant the motion.

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QUESTION 10

The following rules of professional conduct are violated under this fact scenario:

1.5(a) Fees - A lawyer shall not charge an unreasonable fee. These two attorneys have practiced for two years or less. It is unlikely that a fee of \$30,000-\$50,000 would be found reasonable given their experience, reputation, ability, and the violation of probation charge.

1.5(d) Fees - It is also a violation to charge a contingent fee for representing a defendant in a criminal case.

1.11 Conflict of Interest for former and current Government Officers and Employees- Attorney Z recently left the Office of the State's Attorney. This rule prevents him from representing a client in a matter in which he participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent. Attorney Z may be able to avoid this charge if he can show he had the agency's consent to represent X. Con.

16-604 Trust Account – Generally, all funds received and accepted by an attorney or firm from a client must be deposited in an attorney trust account unless received as payment of fees owed or is reimbursement for expenses properly advanced on behalf of the client. It isn't feasible that Y and Z earned \$15,000 from an interview with X. Con.

1.15 Safekeeping of property - Lawyers must keep funds in a separate trust account maintained in accordance with the Maryland Rules. For the same reason noted above the attorneys violated this Rule.

7.1 Communications Concerning a Lawyers Service – A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

“(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Maryland Lawyers' Rules of Professional Conduct or other law;”

The lawyers may have violated this Rule when they told XCon that he didn't have to worry about the violation of probation matter.

7.4 Communication of Fields of Practice - A lawyer may not hold himself out as a specialist. The advertisement violates this rule.