

## FEBRUARY 2000 MARYLAND BAR EXAMINATION

### BOARD'S ANALYSIS

#### PART A - QUESTION 1

The issue is one of adverse possession. To acquire title (ownership) to property by adverse possession, a claimant must demonstrate that his occupation of the land has been actual, hostile, open and notorious, exclusive, under claim of title and continuous or uninterrupted for 20 years. Where adverse possession is not claimed under color of title, it extends only to the land actually occupied by the claimant.

**Actual Possession:** In determining whether a party has been in "actual" possession of the property, the court must consider the character and location of the land and the uses and purposes for which the land is naturally adapted. Orphanos Contractors, Inc. v. Schaefer, 85 Md. App. 123, 582 A.2d 547 (1990).

**Open and Notorious:** The possessory acts of dominion must be so pronounced, continuous and visible as to charge the owners with notice that an adverse claim has been asserted. Where a record owner erects a fence for his own purposes, within his land, its existence does not support an inference that the fence is a visible boundary delineating the extent of a claimant's adverse possession. Costello v. Staubitz, 300 Md 60, 475 A2d 1185 (1984).

**Exclusive:** To ripen into title, adverse possession must be exclusive, that is, the claimant must hold possession of the land for himself as his own, and not for another. The disseisor must show an exclusive dominion over the land and appropriation of it to his own use and benefit, but the possession need not be absolutely exclusive; it need only be of a type which would characterize an owner's use. Blickenstaff v. Bromley, 243 Md 164, 220 A2d 661 (1985)

**Hostile:** The "hostility" essential to acquire title by adverse possession does not necessarily import enmity or ill will, but rather that the claimant's possession be unaccompanied by any recognition, express or inferable from the circumstances, of the real owner's right to the land. Bishop v. Stackus, 206 Md. App. 639, 498 A2d 661 (1985).

**Continuous:** Claimant's use of the property must be continuous and uninterrupted for a period of 20 years.

It is clear that the Joneses took possession of three (3) feet of the neighbors land. They installed a paved driveway on the property and used it continuously.

Their use was open and notorious. The location of the driveway was such that the neighbors

could not help but notice the use of the land by the Joneses.

The use was exclusive. The Joneses exercised such dominion over the property that the Perry's used it only with the Joneses permission. This use also reflected the hostility of the Joneses use to the rights of the actual owners of the three (3) feet of the driveway which they now seek to own.

Their use was continuous, having lasted for more than twenty (20) years.

However, the issue arises as to whether or not the 20 year period runs against an owner who is under a disability. Since Jerry was only 10 at the time his grandparents died, and, at that time, only 11 years of the 20 year period had elapsed, the argument may be made that, although the period of possession may run against him, he has three years after he turns 18 to file an action or to assert his rights and terminate the possession of the claimant.

However, disability subsequent to the commencement of the running of the statute of limitations, such as the disability of infancy....does not interrupt the running of the statute. Where the statute of limitations has begun to run in favor of one in adverse possession against an owner who dies leaving heirs who are minors, the disability of infancy does not affect the running of the statute, since the disability is subsequent to the commencement of the running of limitations. Sellman v. Bowen, 8 Gill 50; 3 Am Jur 2d, subsection 195.

Because the Crosby's, by placing a chain across the entire driveway, have asserted a possessory interest in the 5' of the driveway actually owned by the Joneses, it is conceivable that the Joneses might file a trespass action against the Crosbys. A trespass is an unlawful entry by a person or thing upon the property of another.

## **PART A - QUESTION II**

As with all issues relating to the welfare of children, the "best interests of the child" standard is determinative.

Under 8-103(a) of the Family Law Article, the Court has the authority to modify any provisions of a separation agreement which pertain to children.

In answering this question, you must consider Family Law Article section 5-1027(c) which states that there is a rebuttable presumption that the child born during the marriage is the legitimate child of the man to whom the woman is married at the time of conception. The presumption, however, may be rebutted by testimony of non-access by the husband and the use of the blood test. The use of the blood test was contemplated by the drafters of 5-1028. Toft v. Nevada, ex rel. Pimentel, 108 Md. App. 206, 671 A2d 99 (1996).

Evidence of non-access and the results of the blood test, however, are not determinative of the ultimate issue. The court must then exercise its discretion to determine the ultimate issues in the case.

The case of Sider v. Sider, 334 Md.512, 639 A2d 1076 (1994), dealt with a very similar issue. In Sider, during the course of a divorce and custody dispute, the husband learned that he was not the biological father of the child through a paternity action filed by the wife and the biological father.

Although the issue in that case was custody of the minor child, the court provided some instruction concerning the types of factors which must be considered in determining "the best interest of the child". Some of the factors are as follows:

1. The length of time the child has been away from the biological parent;
2. The age of the child when care was assumed by the third party;
3. The possible emotional effect on the child of a change of custody;
4. The nature and strength of the ties between the child and the third party custodian;
5. The intensity and genuineness of the parent's desire to have the child;
6. The stability of the child's current environment.

The Court reiterated that the "best interests of the child" standard is of transcendent importance and the sole question. It is not considered as one of many factors, but as the objective to which virtually all other facts speak. id. at A2d 1087.

In determining whether Jimmy will be released from his responsibility to pay child support or assist with medical care costs, the following factors must be considered:

1. Although the children are young, they are old enough to potentially have some long lasting emotional pain if their relationship with the only father that they have ever known is terminated.
2. Although the parties are divorced, Jimmy has maintained consistent contact and continues to be involved in their lives;
3. Matthew will need Jimmy's assistance if he is to receive the medical care which he requires;
4. Mary Jo's admission of the affair during the marriage;
5. The blood test which conclusively shows that Jimmy is not the biological father of Matthew

and Martin.

6. Barry's rights and responsibilities as the biological father.

8-101 et seq.

5-1027(c)

## PART B - QUESTION I

The facts describe a fraudulent scheme involving a bank check and requires the applicant to apply the rules contained in the Uniform Commercial Code allocating the loss among innocent parties.

As a starting point, the Bank would be justified in charging Buyer's account for the amount of the check. Maryland Annotated Code Commercial Law Article ("UCC") § 4-401 provides that:

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. *Any item is properly payable if it is authorized by the customer* and is in accordance with any agreement between the customer and bank. (Emphasis added.)

There is no doubt that Buyer signed the check and delivered it to a person he thought was Clarissa Marple. His signature is genuine, even if fraudulently obtained. Thus, at first blush, Buyer is responsible for the loss. However, the UCC contains several specific rules set out in the Statutory Extract pertaining to the allocation of risk of loss caused by fraud.

As a general rule, a forged signature is ineffective under the UCC except as to a person who pays the instrument in good faith:

§ 3-403. Unauthorized signature.

(a) Unless otherwise provided in this title or Title 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this title.

Rendered in plain English, Section 3-403 says that, if the Bank paid the check in good faith, Buyer cannot successfully argue that the Bank, by cashing the check over Marple's forged indorsement, failed to honor his directive to pay to the intended payee, i.e. Marple. Section 3-403 also says that the UCC may contain specific rules which might change this result. If any of these rules apply, then Buyer's account would be recredited.

Section 3-404 provides:

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is

effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(d) With respect to an instrument to which subsection (a) . . . applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

Maryland interprets the so-called “Imposter Rule” narrowly, *see Bank of Glen Burnie v. Elkridge*, 120 Md. App. 402, 707 A.2d 438 (1998) (holding that there must be an actual impersonation to trigger the rule instead of mere misrepresentation). However, in this case there has been actual impersonation by Irma Imposter.

The Imposter Rule provides that Imposter’s forged indorsement of Marple’s signature “is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.” Small Town Bank certainly paid the instrument. The thought process of the teller appears to be in good faith. (Section 1-201 defines “good faith” as “honesty in fact.”) Thus Bank can argue that the indorsement, even if forged, was effective to protect it. The Bank’s challenge lies in whether it has met the ordinary care requirement of 3-404(d). It appears that it has not. The teller knew that Imposter sometimes cashed checks for large amounts which had been drawn on Marple’s account. But the teller also knew the largest check was \$5,000, one-tenth the amount of the check in the fact pattern. In addition, the check presented to the teller was not drawn on Marple’s account; it was drawn on Buyer’s. The teller realized the unusual nature of the situation but his solution, to have Imposter endorse the check “as a precaution” was meaningless. It did nothing to protect either Buyer or Marple. Most fact finders would conclude that the Bank had failed to act with ordinary care.

The Bank has an argument that Marple is liable under Section 3-405, which sets out rules for holding an employer responsible for fraudulent indorsement by an employee. The section reads in pertinent part:

§ 3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the

employer, a forged indorsement purporting to be that of the employer, ....

(3) "Responsibility" with respect to instruments means authority . . . .(ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, . . . or (vi) to act otherwise with respect to instruments in a responsible capacity.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss for the reasons explained above..

However, upon closer analysis, Section 3-405 offers no comfort to the Bank because the teller did not exercise ordinary care.

Section 3-406 of the UCC sets out a comparative negligence standard for the allocation of loss caused by forged or altered instruments. Analysis under this general rule would result in the same conclusion as application of the more specific rules discussed above, i.e. that the Bank is liable for the \$50,000.

## **PART B - QUESTION II**

This question calls for the application of basic principles of contract law.

With regard to Reading Power's rights against Local Charities, one must first determine whether there was a contract between the parties at all. Generally speaking, contract formation depends upon offer, acceptance and consideration. Reading Power's initial letter is not an offer for a contract, it is a request for a donation. Local Charities' response, while equivocal, does not commit Local Charities to provide funds at all, much less the sum requested. In addition, and most crucially, there is no consideration supporting Local Charities' promise, if indeed there was a promise. Consideration is required for a contract in Maryland, even in the context of charitable gifts. *MD. Nat'l Bank v. United Jewish App.*, 286 Md. 274, 289, 407 A.2d 1130 (1979). Reading Power's ability to recover from Local Charities is controlled by the doctrine of detrimental reliance. *Pavel v. A.S.*

*Johnson*, 342 Md. 143, 166, 674 A.2d 521 (1996). In applying this doctrine, Maryland follows the *Restatement (Second) Contracts*. To recover a party must meet all the elements in the following four-part test:

1. a clear and definite promise;
2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;
3. which does induce actual and reasonable action or forbearance by the promisee; and
4. causes a detriment which can only be avoided by the enforcement of the promise. *Pavel*, 342 Md. at 166.

As indicated above, it is questionable whether this case meets the test of “clear and definite promise.” Local Charities did not promise their own funds but said that they should be able to raise the money. Local Charities will argue that the word “should” in its letter to Reading Power defeats this first prong of the test. However, even viewing the facts in a light most favorable to Reading Power, one could say that there was no promise to turn over a specific amount but rather that the promise was to turn over the funds collected from the convenience stores.

However, the second prong of the test is more problematic for Reading Power. It is difficult to characterize as reasonable Reading Power’s decision, without further communication with Local Charities, to hire a specialist five months in advance of receiving the funds. If nothing more, it would be prudent to wait several months to see how the fund-raising was progressing. If it could be shown that hiring within this industry normally occurred in this time frame, it could be reasonable since it is clear that Reading Power acted on the basis of the promise. Courts will consider “course of dealing” and “usage of the trade” to evaluate this prong of the test. *See Pavel*, 342 Md. at 167.

The final question is whether the detriment can be avoided without the enforcement of the promise. Reading Power could seek funds from other sources. They would have to demonstrate that there were no other funding sources. They could notify Sarah Teacher who has still significant time to find a comparable position and thus not suffer any loss.

The agreement between Reading Power and Sarah Teacher is governed by the Statute of Frauds, Maryland Annotated Code Courts and Judicial Proceedings Article § 5-901 which provides in pertinent part:

Unless a contract or agreement upon which an action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or another person lawfully authorized by that party, an

action may not be brought: . . .

(3) On any agreement that is not to be performed within 1 year from the making of the agreement.

The agreement between Reading Power and Teacher is oral and was entered into before February 15, 2000. Teacher's performance was to begin on July 1, 2000. Thus the contract could not be performed within one year of the time it was made and is unenforceable under the Statute of Frauds.

Teacher has remedies against Reading Power based upon promissory estoppel as outlined above: there was a definite promise, her reliance was reasonable, and she relied on the promise to her detriment (by giving notice). She will have the duty to mitigate her damages.

## **PART C - QUESTION NO. I**

Admissibility of the statement requires a consideration of the following principles. The 6<sup>th</sup> Amendment to the Constitution grants a defendant a right to counsel. The 5<sup>th</sup> Amendment to the Constitution provides that no person shall be compelled to be a witness against himself. The advice of Miranda rights and a valid knowing, voluntary and intelligent waiver of same are prerequisites to the admissibility of the statement of a defendant to a police officer. Finally, a Court is to presume a defendant did not waive his rights, and the State must demonstrate a defendant knowingly and intelligently waived his Miranda rights.

Once a defendant even half-heartedly indicates his desire for the presence of an attorney, all interrogation must cease until an attorney is provided. Wallace vs. State, 100 Md. App. 235, 640, A.2d 749 (1994). Any attempt to spark Defendant's initiation to speak without counsel can contaminate the waiver of counsel. Bryant vs. State, 49 Md. App. 272, 431 A.2d 714 (1981). But under Davis vs. U.S., 512 U.S. 452 (1994), it may be argued that a defendant's alleged request for counsel may have been too ambiguous. In Davis, suspect said, "Maybe I should talk to a lawyer", and this was held to be too ambiguous. The counter argument is that Deputy Turner was trying to distract Gus from his concern for the presence of an attorney by minimizing the situation. The Court would probably rule there was not an unequivocal request for an attorney, and as such Gus had validly waived his Miranda rights.

The better argument against admissibility is that Deputy Turner's remark this is "no big deal" was an improper inducement by Deputy Turner and that, as such, the statement was not "voluntary" making it inadmissible in the State's case in chief, although it may be admissible in rebuttal (See Hof vs. State, 97 Md.App. 242, 629 A.2d 1251, 1261 (1993)). Certainly Gus, faced with a felony first degree assault charge, was faced with a serious situation.

The rule regarding the admissibility of a confession is that the State must prove that it was freely and voluntarily given and that it was not the product of force or of a promise, threat, or inducement whereby the accused might be led to believe that there will be a partial or total abandonment of prosecution. A timely motion to suppress the voluntary statement based on the tainting inducement should be filed.

## **PART C - QUESTION II**

Murder is homicide committed in the absence of mitigation, justification or excuse. Murder with premeditation and deliberation is murder in the first degree. All other murder is murder in the second degree. Mitigation may reduce the level of guilt from murder to manslaughter.

A person may use force, including deadly force, in self defense or in the defense of habitation. The person must reasonably believe that there is an imminent threat of death or serious bodily harm. An honest

but unreasonable belief, or the use of excessive force, is not a defense, but may still be mitigation.

Voluntary intoxication may be a defense to first degree murder, which requires the specific intent of premeditation and deliberation, but not to second degree murder, which requires only a general intent.

Tom will be acquitted of first degree murder since there was no premeditation or deliberation and he was intoxicated. Tom will probably be acquitted of second degree murder based on a defense of (at least) imperfect self-defense. Defense of habitation is not available since this was not Tom's home. The trier of fact's assessment of the reasonableness of Tom's belief of imminent danger to his person and the force used in response will determine whether he is convicted of or acquitted of manslaughter.

### **PART C - QUESTION NO. III**

The previous plea bargain and sentencing of Jason in Prince George's County on the possession of stolen property charge precluded a subsequent finding in Charles County that Jason committed storehouse breaking with intent to steal on the given facts. The plea bargain on the possession of stolen property charge became a fact that is entitled to be recognized in any other litigation between the same parties.

Jason cannot be both in possession of the stolen property as receiver of the stolen property and the thief based on the given facts. He either possessed the stolen property knowing or believing they were stolen by others or he intended to steal the property himself when he committed storehouse breaking.

The State participated in the plea bargain and sentencing of Jason on the possession of stolen property charge in Prince George's County. The collateral estoppel component of the Fifth Amendment double jeopardy prohibition prevents the conviction of Jason for the storehouse breaking with intent to steal as Jason cannot be both the receiver of stolen property and the thief. The same facts and the same parties are present in both cases and the plea bargain and sentencing of Jason on the possession of stolen property charges were an adjudication on those facts.

Because the State participated in the adjudication in the Prince George's County case that Jason was in possession of stolen property as the receiver of stolen property and because the receiver of stolen property cannot also be the thief, the State is precluded from relying on the usually permissible inference that Jason's exclusive possession of the stolen property in Prince George's County could be inferred to mean that he stole the property the previous night in Charles County.

There are no jeopardy issues on these facts because the charges against Jason in Prince George's County and in Charles County are for separate and distinct crimes.

## PART D - QUESTION I

Applicants should address at least three (3) issues under the Rules of Professional Conduct:

A. Conflict of Interest. Clearly, there are potential cross-claims by Red Dog, Inc. and Stone against White Tiger, LLC. However, Stone, the sole owner of both entities, is willing to waive any conflict under Rule 1.7. You may represent all three clients if Stone is advised about the implications of common representation and that your representation will not include filing cross-claims among your clients. This explanation should be made in writing and expressly consented to by Stone, individually, and on behalf of White Tiger and Red Dog.

B. Disposition of Retainer. Rule 1.15 requires you to hold your client's funds in an Attorney's Trust Account. The entire \$10,000 should be deposited in the trust account, and drawn on to pay for services as they are rendered. Although a written fee agreement is not required (since the fee is non-contingent), it is preferable to communicate the fee arrangement in writing. Rule 1.5.

C. Interviewing Bo. As a material witness, it is certainly ethical and proper for you to interview Bo. However, he is not your client, and is not yet represented by counsel. Therefore, you must make sure Bo understands who you do represent, that you do not represent him and cannot give him legal advice, other than the advice to secure counsel. Rule 4.3. Since there is a potential of adverse claims between your clients and Bo, you must take care that he has no reason to believe you intend to protect his rights. Rule 4.4.

## PART D - QUESTION II

White Tiger, LLC. – Bo was a servant of White Tiger because he was its employee and subject to its direct supervision. White Tiger's liability depends on whether Bo's tortious conduct is within the scope of his employment. An intentional use of force may be done within the scope of employment, although forbidden or done in a forbidden manner, if it is not unexpectable by the master. Rest (Second) of Agency, §228-235. White Tiger, LLC has potential liability for Bo's acts, as the issue of whether the servant is acting within the scope of his employment is ordinarily a question for the jury, unless only one inference can be drawn from the undisputed facts. See, Rusnack v. Giant Food, Inc., 26 Md. App. 250, 265 (1975), and cases therein cited.

Red Dog, Inc. – Red Dog's potential liability for its physical harm inflicted by Bo depends on whether White Tiger, LLC was subject to the control of Red Dog, Inc. as to the manner in which it performed its management services, including particularly the collection of rents. If so, Bo may be a "subservant" of Red Dog, thereby imposing potential liability for his tortious conduct. See, Rest. (Second) Agency, §§5 and 220. The management agreement between White Tiger and Red Dog characterizes White Tiger as an "independent contractor" and as "wholly responsible" for property management. On the other

hand, Jim Stone is the President of both entities and he established White Tiger's rent collection procedures. Based on the limited facts available, there is not substantial evidence of control by Red Dog, Inc., so it has no potential liability. A well-reasoned Answer, reaching the opposite conclusion will receive substantial credit.

Jim Stone. Stone has no potential liability. Although he is the sole member of White Tiger, LLC, he did not participate or condone Bo's acts. To the contrary, he had expressly directed Bo not to use force. Stone is not liable as a member of White Tiger and/or as a stockholder or director of Red Dog, unless there is a basis for "piercing the corporate veil." Since there are no facts to show a fraud or "paramount equity," there is no basis, under Maryland case law, to "pierce the corporate veil" and hold Stone personally liable. Residential Warranty Corporation v. Bancroft Homes of Greenspring Valley, Inc., et al., 126 Md. App. 294, 228 A.2d 283 (1999). The fact that White Tiger, LLC is a single member LLC, which pays all its net revenue to Stone and has no assets, is insufficient to "pierce the corporate veil."

## PART E - QUESTION 1

A. As to Howard County Sports Vehicles, Sec. 6-102 CJ Art. is applicable. Facts indicate this defendant was organized under the laws of Maryland and maintains its principal place of business in this State and is subject to personal jurisdiction.

B. As to Sayanara Motor Company of New York, Sec. 6-103, (b) (1), (2) & (4) are applicable. The facts establish that this defendant transacts business and contracts to supply a manufactured product in Maryland. It also derives substantial revenue from manufacturing products used in this state and is alleged to have caused tortious injury in Maryland by an act or omission outside the state. Thus, Sayanara is subject to personal jurisdiction.

C. As to Peerless Rubber Co., Sec. 6-102 (b), (4) & (5) are applicable. The facts establish that this defendant regularly does business in Maryland, derives substantial revenue from manufactured products (tires) used in this state, and uses or possesses real property in Maryland. Peerless' business in Maryland is continuous and substantial and renders it subject to exercise of personal jurisdiction.

D. As to Metal Parts, Inc., the facts do not support the conclusion that it is subject to personal jurisdiction in Maryland. Maryland's Long Arm Statute, Sec. 6-103 provides for in personam jurisdiction over all nonresident defendants who purposely avail themselves of the privilege of conducting activities in Maryland, consistent with the Fourteenth Amendment's due process clause as declared by the United States Supreme Court. A defendant must have certain minimum contacts with Maryland such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Therefore, it is essential that there must be some act by which defendant purposefully avails itself of the privilege of conducting activities within this state, and invoking the benefits and protections of its laws. (Poole & Kent Co., v. Equilease Assoc., 71 Md App 9 1987). Merely placing products in the stream of commerce is insufficient to confer personal jurisdiction. The defendant's conduct must be directed toward the forum state. The test is whether or not the defendant created a substantial connection to the forum state by actual and purposeful activity directed to the forum state, or otherwise invoked the benefits of protections of the laws of the forum state. Under the facts in this case Metal Parts, Inc. is not subject to personal jurisdiction.

**Venue.** Suit can be brought in Howard County where the cause of action arose and where Howard County Sports Utility Vehicles carries on a regular business, Sec. 201 CJ Art. All of the defendants in this case who are subject to personal jurisdiction can be sued in Howard County, since one of the defendants carries on a regular business in the area and the cause of action arose there.

Peerless Rubber Company carries on a regular business in Baltimore City. Thus, all of the defendants subject to personal jurisdiction can be sued there.

Sayanara Motors can be sued in Howard County under the above provision. It can also be sued in Carroll County where the plaintiff resides because it does not have a principal place of business in

Maryland. Sec. 6-202 CJ Art. §3; in Howard County where the cause of action arose; or in any county in the State. Sec. 6-202 (11).

Where there is more than one defendant and there is no single venue applicable to all, all may be sued in the county in which any one of them could be sued, or in the county where the cause of action arose. Under the facts, Howard County is the most appropriate but not the only available venue.

***Service of Process:*** As to Howard County Sports Vehicles service would be made on its resident agent, president, secretary or treasurer. If no resident agent and good faith attempts to serve one of its officers failed, service could then be made by serving the manager, a director or lower level officer or any other person expressly or impliedly authorized to receive service.

Delivery by a person over eighteen years of age who is not a party is permissible by personally delivering to the defendant a copy of the summons, complaint and other papers.

If there is no resident agent substituted service may be made upon the State Department of Assessments & Taxation per Rule 2-124(m).

Sayanara Motors and Peerless Rubber Co. are nonresident corporations and are required to register a resident agent in Maryland. Service will be made on a resident agent in the manner provided for resident corporations such as Howard County Sports. If none, substituted service may be made upon the Department of Assessments & taxation. Rule 2-124(m). Certified mail, delivery restricted to a senior officer of a foreign corporation, return receipt requested, has been sanctioned by the Court of Appeals so long as it was reasonably calculated to apprise the defendant of the pendency of the action.

***Pleadings of Sayanara:*** If Sayanara wants to challenge jurisdiction, venue or sufficiency of service of process, it must do so by a preliminary motion under Rule 2-322. Failure to file a motion raising these issues results in waiver. Either the Motion or the Answer must be filed within sixty (60) days after service of the summons and Complaint. Filing of the Motion extends the time for filing an Answer for fifteen (15) days after entry of the Court's Order on the Motion.

In addition to an Answer, Sayanara should file a cross claim against Peerless Rubber Company and Metal Parts, Inc. The cross claim should be filed within thirty days after the time for filing of Sayanara's Answer. This time will be affected by whether or not Sayanara files a preliminary motion. Rule 2-331(b), (d).

***Computer Generated Evidence:*** The evidence is computer generated evidence as defined in Rule 2-504.3. It is visual depiction and a conclusion formulated by a computer program or model. Sayanara may introduce such evidence if it provides written notice to all other parties within the time provided in the Court's scheduling order, if any, or within ninety (90) days before trial. Among other things, Sayanara must provide a statement of what the computer generated evidence purports to prove or

illustrate, and preserve the evidence and furnish it to the Clerk of Court in a manner suitable for transmittal as part of the record on appeal.

## **PART E - QUESTION 2**

1. A criminal conviction is inadmissible to establish the truth of the facts upon which it is rendered in a civil action for damages arising from the offense for which the person is convicted. Rationale for the rule is that the parties to the criminal prosecution are different, the rules of evidence are different, and the purposes and objects sought to be achieved are different.

2. The statement is “hearsay” by definition. Hearsay consists of testimony in court, or written evidence of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Carl’s statement was clearly not made under oath, and its validity is dependent upon the veracity of Carl. Thus, it is unquestionably hearsay and unless one of the exceptions applies it cannot be admitted.

3. Generally speaking, declarations offered for the “state of mind” exception only indirectly indicate the mental state they are tendered to prove. Thus, if the utterance is reasonably understood, Carl’s statement was merely an attempt to explain his former conduct rather than one that was evidence of his intent at the time in which the statement was made. In order to fall within the exception, the statements must be of a “present existing state of mind”, and must appear to have been made in a natural manner and not under circumstances of suspicion. The statement does not meet the requirements of the state of mind exception.

4. The business records exception provides that “a writing of record made in the regular course of business as a memorandum of record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence or event.” Rationale behind the business records exception is that the writer is under a duty to make a truthful report. Thus, a police report indicating that an accident occurred, citing the parties involved, noting other aspects of the accident observable by the investigating officer come within the exception. However, statements made to the officer by witnesses or parties to the accident are not admissible. The report contains information supplied to him by persons who do not have a “business duty” to report accurately, and therefore, the information is hearsay when offered through the police report. While all civilians who supply information to the police have both the legal and moral duty to furnish accurate information, they do not have a “business duty” to be truthful.

5. Admissions are “the words or acts of a party-opponent, or of his predecessor representative, offered as evidence against him.” Therefore, admissions are considered to be substantive evidence of the facts admitted. Party may offer into evidence against his opponent anything said by him as long as it illustrates some inconsistency with the facts now asserted by the opponent in pleading or in testimony. Admissions do not have to be against the speaker’s interest when made. Thus, the statement is admissible

as an admission or statement of party opponent offered against him. The party making the statement can, of course, take the stand and explain the statement.

6. Declaration against interest: This exception requires that the declarant state facts which are against his pecuniary, proprietary or penal interest at the time they are made and that the declarant be unavailable at the time of trial. The two prerequisites are the “legal” unavailability of the declarant and a circumstantial probability of trustworthiness. Once again, Carl’s statement does not come within the declaration against interest exception because it was not made against his pecuniary, proprietary or penal interest at the time it was made. Pecuniary interest obviously relates to a person’s financial situation. Proprietary interest usually has something to do with property ownership. Penal interest would involve exposure to risk of punishment for a crime. Thus, it is not admissible because it is not a declaration against interest and because Carl is in fact available.

## Part F - QUESTION I

The answer should first address who has standing to challenge the ordinance. In determining whether a particular litigant has standing to challenge an action, it must be shown that he or she has “an actual, real and justiciable interest susceptible of protection through litigation.” *Mayor and City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 402 (1991). It is clear that two of the outside vendors have been directly impacted by the new ordinance, and the following actions can be brought on their behalf.

The vendors may be able to attack the law as violative of the equal protection guarantees of the 14<sup>th</sup> Amendment, arguing that there is no basis to support the distinction between the inside vendors and themselves. The State will counter that there is no suspect classification at issue and the rational basis standard of review should apply. Under this standard, the State will argue that the law must be upheld since it is reasonably related to the valid police power goal of relieving congestion in the public rights-of-way.

The vendors may also argue that the law is in violation of the Establishment Clause of the First Amendment, made applicable to the states via the Fourteenth Amendment, because it excludes religious organizations from its purview and therefore promotes religion. Such challenges are generally analyzed by applying the test set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, the ordinance must (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not foster excessive governmental entanglement with religion. The State will, of course, counter by arguing that its purpose is the lessening of congestion of its walkways (thus secular) and the law excludes all nonprofits and therefore does not promote or inhibit religion.

The vendors could challenge the penalty as being excessive and unreasonable under the Eighth Amendment since the fine is quite high for a few hotdog sales, as is the possibility of imprisonment. The State will assert that the penalty is the minimum necessary to ensure compliance.

The vendors could also argue that the ordinance violates their substantive and procedural due process rights, guaranteed by the Fourteenth Amendment, for several reasons. First, they were subjected to a loss of property without any hearing. Second, the ordinance is not reasonable – i.e., so vague and overbroad that the vendors have no true notice of what constitutes a violation or whether they fall into the class of possible violators. The State will argue that the law clearly prevents outside vending on Sundays or other game days by non-philanthropic/charitable/religious organizations and a criminal trial will be held despite the failure of the law to expressly so state.

The vendors may, finally, argue that the ordinance results in an illegal taking of their property in violation of the Fifth Amendment. The State may counter that the vendors’ property is tantamount to contraband under the circumstances, they were given reasonable notice not to sell their wares and they

should have opted to follow the law.

## **Part F - QUESTION II**

Mary Meek may bring the following actions against Poundrock and/or the off-duty officer:

Battery – Poundrock committed an act that resulted in harmful or offensive contact to Meek’s person. The same action could be brought against the officer since he “forcibly ejected” Meek from the store.

False Imprisonment – The officer could be liable for false imprisonment since Meek was unlawfully restrained by the use of physical force without consent. There may be a “shopkeeper’s” privilege to detain Meek for further investigation of Poundrock’s charge of theft, but that was not done under the instant facts since the officer was not an agent of We Are Toys.

Slander – Poundrock made loud verbal statements that she knew to be false. The statement involved moral turpitude and therefore was defamatory per se. Even if not considered per se defamatory, the facts indicate that Meek underwent counseling for her emotional damages and Poundrock may be liable for these as well as punitive damages since she acted with malice. The officer also stated that Meek was a thief; perhaps his defamatory words are also actionable.

Intentional Infliction of Emotional Distress – Due to Poundrock’s extreme and outrageous conduct and Meek’s resulting emotional distress, Poundrock may be sued for intentional infliction of emotional distress.

Conversion/ Trespass to Chattel – Poundrock may be subject to a conversion action for her seizure of the Smokemon toys. Ms. Meek arguably had a right to possess the toys (although she had not yet paid for them) and Poundrock’s seizure without her consent may, therefore, be actionable. In the alternative, Poundrock may be subject to an action for trespass to chattel for her seizure of the toys since the two actions are quite similar in nature. *See, Staub v. Staub*, 37 Md. App. 141, 376 A.2d 1129 (1977).

Finally, all acts of the agent officer may be imputed to Howard County. The County may argue that the officer was acting outside of the scope of his employment; or, in the alternative, that the officer’s actions were reasonable under the circumstances and not actionable.