FEBRUARY 2002 BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Bob and Joe resided in an inexpensive motel on Pulaski Highway in Baltimore County, Maryland. The area surrounding the motel was well known to the community and the local police as a high crime area with drug use, prostitution and theft common occurrences.

Bob asked Joe if he wanted to make a quick buck by robbing the corner liquor store. Joe agreed. The men decided to use Joe's BB pistol as their weapon. The BB pistol was an exact replica of a 9mm pistol.

Using the BB pistol, Bob and Joe held up the liquor store. Bob pointed the BB gun at the store clerk and forced him to turn over the contents of the cash register. As they were leaving the store, Joe grabbed some candy and two cartons of cigarettes off the shelf. In the excitement, Bob accidentally discharged the BB gun striking the clerk in the chest.

Realizing that the BB gun was a fake firearm, the clerk pulled his own gun, fired at Bob, but struck Joe, killing him instantly. Bob then fled the store picking up the cigarettes as he left.

Several months after the robbery, the police conducted a routine visit to the motel to make inquiries concerning illegal activity in the area. Three police officers knocked on Bob's door at about 11:00 P.M. one evening. When Bob opened the door, they identified themselves as police officers and asked if they could enter his room to talk with him. Bob stepped back from the door and allowed them to enter. Upon entering the room, the officers smelled a strong odor of burning marijuana. They then asked if they could search the room and Bob consented.

Upon searching the room, the police discovered a large quantity of marijuana in a dresser drawer as well as the BB gun. They also discovered Marjorie in the room. Bob and Marjorie were then placed under arrest.

Bob has been charged with a number of offenses in connection with the robbery of the liquor store and the possession of narcotics and, after having been arraigned on February 15th, comes to you, and attorney admitted to practice in Maryland, for representation. He informs you that she is going to testify against him if they are tried together in exchange for a dismissal of any charges against her relating to the marijuana.

1. **With what crimes might Bob be charged and what facts would the State use to substantiate each charge?**

2. **As Bob's attorney, what action would you take on his behalf?**

REPRESENTATIVE ANSWER 1

The crimes that Bob could be charged with are:

1a. Conspiracy The State would argue that Bob & Joe had entered into an agreement, had the intent to agree, and the intent to commit an unlawful act (the robbery of the corner liquor store). Even though Maryland doesn't require an overt act, the fact that the liquor store was indeed robbed would suffice. There was obviously an agreement when Bob asked Joe if he wanted to rob the store and Joe agreed. All conspirators are liable for the crimes committed in furtherance of the conspiracy in that is foreseeable.

B. Robbery Under common law, robbery is an assault plus larceny, while using threats to take from the person. Maryland utilized aggravating and unaggravating degrees. A BB gun is not a dangerous weapon purse, but since it was an exact replica of a 9-MM pistol. Perhaps the state would argue that of a handgun to charge Bob with aggravated robbery. There was obviously a threat to inflict immediate injury on the clerk and the threat of force upon the clerk to take and carry away the personal property of the store with the intent to deprive the store thereof. The clerk obviously felt apprehensive since he immediately turned over the contents of the register.

C. Theft (Joe) attempted theft of the candy and 2 cartons of cigarettes. An attempt is the intent to commit the underlying crime (here, theft) plus the taking of a substantial step. Here, Joe took the candy and 2 cartons. The facts are unclear as to whether Joe actually took the items and carried them away before he was shot. If he did, it would be theft (a misdemeanor since the items are under $500.00). If not, it could be attempted theft. Under either scenario, Bob could be charged for Joe's theft or attempted theft since it was done as a foreseeable event of the Conspiracy. All co-felons, under an agency theory, are liable for the acts of the other co-felons that are foreseeable or in furtherance of the conspiracy.

Bob could be charged with theft of the cigarettes since he picked them up and carried them away with the intent to deprive the store of them permanently. Again, this would be a misdemeanor since the theft of the cigarettes is under $500.00.

D. Felony Murder of Joe Felony murder in Maryland is murder in the first degree. However, Maryland typically doesn't hold a felon liable for deaths caused by non-co felons (here, the store clerk pulled his own gun and fired at Bob, but struck Joe). Maryland uses an agency theory BUT under the common law, Bob could be liable for the death of Joe, a co-felon, since it is foreseeable that a victim might try to defend himself from a robbery for which the victim reasonably believed the gun was real. However, in these facts, the clerk realized the gun was a fake.

E. Assault and Battery of Clerk This is not as strong of a charge. It appears Bob accidentally struck the clerk with the discharge of the BB gun. It could be argued that he did not have the intent to inflict injury on the clerk since he was only using a BB gun. However, a BB gun is capable of the infliction of a harmful offensive contact upon another. Plus, this charge would be merged in with the robbery since it's a lesser included offense.

F. Possession of a Controlled Substance Possession with the Intent to Distribute The cops found the marijuana in an areas where Bob lived. Therefore, an assumption can be made that it was his. Also in Maryland, no minimum amount of drugs is needed to charge a defendant with the intent to distribute. The state would argue that since there was such a large quantity of marijuana, Bob should be charged with both crimes.

2. As Bob's attorney, I could try to argue that the police engaged in an unlawful search. Bob had a 4th amendment right of privacy in his room (where he lived) at the motel. The cops were making a routine visit and Bob did consent into letting the police enter and search the room. Bob could have said no and made the cops obtain a valid warrant. Since Bob did not, a motion to suppress the marijuana and the gun will more likely than not be denied.

Another motion I could make would be to have Marjorie and Bob tried separately to ensure he receives a fair trial. This motion could be sustained if I can make a good argument that Bob could not receive a fair trial.

REPRESENTATIVE ANSWER 2

Bob may be charged, but not necessarily convicted of the following:

1a. Solicitation encouraging another to commit a crime with the intent that they actually do so. Here, Bob asked if he wanted to make a quick buck by robbing the liquor store.

B. Conspiracy when two or more people agree to commit a crime. Here, Bob and Joe agreed to rob the store.

C. Weapons Charge wearing, carrying or concealing weapons with intent to cause injury. Here, Bob had a BB pistol.

D. Reckless endangerment indulging in activity likely to cause harm or serious bodily injury. Here, Bob (B) and Joe (J) used a BB pistol which looked like a 9-MM gun to rob a store.

E. Assault Second Degree placing someone in fear of an imminent battery or assault. Here, Bob pointed a BB pistol at the store clerk, who had no way of knowing it was just a BB gun and not really the 9-MM gun it resembled.

F. Assault First Degree see assault above, placing one in fear of serious bodily injury. Here, see facts above, Bob's use of pistol.

G. **Theft** the trespassory taking of the possession of another with the intent to permanently deprive. Here, Bob and Joe planned to take the cash and candy and cigarettes with no intention of returning it.

H. **Robbery** theft (see definition above) by force. Here, Bob and Joe threatened the store clerk with the gun to make him turn over the money in the register.

I. **Robbery with a Deadly Weapon** see robbery definition above and note use of a pistol to force cashier's compliance in this fact pattern.

J. **Handgun Possession** possession of an operable handgun in the commission of a felony. Here, Bob and Joe use a BB pistol (which is not really considered a handgun as it does not use gunpowder to fire/discharge).

Attempt crimes for all the above-listed offenses would be charged, but may merge into the completed crime.

Possession of controlled dangerous substance, and possession with the intent to distribute controlled dangerous substance. Here, large quantity of marijuana was found in Bob's home.

Felony Murder: death that occurs during the commission of a felony. Here, Joe was killed during the robbery. (However, since the clerk was not an agent of the felons, the murder will not be imputed to Bob and will be a justified homicide on the part of the store clerk).

2. As Bob's attorney, I would try to challenge the arrest, search and seizure at his home without a warrant. The fourth amendment, imputed to the states by the 14th amendment prohibits warrantless arrests with limited exceptions the police had no probable cause, nor reasonable and articulable suspicion to go to Bob’s door. This invalidates them approaching him without a warrant in his home where he has a reasonable expectation of privacy. I would file a motion to suppress the evidence procured from the home under the exclusionary rule as a fruit of the poisonous tress. I would file a motion to sever his trial from Marjorie's trial.

QUESTION 2

John and Jocelyn were married in 1992. They were college sweethearts. After graduation, John obtained a job as an architect with an annual salary of $60,000. In less than five (5) years, he had become a partner with an annual income of $285,000. Jocelyn graduated form college in 1994 with a degree in accounting. Soon after graduation, she became pregnant with their first child, Kristin, who was born in December of 1995. The couple had two more children, John Jr., age two years, and Linda, age 3 months.

Although Jocelyn had a degree in accounting, she worked outside the home less than one year. In addition to John's talent as an architect, he also earned additional income as a ski instructor and was an avid skier.

While he was a way on one of his ski trips, Jocelyn happened to review the family's financial records. She found that a large sum of money was not accounted for by their normal spending. She also found many purchases of which she had not previously been aware. She became suspicious of all of John's ski trips and suspected that he was having an affair. When he returned from the latest trip, they began to argue constantly, and John began to spend more time away from home.

Kristin, the oldest daughter attends a private school with a tuition of $12,000 annually. Jocelyn employs a nanny to help her with the children at a cost of $35,000 annually. She had complications with the delivery of her youngest child, and the health insurance did not cover all of the cost. There is an outstanding bill of about $25,000.

John believes that he has taken good care of the family financially. He has paid all of the bills during the marriage. The parties now argue constantly. He loves his children, but he does not believe that his marriage is worth saving.

John wishes to move out of the marital home and comes to your seeking advice concerning the legal and economic consequences if eh were to do so.

What advice would you, an attorney admitted to practice in Maryland, give him?

REPRESENTATIVE ANSWER 1

First, I would inform him that leaving the house would be considered desertion and if he was gone for 12 months or more his wife could file for a fault-based absolute divorce claiming desertion. Next, I would inform him that any claim of adultery by his wife would probably not stand since she has no corroboration and because by continuing to live with him after suspecting it he has the defense of condemnation.

If he wished to move out but not get an absolute divorce, he could file for a limited divorce, which has the same financial consequences, but are still considered to be married. This would not allow him to remarry.

During the divorce process, he would be required to provide his wife and children with pendente lite alimony and pendente lite child support since the wife does not currently work outside the home.

Upon divorce, he would be required to provide his wife with rehabilitative (temporary) alimony, since she has a degree and could work outside the home. When deciding the amount of alimony the court would look to the reason for divorce, the income of the parties and the age of the parties. He and his wife would also have to decide on custody of the children. In this case, the wife would probably keep custody since she was the primary care giver. Custody is also determined by the age and health of the parties, the best interests of the child and if they are old enough (here it probably would not be a factor), the request of the children. John would be granted liberal visitation and would have to pay child support. The amount would be determined by the court since the salary is over $150,000.00. In deciding the amount, the court would look to the couples respective incomes and the amount of visitation that John is granted. John would also have to pay half of Kristin's school tuition and half of the cost of the nanny.

Jocelyn would be granted use of the marital home for three years since she will have custody of the children.

As for their property, the court would divide the property into three piles, his, hers and theirs. Non-marital property is any thing acquired before the marriage, by gift, or inheritance, or with proceeds of inheritance. On finding the marital property the court will divide the property equitably considering amount of incomes, amount of alimony, equity and fault of divorce.

John will also be required to pay half, if not more, of the $25,000.00 bill to the hospital because it occurred while married.

REPRESENTATIVE ANSWER 2

I would advise John that he may seek a limited divorce. I would advise him that this would require a one-year separation from Jocelyn. This would give him time to consider an absolute divorce.

I would advise John that Maryland is an equitable property distribution state and this would be particularly pertinent to him since he started with a pay of 60 K as an architect and from becoming a partner went to $285,000.00. The court will seek to balance the equities and look at his income and Jocelyn's in awarding alimony or child support. Here, Jocelyn graduated from college with an accounting degree. However, she stays at home taking care of the kids and worked outside the home less than one year. In making an award of child support the court will use the best interests of the child standard. The court may find that since Kristin attends a private school with tuition of $12,000.00 a year and Jocelyn pays a nanny $35,000.00 and an outstanding health care bill related to child care of $25,000.00 that an amount (out of John's income) will be higher. Moreover, since the marital home is used for both his wife and children, there is a reasonable likelihood that the court will order that Jocelyn stay in the home with the children Kristin, John Jr., and Linda.

Since John also earns additional income as a ski instructor this income will be considered by the court for determining potential child support/alimony award.

Since John and Jocelyn argue constantly, the court may find that the marriage is irretrievably broken, and grant the couple a divorce.

John should know that in addition to being responsible for a large child support award and split of marital funds in favor of Jocelyn that his taking good care of the family financially and paying all the bills during the marriage while honorable, set him up to have to pay alimony to Jocelyn. Yes, she have an accounting degree, but the court may discount this and find that her lifestyle is so disparate that John must pay her alimony to sustain their style of living for her.

Adultery John should know about this is important with regard to the court's awarding custody of the children.

As grounds for an absolute divorce, Jocelyn may use the adultery charge. Here, the evidence is sketchy at best since Jocelyn only found a large sum if money missing not accounted for by the normal spending. And also, of which she was not aware.

I would ask John to level with me about an adulterous affair to avoid surprise in his case and importantly to develop his argument for custody of the three children since the court would look to the best interests of the children in deciding custody issues and John's character goes to this.

QUESTION 3

Wood Products, Inc. is a small closely held Maryland corporation in Garrett County, principally engaged in the manufacture of baseball bats from ash logs. The company purchases logs from timber owners in the vicinity of its mill. Independent truckers transport the logs to the mill where they are scaled by company employees to determine quality and grade. This information, together with the owner's name, is entered on a scaling slip in duplicate with one copy given to the hauler and the original forwarded to the company bookkeeper for payment to the owner. The slips are not sequentially numbered. Budd Twigg has been a regular hauler to the mill for many years and is well known to the employees at the scaling house. He is also quite familiar with procedures there.

In actual practice, both copies of the scaling slip often were given to the hauler who delivered them to the bookkeeper. The hauler then received the payment check payable to the owner whose name appeared on the scaling slip. In Bud's case, he often was entrusted to deliver the check to the owner of the logs.

On June 1, 1999, Twigg stole a pad of scaling slips from the scaling house and, thereafter, began filling them in to show substantial, wholly fictitious delivery of logs, together with the names of local timber owners as suppliers. He then delivered the slips to the company bookkeeper who prepared checks drawn on City Trust Co., payable to the order of the identified owners. The bookkeeper routinely entrusted Twigg to deliver the checks to the owners. Twigg then forged the payee's signature and either cashed the checks or deposited them to his account at the Dollar Bank where he was well known.

Over a period of three months, Twigg cashed or deposited three checks, one of which he personally indorsed beneath the forged signature of the payee. The remaining checks contained only the forged indorsement of the payee. During this time, the suppliers whose signatures were forged by Twigg had long-standing checking accounts at Dollar Bank.

Upon discovery of Twigg's scheme, Wood Products, Inc. sought to recover the funds paid by the banks over forged indorsements.

What is the relative liability among Wood Products, Dollar Bank and City Trust for the loss caused by Twigg's activities? Identify the facts and statutory provisions which support your conclusions.

REPRESENTATIVE ANSWER 1

Wood Products may be precluded form collecting from either City Trust or Dollar Bank. Section 3-406(a) precludes a person from asserting forgery or alteration against another who takes an instrument for payment or collection if that party failed to exercise ordinary care and that failure substantially contributed to the alteration or forgery.

Wood Products may have failed to exercise ordinary care in several ways. The scaling

slips are not sequentially numbered so that if some of the slips are stolen it would be noticed that the slips are out of order. Additionally, both copies of the slips are given to the haulers for delivery to the bookkeeper. One copy of the slip should be sent to the bookkeeper independent of the hauler. Further, the checks for the timber owners were given to the haulers. The checks should have been sent to the owners directly. The haulers should not have been given the checks.

Dollar Bank: If Wood Products wants to assert that it is not precluded from asserting its loss against Dollar Bank, Wood Products has to show that Dollar Bank also didn't exercise ordinary care when paying or taking the instrument under Section 3-406(b) and (c). If Wood Products can show that Dollar Bank failed to exercise ordinary care, then Wood Products can get the loss allocated between Wood Products and Dollar Bank. Here, Dollar Bank took three checks from Bud Twigg with forged indorsements. Those indorsements were for suppliers who had accounts at Dollar Bank. Dollar Bank could have looked to see if the signatures for those suppliers were appropriate. If it is considered to be a reasonable commercial standard to check the signature of the indorser, then Dollar Bank may be liable for failure to exercise ordinary care as ordinary care is defined in Section 3-103(7).

City Trust: Wood Products would also have to show that City Trust failed to exercise ordinary care under Section 3-406 and here the facts do not show that City Trust failed to exercise ordinary care.

REPRESENTATIVE ANSWER 2

According to Section 3-406, a person whose failure to exercise ordinary care substantially contributes to the making of a forged signature on an instrument is precluded from asserting the forgery against a person who pays the instrument or takes it for value or collection. This section is applicable to City Trust's liability for Twigg's actions. City Trust paid the instrument in good faith. They had no reason to suspect that there was anything out of the ordinary connected with the drafts that they paid on. City Trust pays on the demand of Wood Products and in this case that was exactly what was done on all three drafts.

Section 3-406 also says that if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and person asserting the preclusion. This part applies directly to Dollar Bank's liability. Although Wood Products was negligent, Dollar Bank bears some of the liability. The facts specifically say that Twigg was well known at Dollar Bank. He forged the indorsements of two other long-standing account holders. If Twigg were well known, the bank did not exercise reasonable care in cashing checks with only the forged indorsements of the payee. It is conceivable that the bank is not negligent on the other draft where Twigg personally indorsed beneath the forged signatures. But where Twigg, a regularly known account holder, forged the indorsement of other long-standing account holders at the same bank, Dollar Bank is clearly liable to the extent their failure to exercise reasonable care contributed to the loss.

Finally, a great deal of liability lies with Wood Products. Wood Product has procedures

set out to prevent fraud of this nature. The procedures that were set out for the company to follow were not complied with. The process of one copy of the scaling slip given to the hauler and one copy given to the bookkeeper was not followed. Reasonable care was not exercised when both copies were given to the hauler. Reasonable care was also not taken when the bookkeeper entrusted the checks to the hauler as opposed to sending them to the owners. This was a violation of the company policy and could have averted the entire problem if followed.

Finally, Wood Products may not have exercised reasonable care in guarding the scaling slip that Twigg stole from the scaling house. If reasonable care had been taken in guarding the slips the forgery could have been averted.

QUESTION 4

Ann is a sole practitioner in Cecil County, Maryland, where her practice is primarily in real estate law. She has three children approaching college age. Her need for additional income has caused her to look into legal methods of promoting her practice. She has also decided to list and sell real estate. She is licensed to practice law in Maryland and has become a licensed real estate broker in neighboring Pennsylvania and Delaware as well as in Maryland.

She has considered several means of communications to make the public aware of her services. Her plans include the following:

1. She has decided to create a single web page on the Internet which can be accessed by prospective clients for her law and real estate businesses. Although she does not plan to directly send the web page to anyone, it is anticipated that it would be viewed in all three states.

2. She plans to develop real estate listings by making direct calls to potential customers. She would like to tell the customers that she is also a lawyer and that she can save them money by performing both broker and legal functions.

3. She desires to do an advertising handout for real estate "open houses" which are used to solicit real estate business. This handout would indicate that she is a real estate broker and an attorney. It would be given to prospective clients who attend the open house along with a refrigerator magnet calendar containing name, address and phone number of her combined law and real estate office.

4. Finally, she has prepared brochures advertising that she is a practicing real estate attorney and she plans to place these "flyers" on the windshields of cars in parking lots in Cecil County. The "flyers" state that she is a licensed real estate broker and practicing attorney and add the following at the bottom of her flyer: "Why pay for two, when one will do the work of two."

Before proceeding with her plans, she seeks your advice.

What advice would you, as an attorney admitted to practice in Maryland, give her?

REPRESENTATIVE ANSWER 1

Lawyers commercial speech has limited First Amendment rights. They are subject to the intermediate scrutiny standard. They can't be unjustified, misleading or overreaching.

1. Web Page:

The web page needs to make sure has contents that are not unjustified and it needs to be clear to the public. Needs to show where she is authorized to practice. This means she cannot help Pennsylvania and Delaware residents with their legal needs. She will need to disclose this

fact.

2. Potential Conflicts:

The real estate agent is usually an agent for the seller and has more knowledge of the value of the property than any prospective client. She needs to tell the client to get another lawyer if the value is greater or lower than the client believes. The transactions have to be fair to the client. She can have joint representation if she reasonably believes that (1) representation will not limit materially one party, and if (2) both parties consent with full disclosure. This could be her best option for carrying out both representations, otherwise, the buyer would have to look for a lawyer to make sure transactions are fair and reasonable with the lawyer.

3. No direct Calls.

These are only limited to clients, friends and relatives. These can be found to be overreaching. Customers need to know about the conflict (lawyer is seller's agent) and that they need outside counsel unless of course they consent.

4. Advertisements.

She should put "this is an advertisement" to be safe. This does not seem to be overreaching, or as a catalyst for unjustified expectations.

5. "Why Pay for Two"

Is she representing herself as a "buyer's agent" The buyer has no notice of any conflict of interest. Duty of loyalty? A show of self dealing at the expense of Buyer. She needs to clarify who she is working for (seller or buyer). A client can pay for a lawyer to do services for her and not for the seller. Receiving money from the seller and the buyer is a conflict of interest. Can't do it.

REPRESENTATIVE ANSWER 2

My initial advice would be to keep her legal practice and real estate practices separate. This creates an inherent conflict of interest throughout the process, one that could subject her to disciplinary procedures down the road.

1. The Web Page.

Factually, this is okay. There is nothing wrong, as an attorney, with advertising services on the Internet, as long as requirements of disclosure are met - her practice, address, name, state licensed to practice law in.

If she anticipates that it will be viewed in all three states, she has to disclose that, although she is a real estate agent in Delaware, she is only a licensed attorney in Maryland, otherwise, this is a material misrepresentation.

2. Direct calls to customers to solicit business as a real estate broker are fine, but not when she holds herself out as an attorney. The Maryland Code of Professional Conduct does not allow direct phone solicitations of potential clients. If she wants to make the calls only as a real estate broker and does not subsequently perform legal services on the same client, then it is fine, but even if she didn't initially represent herself as an attorney but took on the role later, it smacks of impropriety, and could bring disciplinary action. It also discusses money - a no-no.

3. Again, the dual relationship causes a problem. First, direct solicitation of potential clients is often okay but maybe not in an "open house" setting, where customers/clients are "tuned in" by the setting. Second, if you want to advertise yourself as an attorney on a magnet, it would have to include your name, firm name, where you are licensed to practice, any specialties, etc. The magnet doesn't include the information of where she is able to practice and thus is improper.

4. All sorts of problems here. First, the Maryland Bar would most likely frown on the distribution of flyers on cars, though it is in Cecil County. The truly egregious part, however, is talking about the reduction of fees - no mention of fees should ever appear in an advertisement, especially one that essentially claims discount prices for legal services.

I would advise her to keep her practices separate, or else only advertise in Maryland, and to review her course on professional responsibility.

QUESTION 5

Part A

Theodore owns and lives in a single family home in a residential development in Fallston, Maryland. He has lived there since 1980. In 1999, Lumpy purchased a lot adjacent to Theodore's. Lumpy installed a large under ground tank and opened a gasoline station. The use was permitted by Local Zoning Laws. There were no other gasoline stations in the area.

Theodore's water is supplied by a well located on his property. In August of 2000, Theodore's well water began to taste and smell of gasoline. Subsequent tests confirmed that gasoline from the station had contaminated Theodore's well.

Theodore informed Lumpy of the problem, Lumpy had the tank excavated and inspected. The tank had developed a small leak and there was evidence that gasoline had saturated the ground over a period of time. Lumpy did not monitor the tank on a regular basis and, therefore, was unaware of the leak.

Other than claims under environmental statutes, describe the theories of liability by which Theodore can make a claim against Lumpy. Explain fully.

PART B

Eddie pulled into Lumpy's station to buy gasoline. Upon exiting his car, Eddie stepped on some oil on the parking lot which caused him to slip and fall injuring his back.

Lumpy's station has a large sign at the road that reads "KO GAS." In the window is a sign that reads "We only sell KO products." All of the employees wear a KO uniform with a KO patch on the sleeve. The gasoline pumps were leased from KO. The station building, pumps and signs are all in KO's corporate colors of red and white.

Eddie always uses KO gasoline and was attracted to Lumpy's station by the KO GAS sign.

Eddie sued KO seeking damages for his injuries. What legal theories could be used to hold KO liable and what will be the probable result? Explain.

REPRESENTATIVE ANSWER 1

A. There are 4 claims Theodore (T) can make versus Lumpy (L).

Negligence

The first is negligence.

Duty and Breach

L has the duty to act reasonably using ordinary care. This standard may be increased to that of a gas station entity if there is superior knowledge of protocol for underground tanks maintenance.

Also, T can exercise a res ispa loquitur claim to bypass duty/breach/causation by asserting that there is no other explanation for what happened than L's negligence. Given there was no problem before L arrived and no other gas stations in the area, this is a potential claim to use.

Regardless, T can assert that L did not act reasonably using industry standard for gas stations or a reasonable property owner with gas tanks in ground.

Causation is established by but/for the breach the harm would not have occurred and that the result was a foreseeable one and the Plaintiff, T, was foreseeable.

These tests are both met under the facts because there was a leak in the tanks and the ground became saturated and that contaminated T's well.

Harm/damages can be proven in relationship to T's land and the well water.

Trespass

Trespass is an intentional tort going onto the property or causing something to go onto the property without permission of the owner. This includes air and subterranean space within reason.

It is not clear that L intended to have oil go onto T's property since the tank was underground and there was no prior knowledge of the leak.

Nuisance – is the unreasonable interference of a land owner's quiet possession of their premises. Generally, it's related to noise, smoke, smells. It may be potential claim to pursue.

Strict Liability (SL)

SL may attach for defective conditions that are unreasonably dangerous or for inherently dangerous activities. The latter is inapplicable because there are ways to make gasoline storage safer (no smoking etc.).

For strict liability, the product must have been defectively manufactured or designed. Here, there is no indication that L had any influence in the design or manufacturing of the tank.

Thus, strict liability is not valid here.

B. Eddie will sue KO under direct negligence and vicarious liability (respondeat superior).

Negligence

KO can be directly liable if it was negligent in the hiring or supervision of the station and its attendants.

There is a remote possibility of success on the direct claim.

Vicarious Liability

In order for KO to be liable indirectly for the negligence of KO, it must be shown L's station was an agent of KO.

To be an agent, L must be acting within the scope of employment and KO must exercise right of control over L's station.

L's station was within the scope because it was dispensing gas.

As far as right of control the facts show that the sign read "KO gas", employees wore KO uniforms, pumps leased from KO, station colors were KO colors.

Thus it appears to be facts to support an agency argument. If for no other reason it can be argued that L's station had apparent authority to act for KO.

By that, a 3rd person can reasonably infer that KO was supporting a belief that L's station was part of KO.

Thus, any negligence on L's part can be attributed to KO as well.

REPRESENTATIVE ANSWER 2

Part A

Negligence – T could claim that L was negligent in not monitoring the tank. Negligence requires duty, breach, cause in fact, proximate cause and damages. L had a duty to act reasonably to all foreseeable plaintiffs. T, as L's neighbor, was foreseeable. L breached what that duty by not inspecting the tank, if not doing so was unreasonable. I am not familiar with custom in the industry or the amount of difficulty to do so. However – I believe T has a strong argument that L breached his duty here by not taking any precautions to ensure that harm did not come to his neighbor, a foreseeable plaintiff. Causation and damages are easy to prove here, the real issue will be breach.

Trespass/Nuisance – T could attempt a trespass claim, since gasoline leaked from the tank onto T's property. Because L did not intend for the tank to leak, and intent to invade another's property is an element of trespass, T's trespass claim will fail.

Nuisance – T has a strong nuisance claim, as L's use of his property substantially interfered with T's conveyance of his property. L's only defense would be that T was hypersensitive because he had a well, where most ordinary people use indoor plumbing. However, L's defense will fail, as I believe using a well is common, and foreseeable as the ordinary use of one's land. Because L's tank leaked and interfered with T's reasonable, ordinary enjoyment of T's land, L will be liable under a nuisance claim.

Strict Liability – There is no strict liability here, although one could be possibly asserted against the tank's manufacturer.

Part B

E will assert a negligence claim against KO, and will attempt to tie KO to Lumpy's station under a Principal/Agent theory of Respondeat Superior.

For KO to be liable, E must first show that L was KO's agent. Then E must assert that as KO's agent, KO should be held liable either as an employee/employer, or independent contractor theories. The first theory can be immediately dismissed, as a lessor/lessee situation, much like franchisor/franchisee will not lead to liability for the lessor without the showing of substantial control of the lessee by the lessor. The KO signs and the uniforms and the colors are not enough by themselves to tie the lessor KO to Lumpy's station. E would have to prove KO was so involved in the operation of L's station, that KO controlled L's employees and such, in order to hold KO vicariously liable.

It seems clear that, without more showings/proof of control by KO, that L's station was merely an independent contractor of the KO brand name. Since nothing on the facts show the duty was non-delegable, or that the operation of the business was inherently dangerous, E's tort action will be limited to L's station only. KO will not be held vicariously liable for the acts of its independent contract lessee here.

QUESTION 6

Sam was stopped at a traffic light in Caroline County, Maryland, when he was struck from behind by a van driven by Yates. The impact damaged Sam's truck and shook Sam up. Immediately after the accident, Yates got out of the van, said the accident was his fault, profusely apologized and promised to pay for the damage to Sam's vehicle. Sam agreed; the two men shook hands, exchanged addresses and departed. For a few days after the accident, Sam sometimes felt a little dizzy but the symptoms cleared up before he got around to seeing a doctor. Sam took his truck to a body shop and had it repaired for $500.

Sam mailed a copy of the repair bill to Yates and requested reimbursement. Yates did not respond. Sam decided to sue Yates. He didn't think $500 was enough to bother a lawyer with so he decided to do it himself.

Sam went to the Clerk's Office in the District Court of Maryland for Caroline County to file suit against Yates. All the paperwork there confused him a little, but after discussing the situation with one of the assistant court clerks, Sam filled out a District Court statement of claim stating that he was suing for breach of contract. He added a written explanation that Yates had agreed to pay for some repair work to his car but had failed to do so. The statement of claim and summons were served on Yates by a deputy sheriff.

Yates did not file a Notice of Intention to Defend or any other pleading, nor did he appear in court when the case was set for trial. The judge entered a default judgement on behalf of Sam against Yates for $500 plus court costs. Sam did not attempt to collect on the judgment.

One month later, Sam's dizzy spells came back. Sam went to see a doctor who performed some tests and told Sam that he had suffered permanent injuries as a result of the accident.

This time, Sam went to see a lawyer to look into things for him. It turned out that the van Yates was driving was owned by his employer, Bill, a wealthy builder who also lived in Caroline County. Yates had been convicted of drunk driving on seven prior occasions. On the day the accident occurred, Bill had lent Yates the van so Yates could go fishing. He knew that Yates didn't have a license and that Yates had been drinking pretty steadily throughout the day.

Sam's lawyer filed suit in the Circuit Court for Caroline County against Yates and Bill, alleging negligence on the part of Yates and Bill and negligent entrustment against Bill. The Circuit Court suit sought damages only for Sam's personal injuries.

Does Sam's prior suit provide a defense for either Yates or Bill? What are the chances of the defense being successful? Explain your answers thoroughly, Do not address the merits of the lawsuit.

REPRESENTATIVE ANSWER 1

The issue at hand here is whether Sam's prior suit will provide a defense for either Yates or Bill.

With respect to Yates, he was previously sued in District Court on a theory of breach of contract. The question is whether Sam should have brought all of his claims arising out of the accident in that suit. I think he should have. When you have a defendant being sued for breach of contract that arose out of the crash, Sam should have brought all of his possible claims against this defendant then as to Yates, any agency based liability would be barred arising from that crash.

However, Sam should still be able to successfully maintain the negligent contract action against Bill because this cause of action did not arise out of the crash in and of itself. Negligent entrustment is a different cause of action from negligence, which Sam would have asserted against Yates.

In the interest of judicial economy, should bring all claims against a singe defendant(s) arising from the same occurrence in a single court action.

The defense for Yates is res judicata which should be plead affirmatively in the initial pleading.

REPRESENTATIVE ANSWER 2

The issue here is collateral estoppel which prevents a 2nd suit between parties that was previously litigated or should have been brought in the previous suit. The main element is the final judgment on the merits in the previous suit, the same parties and the promotion of justice and judicial economy.

Here, Sam brought suit in the District Court and there was a default judgment. This is sufficient for a final judgment on the merits. Second, the parties are the same in the 2nd suit with the addition of Bill. However, the theory of the 1st suit was breach of contract and in the 2nd suit, it's negligence. Thus although there are different claims, the doctrine of claim preclusion prevents Sam from bringing the second suit again because the claim arose out of the same occurrence or transaction (accident). The doctrine prevents the bringing of a 2nd suit for a different claim which arose out of the same transaction or occurrence because of judicial economy; they must have been litigated together. On the other hand, the parties are different in the second - Bill. Thus Sam can sue Bill. However, when claim or issue preclusion is used defensively, the courts do allow the defendant the benefit from the plaintiff's faux pas. Thus, Sam may be allowed to bring negligence suit against Yates.

QUESTION 7

In January 1998, Mark and Mary contracted with Smith, a licensed Maryland architect, to design and supervise construction of a deck and patio for their new home in Anne Arundel County, Maryland. In February 1998, Jones, another licensed Maryland architect, and Smith formed a limited liability company to conduct their architecture practice. Articles of Organization for Jones and Smith, LLC ("LLC") were filed with and accepted by the Maryland State Department of Assessments and Taxation. Smith and Jones decided that they did not want an operating agreement because they were close friends. Smith and Jones each assigned to the LLC all individual business equipment, architectural contracts for work in process, including the contract with Mary and Mark, and accounts receivable related to their respective practices. Smith's spouse was the bookkeeper, manager and authorized person for the LLC. Smith's spouse accepted the assignments from Smith and Jones on behalf of the LLC in February 1998, and Mark and Mary consented to the assignment of their contract with Smith to the LLC.

Smith designed the deck during March and April 1998, and Smith and Jones supervised construction of the deck during May 1998. The deck was completed in June 1998, and Mark and Mary paid the LLC for all services and materials in accordance with the contract. The new LLC immediately advertised its services in a brochure that featured photographs and a description of Mark and Mary's deck as a representative project of the LLC. After reading the brochure, Brown, another licensed Maryland architect, became a member of the LLC in January 2000, because Brown believed Smith and Jones were creative architects.

In May 2000, Mark and Mary's deck collapsed while they were entertaining guests. Mary and five of her guests were seriously injured. Mark and Mary also incurred significant property damage, including structural damage to their house, and the loss of china, furniture, crystal, and other personal belongings. An investigator for their property insurer told Mark and Mary that the cause of the collapse was due to poor architectural design and faulty construction of the deck.

In November 2000, Mark and Mary seek advice from a lawyer about possible claims to recover for the damages to their house, their personal property, and for Mary's injuries.

Assuming that the design and construction were defective, what advice should the lawyer give to Mark and Mary about the potential liability of each of the following parties: Smith, Jones, Brown, Smith's spouse, and the LLC? Explain your answer fully.

REPRESENTATIVE ANSWER 1

Professionals Maryland law permits professionals to take advantage of the personal protection against their business liability under corporations, (professional), limited liability companies, and limited partnerships. However, a professional can never waive their personal liability for malpractice or negligence in their professional capacity.

Smith As a licensed professional architect who had primary responsibility for the job, Mark and Mary (M&M) can hold him personally liable for the injury and damage caused by his negligence. Smith cannot hide behind the veil of protection afforded the LLC because this matter is not concerning mere business losses – this concerns his professional liability.

Jones Because Jones actively supervised the deck construction, he should be considered for personal liability. His liability would depend on whether his role was limited to that of a supervisor without responsibility for design and subsequent modifications. If Jones was only involved with supervising the construction, then he can only be exposed to personal malpractice liability for that aspect. He could argue that merely supervising did not involve his professional management as an architect, but this seems like a weak argument because M&M consented to Jones' role when they approved of the assignment.

Brown Would escape personal liability because he had nothing to do with M&M's deck design or construction. He would be liable for the LLC's losses, but only up to the amount of his investment.

Smith's Spouse She too would escape personal liability because she's not an architect and merely an employee of the firm. Nothing in the facts suggests she was a member, and in a company of professionals, only professionals can be members, stockholders or partners.

The LLC The company is fully liable and should be joined with Smith and Jones in the suit.

REPRESENTATIVE ANSWER 2

The first issue to be discussed is the liability of the LLC. Mark and Mary had their deck designed and constructed by an LLC licensed to perform the professional service of architectural design and subsequent construction. An LLC is a limited liability company which provides limited liability to its members for the debts and obligations of the LLC. Further, this question involves an LLC that renders professional services. Such LLC's also provide limited liability to their members but such liability does not extend to the negligent performance of professional services rendered by any member of the LLC. In such situations, the member is liable for his own negligence to the same extent as would be if he were a sole practitioner. In addition, the LLC is liable for the members' negligence but no other member is liable for any other members' negligence unless the other member(s) were negligent in supervising, controlling or participating with that member.

Thus, the LLC would be liable to Mary for her personal injuries and possibly liable to both Mary and Mark for any claim of loss of consortium they might have. Further, the LLC will be liable for the property damage and personal damage caused by its members' negligence.

Next, Smith is liable for his own negligence in defectively designing and constructing the deck. It was stated earlier, he renders a professional service so he will not be liable for any other debt or obligation of the LLC but he will be for his own negligence. It is clear from the facts that the design was defective and thus, he will likely be held negligent. He will be liable for any

and all harm actually and proximately caused by his defective design. He will also be liable for any harm caused by him for negligent supervision of the construction of the deck.

Jones, on the other hand, should only be personally liable for the harm flowing from his own negligence. The facts state that he helped Smith supervise construction of the deck but not that he designed it at all. Thus, Jones should be liable only for his own negligence in supervising the construction.

Brown should not be held liable for any of the harm caused by the negligence of Smith and Jones. An LLC provides limited liability to members for the negligence of other members (as was noted earlier) and the facts indicate that Brown entered the LLC after completion of the deck and after the other members' negligence occurred which caused the harm to Mark and Mary.

Finally, Smith's spouse should not be liable unless she somehow negligently supervised or hired either negligent member which the facts make no indication of. Thus, as was the case with Brown, Smith's wife should be protected from personal liability by the LLC status of the company.

QUESTION 8

Mike owned a three acre parcel of land in Carroll County, Maryland. On January 31, 1970, Mike conveyed to Olive one acre of the parcel that contained an underground spring (the "Spring Parcel"). In the deed conveying the Spring Parcel to Olive, Mike reserved for himself, and his heirs and assigns, to use jointly with Olive, and her heirs and assigns, the right to use water from the spring and the right of ingress and egress from the Spring Parcel to obtain the water.

On May 17, 1972, Mike conveyed the remaining two acres (the "Dry Parcel") to Xavier, together with all rights, roads, waters and ways belonging thereto. Xavier used the water from the Spring Parcel on a daily basis because the Dry Parcel's only source of water was from the Spring Parcel. On March 22, 1975, Olive conveyed the Spring Parcel to Kay. In April 1975, Kay orally granted Xavier permission to construct an underground waterline that would run from the spring to the Dry Parcel. Xavier completed construction of and commenced operation of the waterline on June 6, 1975. On January 19, 1993, Xavier sold the Dry Parcel to Hilary. Hilary used the waterline and the water from the spring continuously until July 25, 1994, when Kay capped the waterline on the Spring Parcel. As a result, the use of the water from the spring was stopped.

On August 1, 1994, Hilary filed suit for injunctive relief in the Circuit Court for Carroll County, Maryland claiming the right to use the water from the spring without interference or obstruction by Kay.

How should the trial court rule? Explain the reasons for the ruling.

REPRESENTATIVE ANSWER 1

The trial court should rule for Hilary.

A prescriptive easement can be acquired if one follows the steps similar to adverse possession.

The use of the water from Spring Parcel must meet the following requirements in order for a prescriptive easement to result.

Hostile – the use must be adverse to the owner, and permission granted will negate this element. Xavier began to use the water in 1972. When Kay obtained Spring Parcel she granted Xavier oral permission to construct the waterline to use the water. This grant of permission may negate the hostility requirement as will be discussed later.

Uninterrupted – the use must be continuous and uninterrupted. Xavier used the water <u>daily</u> starting in 1972. Hilary used the water <u>continuously</u> from January 1993 to July 1994. This element is met with the use of tacking Hilary's and Xavier's time as permitted through color of title.

Lasting – the use must continue for the required statutory period of twenty years. The water use began in May 1972 and continued through July 1994, 20 years has been satisfied.

Exclusive – use must be exclusive.
Claim of right – Hilary's right is claimed through predecessors in title.

Kay's permission to construct the waterline was given orally. Any interest in land must be written in order to satisfy the Statute of Frauds. The Statute of Frauds requires special proof for deals concerning land. Since the permission was not reduced to a writing, Hilary may assert that permission was not granted, thus hostile, so the elements have been satisfied and she has a rightful use to the water. She will argue the use continued adversely (because there was no permission because it was oral) for 20 years. Thus, Hilary may be able to prevail.

REPRESENTATIVE ANSWER 2

Mike properly reserved for himself and his heirs and assigns two easements in the Spring Parcel. Mike has an express easement in the use of Spring Parcel's water, and an express easement to enter Spring Parcel to obtain the water. These easements were in writing and properly recorded, and so they satisfied the Statute of Frauds.

Both easements touch and concern the subservient estate (Spring Parcel), and they therefore survive Oliver's transfer of the Spring Parcel to Kay. Therefore, Kay's Spring Parcel was still subject to both easements when she turned off the waterline.

This is not yet a victory for Hilary however. As the dominant estate, Dry Parcel passed to Xavier and then to Hilary with the right to enjoy both easements.

But, when Kay granted Xavier permission to run a waterline underground, a new easement was attempted. The permission was oral and not limited to a year or less, and therefore does not meet the Statute of Frauds. Any transfer of an interest in real property for a duration of more than a year is subject to the Statute of Frauds.

The Statute of Frauds is not satisfied here because there is not written evidence of the permission, nor has the permission been properly recorded according to Maryland's recording statute.

Though not subject to an easement, the water pipe was openly and continuously in use for more than 20 years. Hilary can not claim an easement by prescription however, because Kay gave her permission to Xavier to construct and use the pipeline. There being no adversity to Xavier's and later Hilary's use of the pipeline, neither gained a prescriptive easement.

The result, then, is that Kay was within her rights to turn the water pipeline off. As explained above, however, Hilary does retain an easement in the use of Spring Parcel's water, as well as an easement for ingress and egress to enter Kay's property to get the water. While she may not use the pipeline, Hilary can carry all the buckets of water she needs off Spring Parcel.

But Hilary would likely win on a claim for an implied easement by necessity, since the water pipeline is the only source of water for Dry Parcel, and was transferred from a common grantor, Mike.

The court should rule Hilary has an implied easement in the use of the pipeline, and grant Hilary's request for injunctive relief.

QUESTION 9

Since 1995, First Company (the "Company") has deposited all net income in an account at Maryland Bank (the "Bank"). The deposit is governed by an agreement between the parties called a Guaranteed Investment Contract (the "GIC"). Company has earned 6% annually on the funds in the GIC account since 1995. As of February 20, 2002, the balance in the account was $85 million.

On that day, the Company received a letter from the Bank stating that the Bank believed that it is required to invest no more than $10 million in the GIC account. The Bank offered to invest the remaining balance in accounts with a 3% rate of return. The resulting reduction in cash flow will jeopardize the Company's ability to stay in business. The Company's management wishes to force the Bank to continue to invest the entire amount pursuant to the GIC. They have retained you, a Maryland attorney, to review the matter and advise the Company.

After reviewing the pertinent material, you ascertain the following:

1. The GIC is dated February 1, 1995 and terminates on January 31, 2005. It requires the Bank to invest all "Funds" received from the Company at a guaranteed rate of 6%. The GIC defines Funds as "an amount not to exceed the net income earned by the Company in 1995". The total amount deposited in 1995 was $10 million dollars. The additional $75 million dollars represents income received by the Company after 1995. The GIC does not require the Company to invest all income in the GIC but the Company has done this since 1995.

2. The GIC was awarded to the Bank after a competitive bidding process. The bid specifications stated that the successful bidder "shall invest all funds deposited by the Company after February 1, 1995 at a guaranteed rate of return of 6%". The bid specifications were incorporated into the GIC as an exhibit.

3. The GIC contains a provision setting a $100 million dollar "cap" on the amount of Funds to be invested under the GIC. Correspondence indicates that the Bank required this provision and that the amount of the cap was negotiated between the parties and their respective counsel.

4. The amount invested annually under the GIC has exceeded $10 million dollars consistently since 1996. Until the recent decline in interest rates, the GIC was very profitable for the Bank because it was able to obtain a rate of return in excess of six percent.

5. The GIC is the only agreement between the Bank and the Company. It contains clauses stating that all prior and contemporaneous agreements merge into the GIC, that the GIC is the entire agreement between the parties, that the GIC only may be modified by a written instrument signed by both parties and that the GIC is governed by Maryland law. It was prepared by lawyers for the Bank but lawyers for the Company were active in the negotiation of the GIC.

Based on these facts, what arguments can be made that the Bank is required to invest the entire $85 million pursuant to the GIC?

REPRESENTATIVE ANSWER 1

The parol evidence rule forbids the use of extrinsic evidence in a contract dispute where the contract on its face is clear and purports to be a complete agreement among the parties. The contract has a provision which precludes modification by oral agreement. Both parties participated in the negotiations and reviewed it before signing it. The problem arises not from provision which one party claims not to be in the contract, per se, but from contradictory language in the document. The basic dispute is whether the bank should be required to invest the entire $85 million in the account. The agreement calls for the bank to invest "an amount not to exceed the net income earned by the company in 1995." In 1995 the company invested $10 million. The bank will argue that this limits the amount of investment to $10 million per year between February 1, 1995 and January 31, 2005. This agreement is further contradicted by the contract's very own words. The contract goes on to say that the bank "shall invest all founds deposited by the Company after February 1, 1995 at a guaranteed rate of return of 6%." The language, I would argue, is without quantifying language as to any kind of limitation on the amount to be invested. It simply says all. I would also argue that the GIC contains a cap provision which limits the amount of funds to be invested under the GIC to $100,000,000.00. The current balance of the account is now at $85 million. That is $15 million below the cap. The cap has not been exceeded, therefore the bank is contractually obligated to invest the entire $85 million at 6% return, consistent with the agreement. I would also argue the bank is estopped from now trying to invoke any kind of prophylactic cap on the investment, since the Company has been consistently depositing more than $10 million per year but because the bank was getting a greater then 6% return, they did not raise the issue regarding the "excessive deposits." It is only now that no rate of return greater then 3% can be found, that the bank seeks to arbitrarily invoke a limit on the amounts. The GIC is the only writing and the only evidence of a contract between the parties. The court is bound by the clear language of the agreement and where contradictions arise, those contradictions should be reconciled in the Company's favor, for the reasons stated above.

REPRESENTATIVE ANSWER 2

The company and the bank have a contract between them known as a GIC. It states within the GIC that it is a complete agreement, so the contract is a complete integration and generally no additional terms can be incorporated as per the parol evidence rule. There does not appear to have been any unequal bargaining power on the part of either party as both sides had legal teams review the document. So the terms of the contract itself must be reviewed in detail.

If there are ambiguities in the contract as to a material term, parol evidence may be allowed to clarify even if the contract is a complete integration. Obviously, the rate of return guaranteed is material to the contract. The bank made the amount of funds to be deposited a material term by insisting on a negotiated cap. That cap is in direct conflict with the amount inferred under the definition of funds. So, the argument can be made that parol evidence of the amount invested annually since 1996 should be considered to determine the correct interpretation of the material term, ultimately showing that the bank has consistently invested more than the

amount as defined under “Funds”, and should therefore have to continue to act in the same manner by investing the entire $85M.

QUESTION 10

George is an employee of the Acme Corporation. His job is to make outside sales calls to Acme's customers. As a condition of his employment, George is required to use his automobile. Acme provides a monthly car allowance to George to cover his use of the car for business purposes.

On Monday, October 28, 2001, George was driving to work in his automobile. On his way to work, George picked up Hapless, a hitchhiker seeking a ride to the same neighborhood as the Acme office. While driving, George attempted to make a left turn at an intersection controlled by a traffic light. During the turn, a vehicle driven by Reckless who was coming from the opposite direction struck George's vehicle. The accident caused serious injuries to Reckless, George and Hapless.

An on-duty police officer witnessed the accident. She investigated immediately and wrote a report stating that George violated the State Motor Vehicle Law by making a left turn before the intersection was clear, but that Reckless had failed to avoid the collision because he was intoxicated and speeding.

Part A

On February 1, 2002, George files a lawsuit against Reckless and demands a jury trial in the proper Maryland Circuit Court.

i. What factual and legal arguments will George advance to support his claims? Discuss.

ii. What factual and legal arguments will Reckless advance to support his defenses? Discuss.

Part B

Hapless has also brought a lawsuit against Reckless, George and Acme alleging Reckless and George were both negligent and that George was acting as an employee of Acme.

What defenses could Acme raise under the facts stated above?

REPRESENTATIVE ANSWER 1

A i. George will most likely argue that Reckless was driving negligently. He will argue that Reckless had a duty to drive safely, breached that duty by driving into him, that his injuries were actually and legally caused by Reckless and that his damages are his injuries and harm to his car.

ii. Reckless will argue that George was contributory negligent. Unfortunately for George, Maryland retains this doctrine that provides that if a party was at all negligent, even if far less so than the defendant, then the plaintiff is denied all damages for that event. Since George turned across traffic, as the officer testified, George should be denied recovery.

However, to take the sting out of the harsh consequences of contributory negligence, there is the doctrine of last clear chance. George can, and will likely be successful in the claim that while George may have been contributory negligent, Reckless had the last clear chance to avoid the accident. As George was turned on his side (presumably as he was turning) and Reckless was presumably looking straight ahead, Reckless should have seen, slowed down or otherwise avoided George's turning car. Reckless had the last clear chance and George will likely recover, notwithstanding his contributory negligence.

B. Acme could argue that while the car was somewhat supported by his monthly car allowance, George was not at that time within the scope of his employment. George was on his way to work but was not at his job yet. He was not driving to see a client or customer. Principals are only liable for their agents' negligence while they are within the scope of their employment. It is a strong argument that a company should not be liable for the actions of their agents as they are coming and going to their assignments, or work. This would expose all companies to too much liability and would likely end in unjust results. While an argument could be made that George's trip to work is "required" to get there, it is too weak to argue that is within the scope. George is simply not working yet. Acme would not be liable.

REPRESENTATIVE ANSWER 2

A. **i.** Factual and Legal arguments by George.

George will argue that Reckless was negligent, that he (Reckless) has a duty to drive safely on the public roads, that Reckless breached his duty when he failed to yield and was driving while intoxicated, that but for his failure to drive safely George would not have sustained injuries or damage to his car.

George will argue that he was driving safely and abiding by driving rules so that he did not contribute in any way to the accident.

Finally, George would also argue that Reckless who was driving at a high rate of speed and under the influence of alcohol had the Last Clear Chance to avoid the accident but failed to do so given his intoxicated state at high rate of speed.

ii. Factual/Legal claims of Reckless

Reckless will assert that George was not abiding by Maryland State Law when he illegally took the left hand turn. Reckless will probably refer to the on duty police officer's report. The

police officer who allegedly witnessed the accident would say that George violated the State Motor Vehicle Law.

Thus, Reckless would aver that George was negligent having a duty to drive safely, breached that duty when he took the left hand turn into oncoming traffic, and that but for George's negligence he, Reckless, would not have sustained injury.

At the very least, he would argue that George was contributorily negligent and that Reckless could not do anything to avoid the accident.

B. Acme's defenses against a suit by Hapless.

i. On behalf of Acme, I would argue that George was not acting within the scope of his employment or for business purposes when he picked Hapless the hitchhiker up.

Under Respondeat Superior, I would argue that Acme is only responsible for activities that occur during the scope of employment and that driving to and from home is not within that scope.

ii. Finally, Acme could argue that the business allowance for transportation is only for business purposes and that picking up a hitchhiker is NOT a business purpose or has nothing to do with George's employment.

Thus, Acme could not be held liable for George's actions.

QUESTION 11

The State of Maryland is trying to recruit and retain the most efficient, professional employees to work for its various agencies. Therefore, a dress policy has been established. At the request of the Executive Branch, the Maryland Legislature enacted legislation that provides a dress code for its employees. The legislation prohibits State employees from wearing the following items of clothing: "tee-shirts, shorts, jeans, miniskirts, clothes with lettering or wording, or clothing determined to be offensive to others." The legislation also provides that violations of the dress code will result in immediate termination.

During the course of the year, the following State employees were terminated for violating the dress code:

- Jack, and accountant, is also a minister in a recognized denomination. Jack was admonished and terminated for wearing casual shirts with a cross visibly sewn onto the outside of the pocket with the words "In God we trust" emblazoned underneath the cross. An atheist and fellow employee told Jack's supervisor that he found the shirt offensive. The supervisor told Jack he could continue to wear the shirt if the lettering was removed. Jack pointed out that Bill, also in accounting, had the same cross and wording visibly tattooed on his forearm, but has never been admonished or otherwise disciplined. Jack continued to wear his shirt and was terminated.

- Mike, an intern, frequently wore a purple and gold vest worn by a notorious local gang, of which he is a member. Recognizing the vest as the official gang vest, a number of employees expressed fear and concern about Mike even though Mike was an exemplary and friendly employee. Mike continued to wear the vest and was eventually terminated.

- Mary is a world famous dress designer. Mary is not an employee of the State, however she pays her friend Sue, a State employee, to wear her designs which all carry her signature letter "M" on them. Sue has a highly visible job and a reputation for being stylish. Other State employees see Sue and want to wear Mary's designer dresses to work, but cannot because the signature letter is on them. A competitor's dress is similar to Mary's but instead of the "M" those dresses have an "!" symbol on them. State employees have worn the competitor's dress with no ramifications. Despite being admonished, Sue continued to wear Mary's dresses and was terminated.

Mary and the three (3) state employees come to see you, an experienced and duly licensed Maryland attorney, and ask you to represent them in an action against the State for the employees' terminations.

What legal arguments would you make for Jack, Mike, Sue and Mary? Discuss fully.

REPRESENTATIVE ANSWER 1

A conflict of interest may arise when an attorney is asked to represent more than one client in a particular case. A lawyer must not represent two persons who may have adverse interests. Here, Jack (J), Mike (M), Sue (S), and Mary (My) must be informed that they should seek independent counsel, but may consent to my representing each after consultation.

In order to proceed with the claims one must have standing. Standing to sue is obtained when one has actual, personal harm resulting from the violation. Here J, M and S have standing but My does not, as she is not the one who is prevented from wearing her designs.

A litigant may not generally sue the State directly for their claims. The matters would have to be adjudicated at a State agency for employee complaints. However, the three may sue on constitutional grounds. The 1st/14th Amendments guarantee free speech, exercise and assembly with limited exceptions. Speech, as a rule, may not be restricted unless it is unprotected (fighting words or obscenity). Here the legislation restricts lettering and wording determined to be offensive to others. The Equal Protection Clause prohibits the government from making undue restrictions on a certain class of people. Here people at these agencies are having their attire and speech restricted. Under the Equal Protection Clause (14th Amendment) this is a restriction of a fundamental right (expression/speech) and would be analyzed under the strict scrutiny test. Here the State would have the burden to show that the restriction was necessary for a compelling governmental interest and was the least restrictive alternative. J would have a viable claim as another employee has a tattoo with the same signs and wording and that employee was not terminated. M, although maybe not in the best taste, is not in violation with words but by colors that remind others of gang attire. He has a viable claim as well. S's claim is meritorious in that a designer's label is often on clothing and is not offensive. Additionally, a ! should be analyzed under the law as having the same weight as the letter M.

Additionally, the law may be found to be vague (what is offensive) or overbroad (all letters/words) and may be void on its face. Moreover, as written, the law does not offer notice or a hearing for the employees who are terminated. That is an obvious violation of both substantive and procedural Due Process (14th Amendment) protections. The law as applied to these plaintiffs is unconstitutional and should be abolished.

REPRESENTATIVE ANSWER 2

Conflict of interest – I would first advise that representing the 3 State employees and Mary may be a conflict of interest even though each have claims against the same statute. At the very least I must obtain consent from each.

Standing – Mary is not a State employee and therefore is not directly impacted by the law. However, she can claim 3rd party status if she can show a special relationship. Her contractual agreement with Sue and her economic dependence on Sue wearing the outfits might provide a sufficient connection to establish a special relationship.

1st Amendment issues – Jack would assert a claim that his 1st Amendment rights to freedom of religion have been restricted by the law. Under the Constitution the State must show that the statute is necessary to meet a compelling governmental interest. Here the dress code would not qualify because offensive to others will not be construed as a compelling reason to have a dress code. Also, Jack's rights of equal protection have been violated, as a fellow employee is allowed to have a religious tattoo. Here Jack would have to show that the law is facially discriminatory or discriminatory in application or purpose. He will be able to do so since the fellow employee is allowed to have the tattoo.

Mike would assert that his freedom of association right has been violated by this law. Again, since this is a fundamental right, the State is required to show that the law is necessary to a compelling governmental interest. Sue can also raise an equal protection challenge, or she and Mary can raise it. Here they must show that absent an infringement of a fundamental right, the law is not rationally related to a legitimate governmental interest. Because the dress code does further a legitimate concern (proper attire does increase productivity on the job) they may not win.

Due Process - Jack, Mike and Sue can all bring suit under the 14th Amendment's substantive and procedural due process clauses since they were terminated without notice and a proper hearing.

Vagueness, over breadth of the statute – The language "offensive to others" would also be considered vague, overbroad and unconstitutional.

QUESTION 12

Bill Bailey worked for the Home-Mart Stores for two years prior to being terminated by the Manager, Dolly, for being rude to customers. Two days after his termination, Bill Bailey waited in the Home-Mart parking lot until closing and approached Dolly from behind as she walked toward her car. Bill Bailey had his face covered with a scarf. Speaking with a muffled voice, he ordered Dolly to lie in the back seat of the car, face down. Bill Bailey removed the scarf after entering Dolly's vehicle. He drove to a nearby ATM and asked Dolly for her PIN number. He then withdrew $650 from her account. He returned to the Home-Mart, covered his face with the scarf and ordered Dolly from the car. He sped off before she had a chance to see him. Dolly ran to the store where she encountered the assistant manager. She cried, "Call the police, I've been robbed." The Assistant Manager asked, "Was it Bill Bailey? Louie from the day shift told me today that Bill Bailey is mad at you and swears to get even." Bill Bailey was arrested the next day. He signed a written waiver of his Miranda rights and agreed to answer the officers' questions. He told the officers that he had been at a friend's home on the night in question. The officers then asked him to sign a statement to that effect. Bill Bailey refused and then demanded to see his lawyer.

On January 1, 2002, Bill Bailey's trial for car jacking, kidnapping and theft was held. The Court allowed the following evidence over Bill Bailey's objections:

1. The Assistant Manager's statement that Bill Bailey had sworn to get even with Dolly;
2. Dolly's in court identification of Bill Bailey as the person that harmed her;
3. The police officer's testimony that Bill Bailey offered an alibi and then refused to put it in writing; and
4 Evidence that Bill Bailey had been convicted of grand theft in 1986.

Bill Bailey was only found guilty of the theft charge. One day prior to Bill Bailey's January 18, 2002 sentencing date, the State's newly enacted law requiring a mandatory 25-year sentence for second-time offenders took effect. On the day of sentencing the State's Attorney requested that the Court impose the enhanced penalty of 25 years and the Court did so. Bill Bailey immediately contacted you, a duly-licensed Maryland attorney, to handle his appeal.

What arguments would your raise on appeal based on the stated facts? Discuss fully.

REPRESENTATIVE ANSWER 1

The first argument I would raise would be based upon the in court testimony and evidence the trial court allowed in the January 1, 2002 trial. I would argue that some of the evidence was improperly admitted as hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. To be admitted, it must fall under an exception to the hearsay rule.

Assistant Manager's statement:

The Assistant Manager's statement that Bill Bailey had sworn to get even with Dolly is hearsay not within any exception. However, it's offered to prove the truth of the matter asserted that Bill intended to commit the crime. It cannot be considered a prior statement under the former testimony exception, nor an excited utterance.

Dolly's in-court identification:

I would argue that Dolly's in-court identification was wrongfully admitted in violation of the 5th and 6th Amendments (applicable to the State by way of the 14th Amendment) as being unduly suggestive. Dolly did not have anyone to compare Bill against as in a line-up. In addition, she was not competent to testify as during the crime the perpetrator's face was covered and she lacks personal knowledge to attest to the fact that she saw Bill commit the crime.

The Police Officer's testimony:

This is in clear violation of Bill's 5th Amendment privilege against self-incrimination (applicable to the State's via the 14th Amendment). Bill had a right to remain silent and a right to counsel. The officer was improperly allowed to comment on Bill's silence, suggesting an admission on his part.

Prior conviction evidence:

In Maryland, evidence of a defendant's prior conviction is allowed upon consideration of the following: whether this is the same or a similar crime; whether its probative value substantially outweighs any unfair prejudice; whether it was a crime involving a dangerous felony or credibility; and whether the crime is more than 15 years old. Here, the trial court allowed into evidence Bill's prior conviction, similar to the same crime for which he was standing trial. The crime is not inherently a dangerous felony, but it was older than 15 years. The evidence should not have been admitted.

Finally, on appeal I'd take issue with the 25-year mandatory sentence for second time offenders my client is facing. Only one day prior to his sentencing, this bill was passed. I would argue that to apply this law to my client would be a violation of the Ex Post Facto prohibition. I might also argue that the punishment is excessive in violation of the 8th Amendment.

REPRESENTATIVE ANSWER 2

The laws of evidence and constitutional criminal procedure govern this question.

Constitutional implication:

It is constitutionally impermissible under the Ex Post Facto clause that criminal penalty be increased in a retroactive fashion. BB should not have a sentence imposed based on the State's newly enacted law. Because the law was not in effect when he committed the crime, his sentence is not subject to the new law.

Further, the newly enacted law seems too strict and may run afoul of the Constitution as excessive and cruel or unusual punishment. The harm must comport with the punishment.

Evidentiary matters

1. **The assistant manager statement** - This statement contains hearsay within hearsay and should not be introduced into evidence. Hearsay is an out of court statement offered for the truth of the matter asserted therein. For hearsay to be admitted into evidence it must fall into one of the numerous exceptions. Neither Louie nor the assistant manager is a party to the lawsuit so it cannot come in as a party admission. Both parts of the statement must qualify as an exception to the hearsay rule. Part of the statement may fall under an exception that allows the statement to be used to show the party's intent or state of mind around the time of the event (i.e., that BB was mad and swore to get even) but the fact Louie is not testifying makes it hearsay if offered by the assistant manager.

2. **In court identification** - Dolly's identification is not independently verifiable and is not reliable based on the facts. Dolly never saw who did it and did not indicate that she thought it was BB who assaulted and robbed her. The in-court id must be based on the witness' perception at the time of the incident. She does not and has not supplied any information that she can identify him as the perpetrator of the crime. It is also unlikely that she knew who it was because he "muffled his voice" disguising it so that she could not properly id him. Her id is certainly more prejudicial than probative and should not have been allowed if offered to prove that he was the perpetrator of the crime. There is no independent knowledge from Dolly that substantiates that she is identifying BB as the perpetrator of the crime. She never saw him and did not indicate that she recognized him in any other way.

3. **Police Officer's Testimony** – The officer should be allowed to testify to what BB said regarding his alibi but should not be allowed to say that he would not write down and sign a statement because at the point his right to counsel was in effect and the officer and or lawyer/judge cannot comment at trial that the Defendant asserted his constitutional right to counsel. Once he asserted his 5th Amendment right to counsel, the custodial interrogation is terminated and the officer is not allowed to question the Defendant. The officer is also not allowed to testify to the inference from his assertion of right to counsel. The State will argue (and may be successful) that he waived his 5th Amendment right when he spoke about the alibi and that

he is afforded no protection regarding the alibi which may include inferences based on the fact and validity of that statement.

4. Prior convictions – The general rule is that a prior conviction cannot be admitted into evidence to prove the criminal defendant's propensity to commit the crime charged. It can, however, be admitted to attack D's credibility if it was a conviction related to a crime of falsity or fraud or was an infamous crime under common law. Felonies that are over 15 years old cannot be admitted. Thus the conviction of grand theft cannot come in. Because the prior conviction cannot be used to attack D's credibility it should not be used to prove he committed the offense charged.

The assistant manager's hearsay statement, the id and prior conviction should all be excluded from evidence. The officer's testimony should be allowed in part and questionably denied in part.