

JULY 2004 BAR EXAMINATION

BOARD ANALYSIS

QUESTION 1

These facts require the applicant to determine whether or not a contract for the sale of real estate which provides for settlement on a date certain and that includes a statement that “time is of the essence” is in fact an “essential” condition of the contract or merely a “formal” provision.

This answer determines whether or not the Buyer can succeed in this action to compel specific performance by the Seller who has repudiated the contract.

While many contracts may contain “time is of the essence” provisions, the conduct of the parties or the facts and circumstances surrounding the transaction may establish that the provision is formal rather than an essential provision.

In an ordinary case of contract for the sale of land, even though a certain period of time is stipulated for its consummation, equity treats the provisions as formal rather than essential and permits a purchaser who has permitted the period to lapse to make payment after the prescribed date and to compel performance by the seller within a reasonable time notwithstanding the delay, unless it appears that time is of the essence of the contract by express stipulation or by inference from the conduct of the parties, the special purposes for which the sale was made, or other circumstances surrounding the sale.

In these facts there is an express stipulation that time is of the essence. Buyer can overcome the specific provision by establishing that the parties did not intend to establish an unyielding date of settlement. The fact that Seller set 60 days after signing of the contract for closing was based upon his best estimate of when his new house would be ready for occupancy is irrelevant on the issue as it was not made a pre-condition to closing on that date. It would also be inadmissible to vary the terms of the written contract as violative of the parole evidence rule.

The fact that Buyer’s attorney had not completed an examination of title on February 27, 2004 is also irrelevant and would not excuse Buyer from tendering payment on or before that date.

Buyer can point to the extension of time granted several days after the initial settlement date had expired as a waiver by Seller of the essence clause or that the extension indicates that the closing date was not considered essential by Seller. It is generally held that such an extension fixes a new time by which settlement is to be made but does not waive the requirement that the settlement must be made by the date fixed.

By the terms of the contract, Seller was obligated to deliver possession of the property and a deed to Buyer “upon payment” of the balance of the purchase price at settlement. This

required Buyer to tender payment and was a condition precedent to performance by Seller. This failure to do so would constitute a default if time was of the essence and the Seller did not waive or otherwise excuse performance. By modifying the contract to extend the date of closing it could also be inferred that Buyer was aware that his right to demand a deed would be extinguished after March 11, 2004.

This is insufficient evidence in these facts to conclude that Seller did not intend to insist on timely performance by Buyer, or that Buyer relied on any conduct on the part of Seller to his detriment that would trigger the doctrine of equitable estoppel.

Buyer would not be successful in his complaint for specific performance but he may be entitled to the return of his down payment in the absence of a liquidated damages clause in the contract of sale.

QUESTION 2

Actions brought by Eddie:

a. Eddie v. Molly:

Eddie would argue that Molly committed the following torts against him –negligence, battery, and intentional infliction of emotional distress.

Molly acted in a negligent manner for once she assumed the duty to come to the aid of Eddie she had a duty to act reasonably and her failure to do so was the direct and proximate cause of his injuries.

A battery occurred because there was an unpermitted and intentional contact to Eddie’s person that was caused by Molly. Molly may counter that she intended to scare Vichuss. She may be successful if doctrine of transferred intent can only be applied between individuals and not between an animal and a person.

Eddie may bring a claim for intentional infliction of emotional distress. A claim of IIED has four elements: (1) conduct that is intentional or reckless; (2)conduct that is extreme and outrageous; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. Manikhi v. Mass Transit Administration, 360 Md. 333, 367 (2000) Eddie may be successful since Molly acted recklessly and outrageously by discharging a firearm in a reckless manner and Eddie has suffered actual damages as a result.

Molly may argue that she’s protected by the privilege of defense of others, and that she acted as a reasonable person would have under the circumstances.

b. Eddie v. Town of Beverly:

Eddie may try to sue the Town for Molly’s actions since she arguably acted under color of its authority. She was on duty checking meters and in uniform. The Town would counter that Molly acted outside of the scope of her employment as a meter maid by carrying a weapon and discharging it, and that it, therefore, cannot be held liable.

c. Eddie v. June:

Eddie may also argue that June was negligent in releasing Vichuss without the muzzle since her actions were violative of the Town’s Ordinance and the resulting bite would be the type of action that the ordinance sought to avoid. Hammond v. Robins, 60 Md. App. 430 (1984) June may counter that she used reasonable force to counter the threat she perceived Molly to be.

June will be strictly liable for Eddie’s injuries as she knew or with reasonable care should have known that Vichuss had a propensity to bite. Pahanesh v. Western Trails, Inc., 69 Md. App. 342

(1986)

Actions brought by Molly:

a. Molly v. Ward:

Molly may sue Ward for negligence in his operation of his vehicle. As a driver he owes all other drivers and pedestrians the duty to be aware as he drives and not to be engrossed in changing his CDs. It is not unusual to expect people to be in the middle of residential streets. Ward may assert that Molly was contributorily negligent in being frozen in the street, but he had the last clear chance to avoid the accident had he been more attentive to his driving. Molly may not be awarded damages for any generalized “recurring anxiety” however.

b. Molly v. June:

Molly may also assert a negligence action against June since she violated the ordinance by releasing Vichuss and the resulting harm is one that the ordinance sought to avoid. (See discussion, *supra*) June may assert that she correctly came to the aid of the children and used the minimum “force” to counter the threat she reasonably perceived Molly to be.

QUESTION 3

First Bank has a perfected security interest in all E-Tronics inventory and equipment.

Fax Equipment

First Bank's security interest has priority over Two Guys interest in the fax equipment. Two Guys failed to file a financing statement during the 20 day temporary perfection period as provided in CL 9-312(f) and 9-324(a).

Computer Equipment

Two Guys' purchase money security interest in the computer equipment has priority over First Bank. Two Guys' filed the financing statement within the 20 day temporary perfection period as allowed in CL 9-324(a). Two Guys purchase money security interest, therefore, takes priority over conflicting security interests in the same collateral.

Televisions.

First Bank's security interest in the televisions has priority over Third National Bank's. CL 9-324(b). The televisions are inventory. CL9-102(48).

Third National Bank failed to perfect a security interest in the televisions prior to the debtor receiving possession. The 20 day grace period does not apply to inventory. Additionally, Third National Bank failed to send an authenticated notice to First Bank informing it of Third National Bank's intention to take a security interest in the televisions.

All three secured creditors have a priority over general creditors, based on the secured creditors' perfected security interests.

EXTRACT SECTIONS FOR QUESTION 3

Annotated Code of Maryland, Commercial Law Article

TITLE 9. SECURED TRANSACTIONS: § 9-102, 9-312, 9-324

QUESTION 4

1. The Supply Contract:

This contract is a sale covered under Article 2 of the UCC. The contract is written and, therefore, complies with the statute of frauds for a sale of goods, Commercial Law Article §2-201(i). The provisions of Commercial Law Article §2-210 govern the assignability of the supply contract. The statute holds that “A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract”. Furthermore, unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor’s due performance of his entire obligation can be assigned despite agreement otherwise.

There is nothing that prevents Mega Mini from performing the provisions of the contract and is clearly assignable. See, *Macke Co. v. Pizza of Gaithersburg, Inc.*, 259 Md. 479, 270 A.2d 645 (1970). In the absence of a contrary provision, the rights and duties under an executory bilateral contract may be assigned and delegated.

There is no difference between the product Pete happened to get from Cheeze and that supplied by Mega Mini. There was not a material change in the performance of obligations under the supply contract as would justify Pete’s refusal to recognize the assignment. Therefore, the supply contract is enforceable by Mega Mini.

2. The Advertising Contract

A written contract to be performed over more than one year satisfies the statute of frauds. §5-901, Courts Art. This is a personal services contract and not governed by the UCC but rather by general contract law. Maryland law has long held that an advertising agency could not delegate its duties under a contract, which had been entered into by an advertiser who had relied on the agency’s skill, judgment and taste. *Eastern Advertising Co. v. McGaw & Co.*, 89 Md. 72, 42 A. 923 (1899). This is exactly the situation here and as such a personal services contract is not assignable. “Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned.” *Macke, Supra*. Mega Mini will thus be unable to enforce the advertising contract.

3. Damages for Breach of the Supply Contract

Mega Mini would only be entitled to damages under the supply contract. Its damages would not be the \$1,000,000 estimated value of the total goods purchased but rather Mega Mini’s lost profits. To recover direct profits in a breach of contract case, the measure of damages is the difference between what it would have cost Mega Mini to perform and what Mega Mini would have received had repudiation not occurred. *Macke*, 270 A.2d at 650.

Mega Mini would also be entitled to any compensatory damages that arose from this

breach including any expenditures made in preparation of or upon reliance of the contract. *Wartzman v. Hightower Productions*, 53 Md. App. 656 (1983).

There is no claim for punitive damages in a contract action. *Miller Building Supply v. Rosen*, 305 Md. 341 (1986).

EXTRACT SECTIONS FOR QUESTION 4

Annotated Code of Maryland, COURTS AND JUDICIAL PROCEEDINGS

TITLE 5. LIMITATIONS, PROHIBITED ACTIONS, AND IMMUNITIES: § 5-901

Annotated Code of Maryland, COMMERCIAL LAW

TITLE 2. SALES: § 2-102, 2-106, 2-201, 2-210

QUESTION 5

Pursuant to Rule 8.5 of the Maryland Rules of Professional Conduct (“Rule” or “Rules”, as the context may require) Amanda is subject to the disciplinary authority of Maryland, even

though she is not a member of the Maryland Bar because she provided legal services to Heaven and Universe in Maryland. The facts reveal that Amanda has violated the following:

- 1) Rule 5.5 – Practice of law in Maryland in violation of the laws of that jurisdiction.
- 2) Rule 1.5 - Reasonableness of fees. It is questionable whether Amanda’s fees of \$350 per hour for the time expended together with the ten percent (10%) member interest in Universe is reasonable given her experience and her failure to satisfy many of the criteria of Rule 1.5(a)(1) through (6).
- 3) Rules 1.7 (a) and (b) (conflicts of interest) and 1.13 (organization) have been violated in that Amanda represented Heaven and she should not have undertaken either to represent Max individually or to create Universe as both of these representations were directly adverse to Heaven. In addition, her representation will be materially limited by her responsibility to Heaven, by her own interests as a member of Universe and as counsel to both Heaven and Universe. In this matter, Amanda failed to consult with Heaven and Morley (in accordance with rule 1.7(c)) prior to undertaking to represent Max and Universe.
- 4) Rule 1.8(a) - Prohibits a lawyer from entering into a business transaction with the client unless the transaction is fair and reasonable, and the client is advised to seek the advice of independent counsel and is given a reasonable opportunity to do so. Amanda failed to comply with the requirements of Rule 1.8(a) in obtaining a member interest in Universe.
- 5) Rule 8.4(a) - Misconduct attributable to violation of the Rules.
- 6) Rule 8.1(b) - Failure to provide information to disciplinary authority, Attorney Grievance Commission v. Fezell 361 Md 254, 760 A.2d 1108 (2000); Attorney Grievance Commission v. Vanderlinde, 364 Md 376, 773 A. 2d 463 (2001) and Attorney Grievance Commission v. Duvall, 373 Md 482, 819 A. 2d 343 (2003).

QUESTION 6

1. Generally, if the grounds for divorce occur outside the State of Maryland, a party cannot apply for a divorce unless one of them has resided in the State of Maryland for one (1) year. Since Brenda committed adultery in Cumberland, Maryland, Al does not have to wait until

December, 2004 to file and can file his complaint now if he wishes. See Family Law article Sec 7-101(a).

2. Social Security benefits may not be considered marital property and are not subject to distribution or division in any manner in a divorce case. See *Pleasant vs. Pleasant* 97 Md App. 711 632 A2d 202 (1993). Brenda's entitlement to social security benefits could be a factor in the determination of Brenda's entitlement to a monetary award from Al, however.

3. (A.)Townhouse - Al initially acquired it while the parties were living together but not married so it is initially a non-marital asset. Mortgage payments were satisfied by the rental income so that increase in equity by virtue of reduction in the principal balance of the mortgage is not a marital asset. After the parties married and moved to the property using it as their marital residence in December, 2003, from that date forward, if Al makes mortgage payments from marital earnings that portion of mortgage principal reduction could be a marital property asset that could form the basis for a monetary award in Brenda's favor.

(B). The 1000 shares in Turk, Inc. was given to Al by his father (3rd person) and titled in his name alone and is non-marital property (Family Law Article Section 8-201(e)(3)(ii)).

(C). The Mutual fund is a marital asset acquired from marital earnings during the marriage and since titled in Al's name, could be a source of a monetary award in Brenda's favor.

(D). 500 shares received in December, 2003 based on a stock split is a non-marital asset generated from a non-marital asset. See *Wilén vs. Wilén*, 61 Md App 337, 486 A2d 775 (1985).

4. Social Security Disability Dependency benefits to Sally.

Current case law suggest these payments do not result in an automatic credit against a parent's child support obligation. Section 12-202(a) of the Family Law Article does not specifically provide that income received by a child is to be considered as a factor in deviating from the guidelines. A court has discretion, if circumstances warrant, to adjust the amount of a parent's child support obligation but the court would be obligated to make a finding that the deviation serves the best interest of the child. See *Drummond vs. State* 350 Md 502 714 A2d 163 (1998) and see *Tucker vs. Tucker*, No. 501, September Term, 2003, Court of Special Appeals.

Recent legislation passed by the House and Senate (Senate Bill 928) confirms that with the passage of the legislation the amount of Social Security dependency income paid to the child will be treated as income to the disabled person, but the amount is to be set off against the child support obligation of the parent whose disability generated the payment.

QUESTION 7

The Act can be challenged on a variety of grounds.

First, while Section 5 of the Fourteenth Amendment gives Congress the power to enact legislation to enforce its provisions, this grant of authority does not extend to making decisions as to the extent of constitutional protections. This function is a judicial one and is exclusively

reserved to the courts pursuant to the doctrine of separation of powers. *City of Boerne v. Flores*, 521 U.S. 507, 517 - 521; 117 S. Ct. 2157; 138 L. Ed. 2d 624 (1997); Congress does not have the authority to set aside judicial decisions interpreting and applying the Constitution. *Dickerson v. United States*, 530 U.S. 428, 437, 120 S. Ct. 2326; 147 L. Ed. 2d 405 (2000). Thus Section 2 of the Act is unconstitutional.

2. Congress does not have the power to direct State officials to enforce federal laws, such as the prohibition against same sex marriages contained in Section 3 of the Act. *Printz v. United States*, 521 U.S. 898 (1997) (provisions of gun control legislation requiring local law enforcement officers to perform background checks is inconsistent with concept that "the Constitution confers upon Congress the power to regulate individuals, not States.") This is true even if the federal mandate is intended to be a temporary measure pending adopting of an overarching federal regulatory scheme. *Id.* Thus, Section 4 of the Act is unconstitutional.

3. Congress does not have the power to compel state legislatures to take, or refrain from taking, legislative action. *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) Thus, Section 5 is unconstitutional.

4. While the Supreme Court's decisions in this area are not completely consistent, a good argument can be made based upon the Supreme Court's Fourteenth Amendment jurisprudence that Section 5 of the Fourteenth Amendment gives Congress the power to create remedies for violations of the provisions of that amendment but not the authority to set out the substantive scope of the amendment itself; compare *The Civil Rights Cases*, 109 U. S. 3, 13-14 (1883) ("The legislation which Congress is authorized to adopt is not general legislation upon the rights of citizens but corrective legislation") and *Boerne v. Flores, supra*, with *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Thus, Section 5 does not give Congress the power to prohibit same sex marriages. The authority to regulate marriage would be reserved to the State under the provisions of the 10th Amendment. See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Congress may not regulate non-economic criminal behavior based solely on the aggregate effect of such behavior on interstate commerce for to do so would render the 10th Amendment a nullity.) Such reasoning would lead to the conclusion that the Act is invalid in its entirety. See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (Texas anti-sodomy law invalidated as violated substantive due process; majority (per Justice Kennedy) and dissenters (per Justice Scalia) disagree as to whether decision invalidates same sex marriage prohibitions.

QUESTION 8

(a) The Photograph

An objection should be made based on the photograph's not being relevant. Maryland Rule 5-402 states in pertinent part that "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Evidence is relevant and therefore admissible "if it tends either to

establish or disprove the issue in dispute.” *Banks v. State*, 84 Md. App. 582, 589 (1990); *Lucas v. State*, 116 Md. App. 559 (1997), *cert. denied*, 348 Md. 206 (1997). Carl’s lawyer should argue that a photograph of the defendant kneeling behind stacks of money has nothing to do with possession of cocaine with the intent to distribute. Money can be made through legal activity, and people are free to be photographed with their money. In other words, the photograph does not tend to establish that Carl possessed cocaine with the intent to distribute, and therefore is irrelevant. The State, however, should counter that Carl’s connection to the apartment is important because it helps to establish that Carl was involved in processing and distributing crack cocaine, not just visiting the apartment to purchase it. The photograph being in a backroom of the apartment “tends to establish” that Carl had more than a casual connection to the apartment, and therefore is relevant, and the objection probably will be overruled by the judge. The prosecution may authenticate the photograph by identifying Carl as the person in the picture. *See Lucas v. State, supra*.

Assuming that the photograph is relevant, Carl’s lawyer should object to its being allowed into evidence based on Maryland Rule 5-403, which states in pertinent part that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Introducing the photograph into evidence may unfairly prejudice Carl because large amounts of cash often are associated with the drug culture. The balance of the probative value of the photograph (connecting Carl to the apartment) against its prejudice to the defendant (drug culture association) is “committed to the trial judge’s sound discretion.” *Bedford v. State*, 317 Md. 659 (1989). A Court’s determination in this area will not be disturbed unless plainly arbitrary. *Johnson v. State*, 303 Md. 487 (1985). Although the photograph is prejudicial, given the connection it creates between Carl and the stash house, a judge likely will overrule the objection, and such a decision will not be seen as “plainly arbitrary”.

(b) Carl’s Prior Conviction

Maryland Rule 5-404(b) does not allow evidence of other crimes “to prove the character of a person in order to show action in conformity therewith.” However, evidence of other crimes may be “admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident.” None of the exceptions under the Rule is applicable, and therefore the objection should be sustained by the judge.

The conviction is not admissible in the State’s case-in-chief; but may be introduced in rebuttal if defendant testifies to impeach his credibility. See Maryland Rule 5-609 which sets out a three part test: 1. is the conviction more than 15 years old? 2. is it an infamous crime or other crime relevant to a witness’s credibility? and 3. does the probative value of evidence outweigh the danger of unfair prejudice to the witness? Here the conviction falls within the 15 year time limit. Theft is a crime relevant to credibility, *Jackson v. State*, 340 Md. 705 (1995). The trial judge must weigh the probative value v. prejudice factors. Based on the facts, the court would probably allow the State to introduce evidence of the conviction.

c) Carl's Offer to Testify Against Roy

Maryland Rule 5-410(4) provides, in pertinent part, that statements are not admissible that are made "in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty." The facts state that Carl offered to testify against Roy in exchange for probation, which was rejected by the prosecutor. This indicates that the statement was made in connection with plea discussions that did not result in a plea of guilty, and therefore is not admissible. This ruling will be the same whether the proffer of evidence is made during the State's case-in-chief or in rebuttal.

QUESTION 9

Initially, Parsnip and the Bugle should file a motion to dismiss for insufficiency of service of process (Rule 2-322 (a)(4)) and improper venue (Rule 2-322 (a) (2)). Under Maryland Rule 2-322 (a), these motions must be filed prior to filing an answer or these preliminary defenses are waived.

The Court should grant the motions. However, in granting the motions, the Court should require that proper service be made on the defendants as required under Maryland Rule 2-121 (a), and transfer venue of the case to Somerset County as permitted in Rule 2-327 (b).

Service on the defendants was improper because the facts state that the Doolittles' made service via first class mail. To be effective, service of initial process may be made by mail only if made "by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: 'Restricted Delivery -- show to whom, date, address of delivery.' Service by certified mail under this Rule is complete upon delivery." Rule 2-121 (a) (3). The defect in service can be remedied by mailing the summons and complaint as required by the Rule without prejudice to the Defendant.

Although the defendants can also correctly assert that the Circuit Court for Prince George's County is not the proper venue for the action to be heard, the Court need not dismiss the action. Under Md. Code Ann. Cts. & Jud. Proc. ("CJP") §6-201 (a), the action should have been filed "in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation." According to the facts, Parsnip resides and operates her business in Somerset County. Although the Bugle solicits advertisers in Prince George's County it should not be deemed doing business in that county absent other contacts. *Davidson Transfer and Storage Co. v. Christian* 197 Md 392, 79 A.2d, 541 (1951). The exemptions from this requirement in §§6-202 and 6-203 are not applicable in this case, therefore the action should have been filed in Somerset County, not in Prince George's County. If the Court sustains the defense of improper venue in this case, which it should, the Court can transfer the action to Somerset County if the Court determines that "in the interest of justice the action should not be dismissed." (Rule 2-327 (b)).

In addition to these two mandatory preliminary motions, Parsnip and the Bugle have other grounds to request dismissal of at least one of the claims in the action. Although the general statute of limitations is three years (CJP §5-101), Eliza's claim for damages for libel or slander is governed by CJP §5-105 and is barred by limitations. The statute of limitations for those intentional torts is one year. Eliza filed her action on March 15, 2004, which is more than one year after the January 12, 2003 publication of the defamatory statements by Parsnip. Parsnip should file a motion to dismiss this Count and the Court should grant it.

Donna's claims for damages for libel or slander, on the other hand, are not barred by limitations. At the time that Parsnip published her libelous statements, Donna was a minor. The facts state that the Complaint was filed on the day after Donna's 18th birthday. This means that

Donna was a minor until one day before the suit was filed. Under CJP § 5-201, a statute of limitation is extended for a minor until "the lesser of three years or the applicable period of limitations after the date the disability was removed." In this case, the "disability" was removed on March 14, 2004. Donna had one year from that date or until March 13, 2005 to file her claim for damages for libel or slander. Donna's complaint was timely filed.

The counts for false light defamation and intentional infliction of emotional distress should both survive preliminary motions to dismiss. Those counts are both subject to the general three year statute of limitations in CJP §5-101. The Complaint for those counts was timely filed.

Annotated code of Maryland, COURTS AND JUDICIAL PROCEEDINGS

TITLE 5. LIMITATIONS, PROHIBITED ACTIONS, AND IMMUNITIES:

§ 5-101, 5-105, 5-201

TITLE 6. PERSONAL JURISDICTION, VENUE PROCESS AND PRACTICE:

§ 6-201, 6-202, 6-203, 6-301, 6-312

Annotated Code of Maryland, MARYLAND RULES

TITLE 1. GENERAL PROVISIONS: Rules 1-202, 1-203

TITLE 2. CIVIL PROCEDURE - CIRCUIT COURT: Rules 2-121, 2-124, 2-311, 2-321, 2-322, 2-327

QUESTION 10

Landlord's position

Both Will and Grace are in violation of their respective leases. Grace made a unilateral decision to sublet a portion of her premises to a co-tenant. Will made a unilateral decision to first reduce his rent and then to vacate the premises because he had concerns about the effect that Grace's business had on his flower and card shop.

Landlord may be at fault in his treatment of Grace. Although she arguably breached the express term of the lease by entering into a co-tenancy, Landlord effectively waived his right to protest the breach when he continued to accept rent after becoming aware of the situation:

Waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such a right.... An act of the lessor which is frequently relied upon to establish waiver is his acceptance of rent from the assignee with knowledge of the assignment.... Thus, we apply in Maryland the universal rule that a waiver of forfeiture may occur by an acceptance of rent which accrues after the lessor is on notice that a breach has been committed by the lessee....

Chertkof v. Southland Corporation, 280 Md. 1, 371 A 2d 124, 127 (1977). Despite this waiver, Landlord may notify Grace that her co-tenant's use of the property has caused a nuisance and must cease or Grace will be evicted.

Landlord may fare better against Will. At common law, Landlord had three avenues of redress against a tenant that abandons a commercial lease prior to its expiration:

- Landlord could accept the surrender of the lease and terminate the tenancy; if so tenant's obligation to pay rent ceases
- Landlord could reenter premises, attempt to re-let the premises, and hold tenant liable for any accrued rent at the time of reentry, as well as any future deficiencies if unable to re-let or unable to re-let at the same rent
- Landlord could do nothing and hold tenant liable for the entire rent (although some courts no longer look favorably upon this option)

Circuit City Stores, Inc. v. Rockville Pike Joint Venture Limited Partnership, 376 Md. 331, 829 A.2d 976 (2003)

Will's position

Will may argue there was a constructive eviction when he experienced problems with his tenancy and Landlord failed to address them. However, Will must show that the premises became uninhabitable as a result of Landlord's actions, or by its procurement. McNally v. Moser, 210 Md. 127 (1956) Moreover, Will must prove that he abandoned the premises as a result of the action complained of and the abandonment must occur within a reasonable time of said action. Will has not shown that the premises can no longer be used as a card shop and his abandonment occurred nearly a half-year after he first complained of the odor. He may,

therefore, still be liable. *See, Standard Brewing Company v. Weil*, 129 Md. 487 (1916)

Will may also argue that the Landlord and/or Grace were negligent in allowing the nuisance caused by the nail business. Four elements must be shown to succeed on his negligence claim: (1) that the Landlord/Grace had a duty to protect Will from injury; (2) that the duty was breached; (3) that Will suffered actual injury or loss; and (4) that the loss or injury resulted from Landlord/Grace's breach. A Landlord is clearly liable for injuries that result from common areas over which it retains control, but ordinarily has no obligation to maintain the leased portion of the premises. However, in a situation such as the one at bar, where the Landlord becomes aware of the fact that a tenant has created a hazardous condition he may be liable for the resulting harm to another tenant since he could have informed Grace that her failure to abate the condition would result in her eviction. *Matthews v. Amberwood Associates, L.L.P.*, 351 Md. 544, 558 (1998); *Realty Co. v. National Distillers Products Corp.*, 196 Md. 274, 279 (1950). Even if Landlord could not successfully evict Grace due to his waiver of her breach, he would have fulfilled his duty to protect Will from the harmful effects of the nail business by instituting an eviction proceeding. *Matthews*, n. 3.

Will may have a private nuisance claim against Grace for the harm suffered as a result of the nail salon's activities, since it diminished the value of his property. Grace, as a co-tenant, had a duty to not allow a nuisance to occur that unreasonably interfered with Will's tenancy. Will may also have a cause of action sounding in negligence. Grace does not appear to have a defense to either suit by Will unless she can show that the nail business did not result in the harm experienced.

QUESTION 11

A. Defense counsel.

1. Defense counsel will object to the State's use of Mary Jane's notes and will make a motion for the immediate return of the notes to Mary Jane and the suppression of the use of her notes by the State.

2. Defense counsel may also consider filing a motion for mistrial depending upon the substance of Mary Jane's notes and defense counsel's perception of how the case is going for the defense.

3. The notes are protected by the attorney-client privilege and the attorney work product privilege. Defense counsel requested Mary Jane to make the notes for use during the trial. The notes contained Mary Jane's comments regarding the testimony and exhibits presented so far at trial for use by her attorney.

4. Fourth Amendment violation. Defense counsel may argue that there was an illegal search of the lock-up by the deputy sheriff where the notes were found and read and an illegal seizure when the notes were turned over to the prosecutor instead of being returned directly to Mary Jane.

5. Sixth Amendment violation. Defense counsel will argue that Mary Jane has a right to counsel in the trial of her criminal charge. That right was violated when the deputy sheriff realized the notes were about the ongoing trial, but failed to return the notes to Mary Jane, instead providing the notes to the prosecutor. If the prosecutor is allowed to use Mary Jane's notes in the trial, confidential information between attorney and client is exposed. At a minimum, the notes would contain those parts of the testimony and exhibits that Mary Jane wanted to comment upon and wanted to discuss with her attorney.

5. Court's ruling. There was no Fourth Amendment violation by the discovery of Mary Jane's notes in the lock-up as she was an inmate and there was no reasonable expectation of privacy there. *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). The notes were not marked confidential or privileged. However, instead of giving Mary Jane's notes to the prosecutor, the deputy sheriff should have returned the notes to Mary Jane upon realizing the notes were about an ongoing trial. There was a Sixth Amendment violation of Mary Jane's right to counsel because the notes were confidential communications between Mary Jane and her attorney and the State wanted to make use of Mary Jane's notes in its case. The attorney-client Privilege, codified in section 9-108 of the Courts and Judicial Proceedings Article, and the attorney work product privilege were both potentially violated.

Carter v. State, 149 Md. App. 509, 519-522, 817 A.2d 277 (2003)

Hudson v. Palmer, 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984)

QUESTION 12

The following principles are applicable to this fact pattern:

A corporation may provide by its charter for any preference, right, restriction, including restrictions on transferability.

If the corporation which issues the stock imposes a restriction on transferability the stock certificate should contain a full statement of the restriction(s); or a statement that the corporation will furnish information about the restriction to a shareholder on request without charge.

A restriction in the transfer of a security imposed by the issuer (Zero, Inc.) even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless the security is certified and the restriction is noted conspicuously on the security certificate.

- A. Rights of Zero, Inc. Its right to acquire the stock of a shareholder is limited to acquisition upon death of the stockholder. It is not a party to the buy-sell agreement among its stockholders and it obtained no pro-rata purchase right in that agreement.

The agreement among all of the shareholders of Zero, Inc. granting each the right to acquire a pro rata share of the stock of a selling shareholder is valid and enforceable. Abe violated the agreement when he sold 100 shares to Ed. Dan and the other stockholders, Ben and Chris, were each entitled to a pro rata share if they elected to purchase. They will have a cause of action against Abe for violating the agreement.

Because the terms of the restriction on transferability in the buy-sell agreement among the shareholders was not on the stock certificates, it cannot be enforced against Ed who was a bona fide purchaser for value without notice of the restriction.

The restriction noted on the Zero, Inc. stock certificates at the time of issuance created an enforceable right in Zero, Inc. to purchase Ben's stock upon his death. Ben's personal representative holds the stock as part of Ben's estate and is obligated to sell the shares to Zero, Inc. at \$300 per share notwithstanding the value of the 500 shares is substantially higher than the price agreed upon at the time of issuance.

Fran is charged with actual or constructive notice of the restriction on transferability of the stock because it was conspicuously noted on each certificate. Fran cannot be a bona fide purchaser under this circumstance. The contract to sell Ben's stock to Fran at market value is invalid and Zero, Inc. can enforce its right to purchase against Ben's personal representative at the agreed upon price of \$300.