Maryland State Board of Law Examiners

# FEBRUARY 2016 MARYLAND GENERAL BAR EXAM – REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

*NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland essay questions and the Multistate Performance Test (MPT). The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, they are responses which, in the Board's view, illustrate successful answers written by applicants who passed the Maryland General Bar Examination. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.*

## MARYLAND ESSAY QUESTION NO. 1

### Representative Good Answer No. 1

I would make the following objections as to each piece of evidence.

1. The testimony from Jones's tax preparer should be excluded pursuant to the accountant-client privilege

Maryland recognizes an accountant-client privilege, whereby confidential statements to one's accountant for purposes of obtaining accounting services is privileged from admission at trial. The client holds the privilege. Here, Jones told his tax preparer that he saved a lot of money by using unlicensed plumbers. Arguably, this statement relates to Jones's acquisition of accounting services from the tax preparer. The tax preparer would need to know some of the details of Jones's books in order to prepare his taxes.

There are two issues that are relevant to the court's consideration of this objection. First, it may be relevant whether the tax preparer was an accountant or licensed CPA, or was instead merely a friend or some other person who prepares taxes in his or her spare time. Second, there may be an issue as to whether the communication at issue related to Jones's acquisition of accounting services.

If the communication is not privileged, then it is admissible as an admission of party opponent because it was made by Jones and is being introduced by customer. Despite the concerns cited above, it appears that the accountant-client privilege is applicable in this case, and the court should sustain the objection and exclude the evidence.

2. The testimony from the customer that Jones offered $1,000 to her to settle this complaint is inadmissible because it was a statement during settlement negotiations

Statements made during settlement negotiations are generally inadmissible at a later trial in the same case. The policy for this rule is that the law wants to encourage settlements. Because the offer of $1,000 was made during settlement negotiations, it is inadmissible to prove Jones's guilt or culpable conduct. Accordingly, the court should sustain the objection and exclude the evidence.

3. The evidence of Jones's 2005 conviction for theft is inadmissible character evidence

Here, I will argue that the customer is offering the evidence of Jones's 2005 theft conviction for purposes of showing that Jones is a dishonest person and that he acted in conformity with his dishonest nature on the occasion in question and both hired unlicensed plumbers and overcharged the customer. That is, it is being offered to show propensity.

The customer's counsel will likely argue that the conviction is not being offered for propensity purposes, but for impeachment. Assuming it is Jones who is on the stand being cross-examined, the conviction for theft is being offered to show only that Jones is not a credible witness, not that he had a propensity to behave dishonestly and

therefore hired unlicensed plumbers and overcharged customer. Theft is a crime of dishonesty and, therefore, would be probative of whether Jones was a credible witness.

Under Maryland law, a prior conviction may only be offered for impeachment purposes if it is less than 15 years old. Here, the conviction occurred in 2005. Accordingly, it is not too old to be excluded.

Because the conviction is likely being offered to impeach Jones's credibility as a witness, rather than for showing that he had a propensity to behave dishonestly and therefore acted dishonestly on the occasion in question, the court should overrule my objection and allow the evidence to be admitted.

4. The testimony from Mike is irrelevant, unduly prejudicial, and inadmissible character evidence

There is presumption in favor of admissibility. However, evidence must be relevant to be admissible. Here, whether Jones is "a good boss" is irrelevant to whether he hired unlicensed plumbers or overcharged the customer. Accordingly, the testimony should be excluded as irrelevant.

Moreover, testimony from a former employee that Jones "wasn't a good boss" is likely to prejudice the jury against Jones. While the statement might not be very prejudicial, it is unduly prejudicial in light of the fact that it has no probative value on the issue of whether Jones overcharged the customer. Therefore, the danger of unfair prejudice substantially outweighs the probative value of the testimony, and the testimony should be excluded.

Finally, the testimony is inadmissible character evidence. It is being offered to show that Jones is a bad person and, therefore, he engaged in bad behavior on the occasion in question by hiring unlicensed plumbers and overcharging the customer. Accordingly, the testimony should also be excluded because it is inadmissible character evidence.

Because the evidence is irrelevant, unduly prejudicial, and constitutes inadmissible character evidence, the court should sustain the objection and exclude the evidence.

5. The testimony from the customer is hearsay not within any exception to the hearsay rule

As to the customer's testimony that Mike shook his head no when Jones told the customer that the plumber assigned to complete the work at his home was fully licensed and bonded, I will argue that plumber's non-verbal conduct intended as an assertion is hearsay not within any exception to the hearsay rule. Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. An out-of-court statement may consist of verbal conduct intended as an assertion (e.g., a verbal statement) or non-verbal conduct intended as an assertion (e.g., shaking one's head to communicate the word "no").

Here, Mike's shaking his head was clearly intended to communicate the word "no" -- indeed, that is exactly why the non-verbal conduct is being offered -- to show that Mike "shook his head 'no'" when Jones told the customer that the plumber assigned to complete the work was fully licensed and bonded. This out-of-court statement is being offered for the truth of the matter asserted--that the plumber was not licensed and bonded. Therefore, it is hearsay. Moreover, because Mike made the statement, and not Jones, it is not an admission by a party opponent.

Jones's counsel will argue that the testimony falls within an exception to the hearsay rule because it is an admission by a party opponent. While the federal rules define admissions by a party opponent as non-hearsay, the Maryland rules of evidence treat an admission by a party opponent as an exception to the hearsay rule.

Jones's counsel will argue that, because Mike was Jones's employee, and was acting within the scope of his employment when he made the statement -- the nonverbal act intended as an assertion -- the statement should be imputed to Jones and, therefore, is admissible as an admission by a party opponent. Generally, when an employee has authority to speak for his employer, or makes a statement within the course and scope of his employment, the statement will be imputed to the employer.

Here, it is not entirely clear whether Mike was acting within the course and scope of his employment when he shook his head no. However, he was present when Jones told the customer that the plumber assigned to complete the work was fully licensed and bonded, and likely had some authority to communicate on behalf of Jones to the customer. Although Jones would not want this particular statement to be made, it may still be imputed to him if Mike was acting within the course and scope of his employment.

Assuming that Mike was acting within the course and scope of his employment when he shook his head no, this statement should likely be admissible as an admission by a party opponent. Therefore, the court should overrule my objection and allow the evidence.

## Representative Good Answer No. 2

This question is governed by the Maryland Rules of Evidence.

Evidence is generally admissible if relevant, with limited exceptions. Evidence that is relevant has any tendency to make a fact more or less probable.

If evidence is relevant, it must be further considered for hearsay. Hearsay is generally inadmissible unless an exception applies. Hearsay is defined as an out of court statement offered for the truth of the matter asserted.

1) Here, the testimony is relevant as to whether Bob Jones (BJ) used unlicensed plumbers and overcharged customer (C).

It is hearsay because it is offered for the truth of the matter asserted ("saved a lot of money by using unlicensed plumbers"). Therefore, an exception must apply.

Statement of a Party Opponent: may be used to admit an opposing party's statement, during the other party is offering it for evidence. Here, the attorney for the customer is offering J's statement, so this hearsay exception applies.

Accountant-Client Privilege: in MD, correspondence between an accountant and his client is privileged. Here, it is unclear if the tax preparer is also BJ's accountant. Furthermore, BJ's communications to the accountant do not appear related to the preparation of his taxes.

Objection hearsay overruled, testimony may be admissible depending on whether the accountant-client privilege applies.

2) The testimony is relevant, see above. The testimony is also hearsay, see above.

Settlement Offers and Connected Statements: excludes offers to settle if used to prove evidence of negligence or wrongful conduct. Here, BJ's offer of $1000 is excluded because it was made in an effort to settle the case with the customer.

Objection hearsay sustained, hearsay inadmissible due to public policy reasons.

3) Extrinsic character evidence is generally only admissible in MD when used to impeach a witness or to prove special relevancy (MIMIC+). Extrinsic character evidence may be used to impeach a witness if there is evidence of a public record of a conviction of a crime of dishonesty (theft, larceny, fraud, etc.) or an "infamous crime" of a common law felony, either of which occurred in MD in the last 15 years.

Here, the evidence of BJ's 2005 conviction is admissible because it is evidence of a conviction of a crime of dishonesty that occurred within the last 15 years ("2005"). The attorney should first ask BJ about the theft and give him a chance to deny it before presenting the evidence.

Objection improper form of impeachment overruled, cross-examination evidence admissible assuming the attorney rephrases the questioning by first laying a proper foundation.

4) The testimony is relevant because it explains why BJ may have hired unlicensed plumbers. However, it is not hearsay because it is not offered to prove the truth of the matter asserted, i.e. whether J was a good boss and Mike's reasons for quitting.

Assuming arguendo that it were hearsay, it may be admissible under a statement of an opposing party via vicarious admission.

Objection hearsay overruled, testimony admissible because relevant and not hearsay.

5) This testimony is relevant, see above, it is also hearsay because it is offered for the truth of the matter asserted, i.e. the employment of unlicensed plumbers. Expressive conduct may be considered a "statement" for the purposes of hearsay, ("Mike shakes his head 'no' "). The testimony comprises two levels of hearsay; Jones to Mike, and Mike to Customer. An exception must apply to each level in order to admit the entire statement.

Statement of a Party Opponent: covers the Jones to Mike communication, because it was a statement made by BJ.

Vicarious Admission: covers the Mike to Customer communication, because it was a statement made by Mike, in the employment of BJ. An employment relationship exists between the principal (BJ) and Mike if there was an express or apparent relationship. Here, there was an apparent relationship because the 3rd party (customer) observed the conduct between BJ and Mike that would reasonably suggest an employment relationship.

Objection hearsay overruled, testimony admissible.

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## MARYLAND ESSAY QUESTION NO. 2

### Representative Good Answer No. 1

A.

Counts Peter should raise against Superbuy

Negligence - Superbuy is liable for the breach of a reasonable duty of care to Peter that a buyer of a product would expect. Peter should claim that Superbuy sold him a defective television and the consequence of that defect was that the television caught fire and Peter's house caught fire causing more than $100,000 worth of damages to Peter's home. Peter can claim that this manufacturing defect was something that he would not reasonably expect to be dangerous and a buyer of the television is a foreseeable plaintiff to this type of product defect.

Breach of Warranty - Superbuy breached the implied warranty of merchantability as established in § 2-314 of the UCC as applied to Maryland. This section establishes that goods are fit for the ordinary purpose for which they are used. In this case, Peter used his television in the ordinary purpose for which it is used and it caught fire and caused serious damage to his house. Additionally, § 2-715(2)(b) establishes that consequential damages arise from injury to property resulting from any breach of warranty. This breach and the consequential damages which resulted give Peter a claim for breach of warranty of merchantability to bring in this case.

Counts Peter should raise against ETM

Negligence - ETM breached a reasonable duty of care by not finding the defect before putting the television into the stream of commerce. That defect was the actual and proximate cause of the damages that resulted.

Strict products liability claim - ETM manufactured a product with a defect that was unreasonably dangerous and caused damage well beyond what a consumer would expect. ETM put the product into the stream of commerce and should be liable for the manufacturing defect.

B.

Defenses Superbuy Should Raise

Superbuy was buying from ETM and should raise a sealed container defense that they regularly buy televisions from ETM and had no reason to know there was an internal defect. Additionally, the defect is not one that Superbuy would have noticed on a reasonable inspection. Also, Superbuy can also make a claim that Peter assumed the risk by turning on the television after smelling a burning smell and being told by Superbuy to unplug the television and not use it. Maryland is also a contributory negligence jurisdiction and Superbuy can claim that it was Peter's contributory negligence that was the primary cause of the accident. Superbuy should seek indemnification from ETM if they are held liable for any damages.

Defenses ETM Should Raise

ETM had not received any complaints regarding the defect. There was no way for ETM to know even with a reasonable inspection that there was a defect in this particular laser view mechanism. ETM can also claim that Peter assumed the risk and was contributorily negligent as discussed above.

C.

Summary Judgment should only be given if there are no issues of material fact and the judgment can be given as a matter law. The court should not award summary to judgment to any party in this case. Peter's actions of turning on the television after knowing of the smell and being told by Superbuy not to use the television create issues of material fact regarding assumption of the risk and contributory negligence. Those are issues that will require a finder of fact to determine how much liability there should be for Peter, Superbuy, and ETM.

## Representative Good Answer No. 2

Peter (Buyer) should allege against each defendant

Breach of implied warranty of merchantability against Superbuy

In a contract for the exchange of goods, and the purchase of goods from a merchant, there is an implied warranty of merchantability implied in every sale if the seller is a merchant with respect to the goods being sold. A merchant seller, under ucc 2-314-318 includes the manufacturer, distributor, dealer wholesaler, or retailor of a good. In this case, Superbuy and ETM are both sellers and merchants for the purposes of the following analysis because Superbuy is a large electronics dealer and ETM is a manufacturer of electronics and televisions.

Peter can sue Superbuy under a breach of implied warranty of merchantability claim for the sale of the Laser View TV set he purchased from Superbuy. In sales contracts between buyers and merchant sellers, there is an implied warranty of merchantability. This warrants that the goods at the center of the sale are good for their ordinary purpose for which such goods are used and that they pass without objection in the trade under the contract description. This warranty essentially states that when purchasing a good from a merchant who deals with these types of goods, the object will work the way it is supposed to work. Here, the good is the 96 inch TV that Peter purchased. In order to successfully sue for a breach of the implied warranty of merchantability, the buyer must show that 1) the warranty existed, 2) that there was a breach of the warranty, and 3) that the damages resulted from the breach of this warranty, and lastly, 4) that the warranty was not properly disclaimed.

Here, Peter would argue that there was an implied warranty of merchantability for the TV he purchased because the TV is a good covered under the UCC, and he purchased it from a merchant seller who generally deals with goods of this kind. Peter can also claim that there was a breach of this warranty because the TV would start emanating a burning smell after 20 minutes of usage, and eventually erupted into flames, which is not how TVs are supposed to work in the ordinary course of their use. The damages that resulted are a result of this breach of merchantability, and there do not appear to be any disclaimers in this case.

Peter can also sue ETM and Superbuy under a theory of strict liability for a product defect.

Peter can bring a suit against ETM and/or Superbuy under a strict liability theory for defective product. Such a claim arises when the plaintiff can show that the defect in question existed at the time of the products manufacturing, or that the product was defectively designed, or that the product did not come with sufficient warnings. Here, the most likely claim Peter can bring would be one under a manufacturing defect.

Peter would have to show that the defect existed at the time of manufacturing, and that the damages resulted from the defect. In strict liability suits, the plaintiff can sue the retailer, as well as the manufacturer.

B. What defenses should be raised by each defendant

ETM and Superbuy can argue that Peter assumed the risk of injury by continuing to use the TV after the defect was brought to their attention.

Assumption of the risk is a defense recognized in Maryland that serves as a bar to recovery. In order to successful argue assumption of the risk, the defense must show evidence that the plaintiff knew of the risk that may result from his action, that he voluntarily chose to ignore the risk. Here, as mentioned above, Peter knew that the TV would exude a burning smell and there is an inference that can be made that he did not want the burning smell to cause a fire. He was told not to unplug the TV but did not, and continued watching.

Contributory negligence: In Maryland, a plaintiff whose own negligence contributed to his injury is barred from recovery. The defendant would have to offer evidence of the plaintiffs' own negligence and if they can show that the plaintiff contributed to, or caused the injury through his own action or inaction, the plaintiff is barred from recovery. In this case, Peter continued to watch TV and fell asleep. If ETM can show that Peter acted unreasonably and was negligent in regards to his conduct, then he will be barred from recovering. (Falling asleep likely unreasonable under the circumstances, because a reasonable person would have unplugged the tv)

In regards to the breach of warranty of merchantability claims, ETM and Superbuy likely do not have valid defenses because there were no disclaimers given in the facts. The only possible defense they have is to claim that Peter has a duty to mitigate damages by not acting irresponsibly and continuing to use the product after they Superbuy was made aware of the issues. Section 2-715 b states that a buyer can recover for injury to person or property proximately caused from any breach of warranty, and therefore peter's strongest claim is based on his merchantability claim.

C. Peter and Defendants move for summary judgment, how should the court rule on them?

1. Peter's Motion for Summary Judgment

The court should overrule Peter's motion for summary judgment. In Maryland, while a finding of negligence per se is evidence of negligence, it does not serve as proof. Therefore peter would be able to argue that there is enough circumstantial evidence to show that there was a duty to sell a product that was not defective, that they breached their duty with the faulty manufacturing, and that the faulty manufacturing caused the TV to burn his house, but there is a dispute as to a material fact that he was likely contributorily negligent and this would be a bar to his recovery in Maryland since assumption of the risk and contributory negligence both bar a plaintiffs recovery (absolutely).

2. Defendants move for Summary Judgment

The court should overrule the defendants' motions for summary judgment because there is still a dispute of material fact regarding Peter's contributory negligence and assumption of the risk. There is enough evidence for this case to go to the trier of fact and have them find liability or that there is no liability as a result of the defendant's defenses.

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## MARYLAND ESSAY NO. 3

### Representative Good Answer No. 1

1. The statements

Whether the motion to suppress Jared's statements will be allowed into evidence. In Maryland, subject to the 5th amendment constitutional standards a defendant has a right against self-incrimination. This right includes the right to be free from not being coerced into making incriminating statements to police officers. Here, Jared's attorney could argue he was coerced into making his statements, when the officer stated, "we might be able to let you go and forget this whole thing, but if you stop talking or lawyer-up I've got no choice but to hold you." This could clearly be taken as coercion by the police officer to get Jared into making statements without his lawyer. Therefore, it is possible Jared's rights were violated by the officer and his statement could be suppressed.

Whether the motion to suppress the statements violated Jared's 6th amendment right to counsel. In Maryland, the 6th amendment right to counsel is an absolute right, and attaches as soon as a criminal defendant is arraigned. Since Jared has been arrested and formally charged he has been arraigned for purposes of his 6th amendment right. Jared does not know yet if he wants a lawyer, but advises the police officer I don't think I should say anything else until I talk to a lawyer. A defendant must invoke this right clearly and unambiguously, and it appears Jared probably does so. Therefore, if Jared had invoked his right to his lawyer, the police had to cease all questioning until his lawyer arrived, and therefore any statement taken prior to that would be suppressed.

Whether the motion to suppress the statements will succeed because of a possible Miranda violation. In Maryland, under the Miranda doctrine, a criminal defendant must be advised of his rights to remain silent, that anything said can be used against them, their right to a lawyer, and if they cannot afford a lawyer the right to have one appointed. Miranda is triggered when a defendant is in custody and is being interrogated. Since Jared is in jail it is obvious he is in custody and the facts indicate an interrogation is taking place so Miranda is triggered. The facts indicate Jared was properly advised of his constitutional rights, however, another part of Miranda is a defendant cannot be coerced into a confession and any statements a defendant makes must be voluntary. Here, Jared thinks he needs a lawyer, yet when he says he does not want to talk say anything until he talks to a lawyer the police officer, almost tries to seemingly trick him by saying, if you ask for a lawyer or be silent, "I've got no choice but to hold you." This could clearly be taken as coercion, especially when factoring in Jared was interrogated for 6 hours after this where the officer obtained a confession. Considering the quotes by the police officer, factored in by the long interrogation this is probably not a voluntary statement by Jared. Furthermore, the officer must cease all questioning until the attorney is present once Jared invokes his right to a lawyer which he does. Therefore, it is likely Jared's statements were in violation of his constitutional rights and it is possible and probably likely they will be suppressed.

2. The weapon

Whether the murder weapon used by Jared is likely to be suppressed or not. Under Miranda, statements provided by a criminal defendant will not be admitted into evidence if the statements were obtained in violation of a Miranda standard. However, physical evidence of a crime obtained by a statement in violation of Miranda is still admissible in court. Although it seems fairly clear Jared's Miranda rights were violated by the police officer's statements and long interrogation, this would bar his statements from evidence but not the weapon. Even though Jared invoked his rights to his attorney on two occasions, and the officer still did not cease questioning this only

pertains to the statements and not the weapon. Jared's lawyer will argue the murder weapon is "tainted evidence" and should be barred by the exclusionary rule or fruit of the poisonous tree, however, this argument will likely not work. These rules generally almost apply to evidence and derivative evidence found in violation of the 4th amendment, and there has not been a 4th amendment violation by the police in this scenario. Since physical evidence obtained even in violation of Miranda is admissible, this will probably allow the prosecution to get the murder weapon introduced as evidence. Therefore, it is likely the murder weapon will still be admissible into evidence and the court will deny the motion to suppress.

## Representative Good Answer No. 2

In this situation, the 4th amendment (search and seizure) was not violated because Jared was legally arrested. Therefore, any items found on his person incident to his lawful arrest will be admissible. The fact pattern also states that Jared was properly advised of his constitutional rights. Therefore, there was likely no violation of his Miranda rights under the 5th amendment. Miranda rights provide that at the time of arrest/being taken into custody and before being questioned by authorities, the defendant must be advised that he has a right to remain silent, that if he chooses to speak, anything he says can be used against him, and that he has the right to an attorney (in criminal cases, here it is a murder charge) and that if he cannot afford an attorney, an attorney will be provided for him. Since Jared was properly advised of his constitutional rights at the time of his arrest, it is unlikely that any statements made to police during the following interrogation will be suppressed as a violation of his Miranda rights. The 6th amendment right to an attorney attaches when the defendant is charged. Here, Jared would have a right to an attorney under both Miranda (5th amendment) and 6th amendment after he is arraigned in court.

A defendant may make a waiver of his constitutional rights. A waiver must be knowing, intelligent, and voluntary. Here, there are no facts to suggest that the officer improperly forced Jared to speak with him. Jared first asked the officer whether or not he needed an attorney. The officer is under no obligation to tell Jared if he needs an attorney or not. Jared was clearly considering asking for an attorney and the officer even asked if he did need an attorney. Jared, however, made a waiver of his right to speak to an attorney and to have an attorney present before speaking with investigators when he continued to answer the officer's questions. The right to speak to an attorney must be firmly stated. Here, Jared seemed unsure if he needed an attorney and continued to speak. Jared later stated that he didn't think he should say anything else until he talks to a lawyer. The officer does not deny his request, but states in response that it's his choice, but that he might be able to leave after questioning if he keeps answering questions. The officer then states that he's got no choice but to hold Jared if he stops talking or lawyer's-up. This instance may be improper by the officer because he is implying that he will have to stay in custody if he does not answer questions. Although, Jared considered his options in talking or lawyering-up and decided to continue to answer the officer's questions. This will likely constitute a valid waiver of his right to speak to an attorney because he knew he had the right, he "considered" whether or not he should wait for an attorney, which means that he made an intelligent decision in continuing to speak. The only consideration would be if the waiver was voluntary. It could be argued that the police officer's statement that he would definitely stay in custody if he lawyered-up may have unduly influenced his decision and scared him into not asking for an attorney.

Following six hours of interrogation, Jared confessed to the murder. The attorney for Jared may argue that Jared was suffering from duress after being questioned non-stop for six hours. There is, however, no time limit for questioning and there is nothing in the facts to suggest improper conduct by the police during this time period. Based on the factors discussed above, the court should deny the motion to suppress the statement that Jared committed the murder. Jared was advised of his constitutional rights and made a valid waiver of those rights when he chose to speak to the officer without an attorney present.

Following his confession to the murder, Jared stated that he now wanted to talk to a lawyer. The officer immediately stopped asking questions and stated that he would contact the attorney. The officer returned only fifteen minutes later and continued to ask questions. Jared did not answer when the officer asked if he minded if he asked a few more questions. Jared did, however, answer the officer's questions. During this questioning, Jared told police precisely where he had disposed of the murder weapon. Although Jared may have made a waiver by answering the officer's questions, Jared had made a clear request for an attorney. Once a defendant demands to speak with an attorney, the questioning must cease immediately and cannot resume until the attorney is present or if a long enough period of time has elapsed as to constitute a separate interrogation. Here, the officer was away for only fifteen minutes and he likely violated Jared's right to an attorney when he continued to question him without his attorney present. Therefore, the court should grant the motion to suppress Jared's statement to the precise location of the murder weapon and should grant the motion to suppress the seizure of the murder weapon under the fruit of the poisonous tree doctrine. The fruit of poisonous tree doctrine states that any evidence discovered as a result of an illegal police activity should be suppressed. The only exception to admitting the murder weapon is if the police can show that they had other valid sources and would have discovered the murder weapon without the statement made by Jared.

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## MARYLAND ESSAY QUESTION NO. 4

### Representative Good Answer No. 1

This issue is partly governed by partnership law.

A.
A partnership is an agreement between two or more people to operate a business and share in profits and losses. As stated, there is a partnership between J & D to run J & D consulting.

Partners are joint and severally liable for the obligations of the partnership. Here, the partnership entered into an employment contract with Debra Johnson (DJ), the contract was to last from August 18, 2014 to May 2015 with DJ receiving monthly payments from the start date through August 17, 2015.

The partnership notified DJ that her contract would terminate at the end of the 2015 school year and failed to pay her for June, July, and August. Therefore the partnership breached its contract with DJ.

A judgment against a partnership can be satisfied through the assets of the partnership itself. If the assets of the partnership is not sufficient to satisfy the judgment, then the partners are jointly and severally personally liable for the judgement.

Therefore DJ must first look at J & D Consulting's assets to satisfy her judgment. If the partnership does not have sufficient assets to satisfy the judgment, then DJ can sue both J & D personally to obtain the remainder of the judgment. DJ can sue one or both parties for the entire judgment amount.

A corporation may be liable for breach of contracts it enters. Here, DJ cannot sue LRC Corporation since LRC Corporation did not enter into the contract with DJ directly. Instead LRC was managed by J & D Consulting, who entered into the contract with DJ.

B.
Partners are liable to each other for the obligations of the partnership since they share in profits and losses. Here, J & D are partners and therefore are individually personally liable to pay the judgment. Therefore if DJ sues J & D personally to recover the judgment, and DJ's judgment is only paid by one partner, then the paying partner can each sue the non-paying partner for contribution.

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## Representative Good Answer No. 2

As the judge's law clerk I would address the following in the memorandum:

Part A

A partnership is an agreement by two or more people to carry on a business for profit. Here, James (J) and Donald formed a Maryland partnership, J & D Consulting and provided management services to the Littletown Recreation Council Inc. Because a partnership was formed Debra (D) could sue the partners individually and could also sue the partnership because partners are personally liable for the debts of the partnership.

In order to satisfy her judgment against the partners individually, D would have to first exhaust the partnership assets before she could satisfy the partnership judgment against the partners individually. Under the exhaustion rule, creditors of the partnership must exhaust the assets of the partnership before they can gain rightful access to the individual assets of a partnership. Therefore, depending on what property is held by the partnership, D would be required to assert her judgment against that property before she could satisfy the judgment against J or Donald individually.

Since partners are jointly and severely liable D could satisfy her judgment first against the partnership and then against either J or Donald.

Part B

If D succeeds in a suit for her unpaid wages and unlawful termination of her contract, J and Donald could have contribution or indemnification claims against one another. Partners are jointly and severally liable for the debts of the partnership. As such, if D satisfies her judgment against J individually, J would have a contribution claim against Donald to satisfy the judgment and vice versa. Also, if the Partnership agreement provides for some type of indemnification, then one partner might have to indemnify the other.

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## MARYLAND ESSAY QUESTION NO. 5

### Representative Good Answer No. 1

A. Pursuant to Rule 2-541, in order to contest the magistrate's findings and recommendations, Wife must file notice of her intent to file exceptions and deliver a copy of the notice to the magistrate within five days of notice of the determination. Then, the magistrate shall file a written report with his recommendation within 30 days after notice of intent to file exceptions, and provide a copy to all parties. Without filing of this notice, a party may not file exceptions.

Within 10 days of the magistrate's filing of the written report, a party may file exceptions with the clerk. Any other party may file exceptions in that same time period, or within 3 days after service of the first exceptions, whichever is later. Exceptions must be in writing and set forth the asserted error with particularity. Any matter not so set forth is waived until the court finds that justice requires otherwise. The party filing exceptions must also prepare and transmit to the Court a transcript of the testimony necessary to rule on the exceptions. However, the party has between 30 and 60 days (as the magistrate may allow) after the filing of the exceptions to file such a transcript. The Court may extend this time for good cause shown. The party filing exceptions must serve a copy of the transcript on the other party. Or, if all parties agree, the parties may submit a statement of facts.

The Court will hold a hearing on the exceptions if the party taking exception requests such a hearing upon filing of the exceptions. Within five days of service of the exceptions, the opposing party may request a hearing as well. The exceptions will be decided only upon evidence presented to the magistrate unless the excepting party sets forth particular additional evidence to be offered and why such evidence was not offered at the hearing before the magistrate, and the Court determines that the additional evidence should be considered.

Considering the foregoing, Wife must file notice of her intent to make exceptions and deliver a copy of the notice to the magistrate within the next four days, as she received notice of the magistrate's recommendation yesterday. Then, after the Wife receives a copy of the written report, she must file written exceptions within 10 days of receipt. She must assert the error the magistrate made in denying Wife's request for the $5,000 arrearage. She must also prepare and transmit a transcript of the testimony taken at the hearing before the magistrate, and submit the same to the court within 30 days, or more, if the magistrate allows such additional time. If she needs additional time to request and prepare the transcript, she should make that request as soon as possible. Alternately, she and Husband could agree to a statement of facts to submit to the Court. However, considering the acrimonious relationship between the two, it is likely better to obtain a transcript. If the Wife would like the Court to consider her exceptions without a hearing and without hearing additional testimony, she needs to submit nothing further. However, if she wants a hearing, she should make that request concurrent with filing her exceptions. If she wants to present additional evidence, she should also make that request concurrent with filing her exceptions and set forth what evidence she wants to offer and why the evidence was not previously offered.

B. If the Circuit Court denies Wife's request, she can take the following steps: (1) file a motion for judgment notwithstanding the verdict and a motion for a new trial; (2) file a motion to amend or alter the judgment and a motion for a new trial; (3) file a motion to revise the judgment; (4) seek in banc review or appeal to the Court of Special Appeals.

First, Wife can make a motion for judgment notwithstanding the verdict and a motion for a new trial. This motion must be filed within 10 days after entry of judgment. The motion for judgment notwithstanding the verdict alleges that the judgment could not have been reached based upon the evidence heard. When the motion for judgment

notwithstanding the verdict is filed concurrently with the motion for the new trial and the motion for judgment notwithstanding the verdict is granted, the Court determines whether to grant the new trial if the judgment is thereafter reversed on appeal. She must file her grounds in writing. If the Court grants this motion, it may set aside all or part of any judgment and grant a new trial on some or all of the issues (if the issues are fairly severable).

Second, if wife chooses not to make a motion for judgment notwithstanding the verdict and a motion for a new trial, Wife can file a motion to alter or amend a judgment and a motion for a new trial. This motion must be filed within 10 days after entry of judgment. The court may choose to amend its findings, set forth additional findings, enter new findings or new reasons, amend the judgment, or enter a new judgment. When filed concurrently with a motion for a new trial, the Court also decides whether to grant a new trial, if they choose not to amend the judgment.

Alternately to the two above suggestions, Wife could file either a motion for judgment notwithstanding the verdict or a motion to alter or amend a judgment, and then file a motion for a new trial within 10 days of the determination of either of the two motions.

If Wife chooses not to file any of the foregoing, she can file a motion to revise the judgment within 30 days after entry of judgment. Any motion filed after 10 days of the verdict and within 30 days is treated as a motion to revise. The Court has the power to revise a judgment for fraud, mistake, and irregularity; newly discovered evidence that could not have been discovered by due diligence in time to request a new trial (within 10 days after judgment); or for clerical mistakes. In the instant case, the facts do not state the grounds that she would base her motion to revise the judgment upon. There is no evidence of fraud, newly discovered evidence, or a clerical mistake. However, she must base her grounds in one of the foregoing in order to obtain a revised judgment.

Fourth, if the Court does not grant her motion for judgment notwithstanding the verdict, to alter or amend the judgment, or to revise the judgment, the Wife must choose whether to seek in banc review of the judgment or appeal the case to the Court of Appeals. She may choose only one avenue, as in banc review forecloses her ability to appeal the case to the Court of Special Appeals.

If Wife chooses to seek in banc review of the judgment, she must file notice for in banc review within 10 days of entry of the order denying her motions for judgment notwithstanding the verdict, alter or amend the judgment, or revise the judgment. Wife cannot file this notice before the Court's determination of the three foregoing motions.

Within 30 days after filing notice, Wife must file four copies of a memorandum stating the questions presented, facts necessary to decide them, and her supporting argument. Any opposing party, such as the Husband, then has 15 days to file four copies of a memorandum stating alternative questions presented, additional or different facts, and his supporting argument. The judge of the panel will then determine whether a transcript is required for decision of the questions. If so, one of the parties must provide the transcript.

The Court will then schedule and hold a hearing, unless the parties notify the clerk at least 15 days before the hearing that the hearing has been waived. The panel then prepares and files a brief statement of the reasons for their decision.

If Wife chooses instead to appeal to the Court of Special Appeals, she must file notice of her appeal with the Circuit Court within 30 days after entry of the judgment or an order denying her motion(s) for judgment notwithstanding the verdict, to alter or amend the judgment, or to revise the judgment. At the time of filing her notice, the Wife must deposit the appropriate fee with the clerk of the Circuit Court. The Court of Special Appeals will then hear the appeal.

## Representative Good Answer No. 2

Following the magistrate's decision the wife has a few options if she is not happy with the decision of the magistrate. In Maryland, a party has the option to file exceptions pursuant to a magistrate's decision under rule 2-541. Pursuant to rule 2-541 (e)(1) the wife must file exceptions with the magistrate within 5 days of the decision and shall file a notice of intent to do so within that time frame and deliver it to the magistrate. The wife must file within this timeline for exceptions or she will waive the ability to do so during the rule. The first advice I would give her is to file for the exceptions or they will be waived. Therefore, this should be done immediately as she only has five days to complete this task.

Next will be the contents of the exceptions report which the wife will have to plead in a certain way in order for this to be sufficient. Pursuant to 2-541 (e)(2) the exceptions report should include findings of fact and conclusions of law and a recommendation in the form of a proposed order or judgment. Here, the wife must address these issues and make a recommendation.

Next pursuant to 2-541 (g) the wife must file exceptions with the clerk. The exceptions must be filed with particularity and shall set forth the asserted error with particularity. The wife here should assert the error that she has lost $5,000 in alimony payments which she believes were rightfully owed to her by court order. The wife must plead this with particularity, and must file a transcript within 30 days unless she can show good cause for a delay. Then she may have an option for a hearing with the magistrate pursuant to 2-541(h). Therefore, this is what the wife should do regarding the magistrate's order.

2. Available procedures to review circuit court order.

One of the first available procedures for the wife is to file a motion for a new trial pursuant to rule 2-533. In Maryland, a party must file a motion for a new trial within ten days of entry of judgment. The wife must also show support for the grounds of a new trial pursuant to 2-533 (b). Since it is only a day after the judgment the wife is clearly within her window to file for a new trial. She must make the motion within ten days of this order, and have grounds for the new trial. Since she is owed $5,000 pursuant to a court order this should suffice as grounds for a new trial. Therefore, the wife should file a motion for a new trial within ten days of the circuit court ruling.

The wife can also file a motion under 2-534 to alter or amend a judgment. In Maryland, a party can motion for an alteration of judgment within ten days of when the judgment was ordered and must state its reasons for doing so. Here, the wife is only a day removed from the ruling so she is well within her grounds to file a motion to alter the judgment. This would give her applicable time to try to present new evidence or get the court to review the judgment against her. Therefore, the wife could file a motion to alter or amend the judgment.

The wife could file a motion under rule 2-535 for revisory power. Pursuant to rule 2-535 on motion by a party filed within 30 days of judgment, the court may exercise revisory power and control over the judgment, and can take any action it can pursuant to rule 2-534. Since the wife is only a day removed from the action this would be a motion she can file. This motion gives the court all the ability it has under 2-534 and potentially another avenue for her to amend the judgment against her. Therefore, the wife could file a motion pursuant to rule 2-535.

The wife could file a motion under 2-551 and request the court to perform an in banc review. In Maryland, the notice for an in banc review must be filed within ten days of entry of judgment. The wife must also file four copies of memoranda with this motion. Since the wife clearly has time to file for the in banc review this would be another

option for her. Therefore, the wife could file a motion under 2-551 for an in banc review of the judgment against her.

Another applicable procedure to the wife for the circuit order would be to file a motion for appeal pursuant to 8-202. In Maryland, a party has 30 days to file a notice of appeal, after entry of the judgment or order from which the appeal is taken. In a civil action pursuant to 8-202 (c), an appeal can be filed pursuant to order denying a motion pursuant to rules 2-532, 2-533, or 2-534. This would give the wife another option in the event of a denial of one of her previous motions. The wife has plenty of time to file the appeal and would also have that as an option to review the circuit court order. Therefore, the wife has several options for review of the trial court order, such as a motion for new trial, a revisory motion, a motion to alter or amend judgment, an appeal, or a motion for in banc review.

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## MARYLAND ESSAY QUESTION NO. 6

### Representative Good Answer No. 1

A.

I would advise daughter that she will likely be held liable with regards to the claim against her mother, because Daughter held herself out as mother's surety; and Nursing Home reasonably relied on that holding out by Daughter.

Under the doctrine of Equitable Estoppel, an individual who holds themselves out as having apparent authority, and who knowns that such conduct would reasonably lead to reliance by the other party will be estopped from denying her apparent authority if it was reasonable for the other party to rely; and the other party did in fact rely on that apparent authority.

Here, Daughter held herself out as being authorized to provide payments to Nursing Home, when Daughter writes and signs checks from Mother's checking account (for which she is a signatory) for the next three months. Daughter should have known that such conduct, coupled

with the fact that she was signed "agent" next to her name on the "Billing Agreement", and coupled with her Mother's arthritic condition, would induce Nursing Home to reasonably believe that Daughter was in fact authorized to send checks from Mother's checking account and that Daughter would continue to send checks from Mother's checking account as she had done in the first three weeks. Here, Nursing Home in fact reasonably relied on that conduct, and daughter can be estopped from denying her obligation to pay the contract.

B.

i) There is a valid service contract between nursing home and mother. A contract requires that there be a) a bargain b) mutual assent and c) consideration. Here, all three were present;

There was consideration between mother and nursing home; Mother bargained for private room, board, and nursing care, and Nursing Home bargained for Mother's $8,000 a month.

The fact that Mother signed "x" as her signature does not defeat the contract; courts look at the intent of the parties when upholding the validity of the signature; Mother's "x" clearly denotes her intent in lieu of her Arthritis.

ii) Nursing Home and Daughter?

Daughter will be held to have entered into a Surety contract with Nursing Home, making herself liable for the personal obligations of Mother;

Daughter signed her name "Agent" next to Mother's name; and induced Nursing Home to believe she was a surety by in fact paying mothers obligations for three straight months.

### Representative Good Answer No. 2

A. Advice to Daughter as to claim against her Mother.

I would tell Daughter that there is a valid contract between the Nursing Home and Mother. For a contract there needs to be offer, acceptance, consideration. Here, these elements are met. Mother was to receive room, board and nursing care in exchange for $8,000 per month. The contract was signed by Mother, binding her to the agreement. Mother is only able to sign an "X" on the agreement as her hands were very arthritic however, Mother

intended to be bound by that signature and it is therefore sufficient. The only potential defense that the contract between Mother and the Nursing Home is not valid is that Mother lacked capacity to bind herself, however there are no facts to indicate that Mother was incapacitated, and, as such, this would not be a viable defense to the breach.

As Mother has passed away, the suit against her is against her estate. Since at the time of the death Mother owed money to the nursing home, I would recommend that Daughter pay that amount to the nursing home out of Mother's estate. If Daughter does not, and judgment is entered against Mother, the estate will have to pay the outstanding amount regardless. Further, to get satisfaction of the judgment, the Nursing Home would be able to attach to any property Mother owned.

Moreover, Mother's estate will likely be estopped from arguing that there was not a valid contract since Mother relied on the contract and can now be estopped from arguing that there is no contract. This is demonstrated by Mother staying at the Nursing home and receiving care and that payments were made for three months. Further, the Court could order payment of the past due balance through detrimental reliance as there was a promise of payment, the Nursing home foreseeably, reasonably, and detrimentally relied on this promise by continuing to provide care for Mother, and they should be paid for that reliance.

B. Valid Contracts

1. Valid Contract with Mother: As discussed above, there was a valid contract between the Nursing Home and Mother. Nursing home was providing a service to Mother and she was paying them in exchange. Although Mother was arthritic and could not sign her own name, she was able to put an "X" on the contract and had the requisite intent to be bound.

Further, Daughter signed the contract as an "agent" of Mother, if Daughter was in fact an agent of Mother, than she could bind Mother if she is within the scope of her authorization. There is nothing in that facts that indicate that Mother did not want to be bound to this contract and therefore Mother, or in this case, Mother's estate can be bound by Daughter acting as Mother's agent.

An argument could be made that Daughter was not, in fact, an agent of Mother as Mother did not have a Durable Power of Attorney. However, Mother stayed at the nursing home for the remaining nine months of her life, clearly demonstrating as waiver and retroactive authority to Daughter, which would bind Mother's estate into paying the past due balance.

2. Valid Contract with Daughter.

There is no express contract between Daughter and the Nursing home. Daughter did not enter into the contract, but, rather, signed as an agent for her mother. However, as Mother's agent, Daughter could be bound if the Nursing Home entered into the agreement due to Daughter's assurances that payment would be received. An agent can be held liable for the contracts of the principal if the agent works outside the scope of her authorization or if the creditor reasonably relied on the assurances of the agent. Further, Daughter paid for three months of services from Mother's account, which she was a signatory of, further demonstrating that she was Mother's agent. As such, I would advise Daughter that she did not have a contract with the Nursing Home and was only acting as an agent with either implied authority or retroactive authorization when she signed the contract as Mother's agent.

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## MARYLAND ESSAY QUESTION NO. 7

### Representative Good Answer No. 1

The new law may be unconstitutional for the following reasons:

1. Ex post facto - a law is unconstitutional if it punishes an individual for action committed before the law was passed that was legal but is now illegal. Can't criminalize a past action if it wasn't crime before the law was passed. Because the law was just recently passed and punishes those who committed the offense when it was not illegal to do so it is unconstitutional. Here, the law is charging now individuals who committed witness intimidation three years ago.

2. 8th Amendment cruel and unusual punishment. Prohibits the government from excessive and cruel punishments. Here, 15 year sentence in prison and the fine of up to $500,000 is excessive and the crime may not fit the punishment. However, $500,000 fee is too excessive. The mandatory minimum sentence of seven years without the possibility of parole is excessive and cruel. Here, the punishment does not fit crime.

3. Confrontational Clause - Defendant has the constitutional right to confront a witness in court. Here, allowing the witness to testify via closed circuit television violates the confrontational clause.

4. Equal protection via the 14th Amendment due process clause prohibits the government from discriminating. Here, the state is being treated differently from the defense. There is no suspect class. However, there is a fundament right to confront a witness. Strict Scrutiny will apply. The law will be constitutional if law is necessary to achieve a compelling government interest. Here, although witness intimidation is a compelling interest, there are less restrictive means to achieve this. Witness protection for example. This law will be unconstitutional.

5. Due process - prohibits government from infringing upon liberty interest without notice. Here, the government is infringing upon a liberty interest. The law will be found unconstitutional.

6. Vagueness - if a law doesn't explain clearly what is expected to a citizen with reasonable intelligence it is unconstitutionally vague. Here, the law says you will be charged with a crime. The statute doesn't clearly define what is excepted behavior and what crime one will be charged with.

7. Overbroad - if it punishes anyone who allegedly commit the crime, then it punishes those who are in fact guilty and those who are not guilty as well. It is unconstitutionally overbroad.

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## Representative Good Answer No. 2

The first portion of the new law is problematic because of its violation of the confrontation clause. In Maryland, defendants in criminal cases have the constitutional right to have a face-to-face confrontation with their accusers. This new law completely violates this principle. This new law makes it entirely too easy for the State to barricade all of its witnesses from the defendant so that there is no confrontation at all. According to the new law, the State's Attorney may simply request that the witness be permitted to testify via closed-circuit television. The State's Attorney does not even have to show any type of cause; they simply request that the witness be separated from the courtroom and that's it. Closed-circuit television are used in exigent circumstances where there are young victims and it would be too damaging for them to interact face-to-face with their abusers. This however, is too broad. Any witness can, at any time have their identity concealed. Although, the defense is allowed to question the witness through the closed-circuit television, it will be impossible for a defense to mount any type of viable strategy if they are forbidden from contacting their accusers. This portion of the law is unconstitutional because it completely violates the confrontation clause. This portion of the bill should be stricken completely.

The second portion of the new law is also unconstitutional because it amounts to a bill of attainder. In Maryland, it is unconstitutional to enact legislation that criminalizes behavior and then attempts to retroactively punish that behavior. This new law attempts to do this by seeking to charge anyone who committed the offense of witness intimidation in the three years prior to the law's enactment. The law would be constitutional if it simply criminalized witness intimidation from this point out. However, by attempting to reach back in time and criminalize behavior, it has become unconstitutional. The law should simply criminalize witness intimidation without the added retroactivity.

The sentencing structure for this new law is also unconstitutional. The mandatory minimum sentence called for in the bill violates the Eighth Amendment right against cruel and unusual punishment. This bill calls for a mandatory minimum of seven years without the possibility of parole. Courts have held in the past that it is unconstitutional to sentence people to life in prison without the possibility of parole if the crime did not result in the death of a person. Under this coloring, it seems equally unconstitutional to unconditionally sentence someone to a seven year sentence without the possibility of parole if the crime can be achieved with no force at all. There should be no mandatory minimum for this crime.

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## MARYLAND ESSAY QUESTION NO. 8

### Representative Good Answer No. 1

A. The Circuit Court of Harford County should approve the request of the Motions. Buyer filed Motions to Dismiss and for Summary Judgment. Upon filing the Motion for Summary Judgment, Buyer is asserting that Jones has no valid case because there are no legitimate facts asserting his claim. In addition, Buyer is asserting that if the case were to go to trial, a jury or judge would dismiss the case because there is a clear winner, Buyer, based on the facts alleged as there is no substance to Jones' suit. Therefore, Buyer is asserting that the Court should dismiss the case under Motions to Dismiss, and shut down the entire suit.

The Court should agree with this because the Covenant does not state how dense or not dense the research campus should be. The Covenant merely states that the Development Parcel must be used for "...agricultural, academic, research, and development, and the delivery of health and medical care and services, which uses may specifically include, but not be limited to, the development of a research campus." How dense the campus should be, or the size of the buildings that will constitute the campus, was not included in the covenant, and is not a material term to the covenant. If the case goes to trial, Jones will have to invoke the Parol Evidence Rule, so that he will be allowed to testify as to why he is upset, as this was not what he was envisioning. The Parol Evidence Rule prohibits such testimony when a signed written document is considered to be the final expression of the terms of the agreement. Evidence of prior or contemporaneous testimony from before the document was signed, is not admissible unless it falls under certain exceptions, such as ambiguity of terms or mistake. In this case, the Parol Evidence Rule cannot be asserted by Jones as the covenant is clear in the purpose that the Development Parcel should be used for, based on Jones' wishes. Allowing there to be a trial will require Jones to testify and bring forth evidence as to why the Development Parcel is in violation of the covenant.

B. Smith is bound by the Covenant contained in the deed to Buyer, and cannot use the two acres of the Development Parcel as a convenience store. The Deed containing the Covenant was properly recorded in the Land Records of Harford County. Although Smith may have a deed where the Covenant is omitted, subsequent buyers are considered on notice of a recorded deed and its terms. Therefore, as a subsequent buyer, Smith should be on record notice of the terms as any land index search would have revealed the Covenant had been recorded.

### Representative Good Answer No. 2

A. The Circuit Court should rule in favor of Buyer. When evaluating the terms of a contract, extrinsic evidence must only be introduced following the parol evidence rule. The parol evidence rule provides that parties are bound by the terms of the contract unless the terms of the contract are ambiguous. In this case, there are no ambiguous or disputed terms of the contract. Additionally, Jones is not asserting that he meant to include density and scale provisions in the Deed, and viewing the facts in a light most favorable to Jones yields a result favorable to buyer. Therefore the court should rule in favor of Buyer.

B. Smith is bound by the covenant conveyed in the Deed to Buyer. Even if a covenant is omitted from a deed of conveyance, the recipient can still be bound by the covenant if the covenant is recorded properly and "runs with the land". In this case, Jones intended for the covenant to run with the land and included it in the deed provision to which Buyer agreed. Additionally the deed was properly recorded with the covenant and therefore, Smith purchased the parcel with notice of the covenant. Therefore, Smith should be bound by the covenant.

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## MARYLAND ESSAY QUESTION NO. 9

### Representative Good Answer No. 1

Negligence claims involve four elements: duty, breach, causation (but-for cause and proximate cause) and damages. A tortfeasor is liable for the negligence damages he causes and any additional foreseeable negligence by others that occurs as a result of the original negligence. Medical malpractice is considered foreseeable negligence.

A.

Electrician - can argue that he should not be held liable for the death of Driver.

Here, Electrician has a duty to operate his truck non-negligently and avoid injuring others with it. He breached that duty when he crossed the center line of the road and hit Driver's car. This breach was the but-for cause and the proximate cause of Driver's original injuries from the accident.

So, while Electrician is likely liable for Driver's original non-fatal injuries, he can argue that he is not responsible for the additional fatal injuries caused by Nurse. Electrician can argue that Nurse's acts were not foreseeable and therefore constituted a superseding cause that cut-off the chain of causation running from Electrician's original negligence.

Electrical Company - can argue that it should not be held vicariously liable for the accident as the accident did not occur within the scope of Electrician's employment.

Under the doctrine of respondeat superior, an employer can be held vicariously liable for torts committed by its employee within the scope of the employee's employment.

When the accident happened, Electrician was driving home from work in his own pickup truck. Electrician was not driving to a job site or driving the company van. Therefore Electrical Company should be successful with its defense.

Nurse - can argue that Maryland's Good Samaritan law protects him from liability.

Maryland has a "Good Samaritan" law which protects medical professionals who render free aid in an emergency from liability for simple negligence.

Here, Nurse is a medical professional, and seems to have been rendering aid for which he did not expect payment. The issue with Nurse's defense will be whether Nurse was grossly negligence, as the Good Samaritan law does not protect against liability for gross negligence. Nurse can argue that his actions were a reasonable response to an emergency situation, as there was an immediate danger that an engine fire would engulf the car. Driver's wife can argue that Nurse's actions constituted gross negligence. In the alternative, Driver's wife could argue that Nurse's actions don't come under protection of the Good Samaritan statute at all, as the negligence involved was not regarding the provision of medical care. Driver's wife could argue that rather, the general tort law concept that rescuers take on a duty to enact a rescue in a non-negligent manner should apply to Nurse's actions in removing Driver from the car.

Hospital - can argue that it should not be held vicariously liable for Nurse's actions as Nurse's actions did not occur within the scope of Nurse's employment.

Like Electrical Company regarding Electrician, Hospital can argue that it should not be held vicariously liable for Nurse's actions. At the time of the accident, Nurse was walking toward Hospital to begin his night shift. Nurse witnessed the accident and rushed to give aid to Driver. Hospital can argue that Nurse had not yet started work and was still on his commute when he made the personal decision to aid Driver. Hospital can argue that Nurse's actions were not made within the scope of his employment for Hospital and were not in any way under Hospital's control. Therefore, Hospital should be successful with its defense.

B. Lawyer's contact with Driver's wife was likely improper.

Under the Maryland Rules of Professional Conduct, an attorney shall not solicit business from someone who the attorney knows, or should know, is in a mental, emotional, or physical state that would make it difficult for them to make a reasonable decision about hiring an attorney.

Here, Lawyer knew, or should have known, that Driver's wife would be in a vulnerable and uncertain mental and emotional state after finding out that her husband had just died. Despite this, Lawyer contacted her just two days after the accident. While the RPC do not set a specific time frame for waiting to contact someone, Lawyer's behavior seems like the type of predatory behavior the RPC seek to stop.

Solicitation by mail is otherwise proper as long as "Advertising Material" is clearly stated on the outside envelope.

## Representative Good Answer No. 2

(A) Defenses to be raised

(i) Electrician

The electrician should raise the defense of contributory negligence and intervening force. The Electrician should argue that the Driver was contributorily negligent in causing the accident. Contributory negligence is a complete bar to recovery in Maryland. On these facts, however, it does not appear that the Driver was contributorily negligent. Therefore, this defense will fail. The Electrician should also argue that he was not the cause of the Driver's death because the Nurse is the one that dropped the Driver on the cement, which caused the death of Driver. A party will be deemed the cause of an accident if it is both there is actual and proximate cause. Here, the Electrician crashing into the Driver's cause was an actual cause of Driver's death. But for the accident, Driver would not have died. In addition, even though the nurse intervened to try and rescue the Driver, she will be deemed a foreseeable intervening force. Proximate causation deals with foreseeability. It can be argued that it was not foreseeable that the Driver would fall and hit is head on the ground. However, under the theory of danger invites rescue, the Electrician will lose. If a party creates an accident, it is foreseeable that a rescuer will try to intervene. Unless a rescuer is grossly negligent, the party that caused the initial accident will be liable. Therefore, this defense will not be successful.

(ii) Electrical Company

The Electrical Company should argue that it is not liable for the accident caused by the Electrician because it was not negligent nor is there vicarious liability. An employer can be held liable for the negligence of its employees committed during the scope of its employment. Here, the Electrician was not on duty, nor was he driving the Electrical Company's car at the time of the accident. The Electrician had finished work for the day and was going

home in his own car. Therefore, the Electrical Company cannot be held vicariously liable for the Electrician's negligence.

In addition to vicarious liability, an employer can be found negligent on its own accord on a theory of negligent entrustment. If an employer negligently hired the employee, or supervised the employee negligently, the employer could be held liable. Here, there is no evidence that the Electrical Company was negligent in hiring the Electrician (no evidence of prior accidents), and there is no evidence that the Electrical Company negligently supervised the Electrician. Therefore, the Electrical Company has a strong defense to the suit.

As a side note, Electrical Company could also argue that the Driver was contributorily negligent. As discussed above, however, this is not a strong defense.

(iii) Nurse

The Nurse good raise the defense of the Good Samaritan Law. Generally, a party has no duty to rescue. If a person does try and rescue someone, however, they must not be negligent in their rescue attempt. Maryland has a Good Samaritan Law, which excludes emergency responders from regular negligence in rescue situations. It is not a defense to gross negligence. The nurse here would probably fall under the protection of the Good Samaritan Law, so she should be protected from ordinary negligence in her rescue. There does not appear to be any gross negligence on the part of the Nurse. According to the facts, the Nurse was fearful that the car would explode. She therefore decided to pull the Driver out of and away from the car. There is no evidence that the Nurse was grossly negligent in removing the Driver from the car. She simply lost her grip and dropped him. Therefore, the Nurse should claim that she is protected under Maryland's Good Samaritan Law.

(iv) Hospital

The Hospital should argue that it was not negligent and that it should not be held liable for the actions of the Nurse. There is no evidence that the Hospital was involved whatsoever in the death of the Driver. Even though the Nurse was employed by the Hospital, she was not on duty at the time of the accident, so the Hospital cannot be held vicariously liable for the Nurse's actions. There was also no negligent supervision by the Hospital. Therefore, the Hospital should assert that it was not negligent in the accident and this is a strong defense.

(B) The Lawyer violated several rules of Professional Conduct by sending a letter to the Driver's wife. First, in Maryland, a lawyer must wait 30 days after an accident before it sends direct solicitation to a victim of the accident. Here, the Lawyer sent a direct letter to the wife only 3 days after the accident (2 days after reading about it the following day in the paper). Second, when an attorney sends direct solicitation to an accident victim (or his or her representative), the attorney must disclose that fact on the letter. He must disclose that his letter is for solicitation purposes on the outside of any envelop as well as on the material itself. Here, it does not appear as though the attorney marked his letter as solicitation material. Therefore, he has violated those two Rules of Professional Conduct.

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## MARYLAND ESSAY QUESTION NO. 10

### Representative Good Answer No. 1

This question is governed by Maryland Family law.

Part A: Adultery is an absolute grounds for divorce in Maryland. It requires actual knowledge of sexual intercourse or proof of opportunity and something that indicates that person would have done it. Here, Joan has scene Tina's emails and "discovered" the affair. It is unclear exactly what Joan saw, but assuming she validly discovered that affair was occurring this would be grounds of divorce.

Any grounds of divorce requires corroboration. Here, Joan would have to figure out how to properly bring evidence that the adultery was occurring.

However, for MD to have jurisdiction the parties need to have been domiciled in Maryland for a certain amount of time, or the grounds of the divorce must have occurred in Md. Here, the adultery occurred in California, and the parties have not lived in Md. long enough for Md. courts to have jurisdiction.

I'd advise that Joan would have to wait until either party has been domiciled in Md. for a year, which will be occurring shortly, since they moved to Md. in March 2015.

Part B: A court will determine legal and physical custody based on the best interest of the child. Here, court will consider the fact that Tina has been going out on more out of state trips, her adultery was cause of the divorce, the fact that Joan stayed home and cared for Tom, the fact that Tina was busy with her job, and also where parties live and where Tom would be least inconvenienced by having to potentially move. Court will likely find that it would be in best interest of Tom to have Joan continue to care for him.

Courts are very reluctant to split up legal custody so court will likely grant legal custody to both parents.

Part C: A court may transfer title in a marital home to the custodial parent for up to three years. Here, court may decide that it is in best interest of Tom and Joan to continue living in their marital home which they purchased as TE and will transfer title to Joan for her to live there for up to three years.

Joan would also be entitled to the contents in the home that are considered to have been part of the family use, but will not be entitled to any non-family use items.

Part D: Joan improperly took the $40,000 out of their joint account and court will trace the money that is currently in her personal account back to their joint account. Thus, court will consider it to be marital property, and Joan will be entitled to an equitable amount, but Md. does not split the amount in 50/50 manner.

Factors to consider when awarding monetary amount to one spouse will be duration of marriage, cause of marriage dissolution, current economic status of parties, contributions to the marriage. Here, court will consider fact that Joan agreed to leave her job as a doctor to care for Tom, Tina's adultery caused marriage to end, Tina is now in more successful situation than Joan, and will likely grant Joan some sort of monetary award. (Court will also look to fact that marriage was only for short period and that Joan might not have difficult time in getting job since she was a pediatric doctor).

Part 5: The fact that the couple was married before MD recognized same sex marriage will not affect the analysis, since MD will acknowledge marriages that are proper in other states, and will give them full faith and credit. Md. will even acknowledge common law marriage that occurred in other state, in certain situations.

I would advise Joan to return the money to the joint account and to wait for the court to award an equitable amount, to wait a short while to file for absolute divorce, to file for limited divorce if she needs income to support her and Tom until absolute divorce is possible, and to seek full custody for Tom assuming that is what she wants.

## Representative Good Answer No. 2

This question is governed under Maryland Rules of Family Law. I will advise Joan of the following, which is subject to the discretion of the Court:

A. Adultery is a fault-based divorce claim for absolute divorce and may be filed against a party where there is proof of motive and inclination for the adultery to have occurred.

Here, as Joan found an email on Tina's computer and discovered that Tina was having an affair with John while Tina was aloof and started to go on more out-of-state business trips, there is a likelihood that Joan may successfully file against Tina for adultery.

Filing in Maryland requires that the parties are both residences of Maryland and have been for at least a year prior to filing.

Here, both are residences of Maryland, but have not yet been here for a full year. Therefore, I would have Joan wait until after March 15 to file.

B. Custody is determined at the discretion of the Court based upon the best interest of the child. Legal custody is determined as the Court views communications between the parties, while physical custody will be based upon a number of factors.

Here, there is nothing to indicate that Tina and Joan are incapable of making the best decisions for Tom, though Tina's affair with John and trips away do not necessarily help her case. As such, I would advise Joan to seek sole legal custody, but advise her of the potential for joint legal custody.

As for physical custody, the Court will look at the stability and best interest of the child.

Here, Joan quit her practice as a pediatric doctor to become a stay-at-home mom for Tom, and has been taking care of Tom while Tina went on many business trips away. Therefore, I will advise Joan to see primary physical custody. I would advise Joan, however, to come back to the marital home (though not to forgive Tina through marital affections for her actions) so that the Court does not look disfavorably toward her for taking Tom away from his other parent and home for almost 3 months.

The Court will grant a parent visitation as it sees fit.

Here, as there is nothing to indicate that Tina is a bad or unfit parent, I will advise Joan that the court will likely grant her liberal visitation.

C. Marital assets are those that are acquired during the course of the marriage. Here, the home is a marital asset, and will be distributed equitably between the parties as the Court finds appropriate.

A Use and Possession Order may be granted by the Court to allow the primary custodian to continue living in the marital home for a period of up to three years.

Here, as Joan will likely be the primary custodian of Tom, I would advise in the Complaint that we will ask for a Use and Possession Order to be granted.

D. I will need more facts from Joan to determine the tracings of the $40,000. As it is a joint account, it will likely be a marital asset and will be equitably distributed as the Court sees fit.

E. Maryland recognizes full faith and credit marriages, meaning that it will recognize a marriage of same sex individuals that took place in California since it was validly recognized in California. Therefore, it will not affect my analysis or advice to Joan.

Maryland State Board of Law Examiners

**FEBRUARY 2016 MARYLAND GENERAL BAR EXAM –**
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST**

## MULTISTATE PERFORMANCE TEST

### Representative Good Answer No. 1

To: David Lawrence

From: Examinee

Date: February 23, 2016

Re: Worker's Compensation Claim for Ms. Nicole Anderson

Presumption

Under Article 2 § 257 of the Franklin Labor code there is a presumption that a person providing services is an employee. Under Article 7 §705(a) of the Franklin Labor code the burden of proof rests on the employer to prove that the person rendering service is an independent contractor. Therefore, it rests on Ms. Anderson to show that Mr. Greer was an independent contractor and the court will weigh the evidence liberally towards finding Mr. Greer is an employee

Independent Contractor or Employee

The Franklin Courts have deemed that to determine whether someone is an employee or independent contract depends on the "Right to Control" the manner and means of accomplishing the result desired. Franklin Labor Code §253 and Robbins v. Workers' Compensation Appeals Board (Robbins). They also combine that test with the "Doyle" Factors set forth in Doyle v. Workers' Compensation Appeals Board (Doyle) and weigh the public policy considerations.

Right To Control Test

The principal test of an employment relationship is whether the person to whom service is rendered has the "right to control" the manner and means of accomplishing the result desired. In Doyle, the court ruled that the harvesters' employers had pervasive control over the harvesters because the harvesters only made decisions about which plans were ready to pick and which to weed and that the employers were most unskilled. In Robbins, the court determined that Robbins was not under persuasive control because he was to produce the result of trimmed bushes and was not told exactly how to control the manner in which he did or accomplished the trimming.

In Harris vs. Workers Compensation Appeals Board, Harris was a caddie for the Lamar Country Club (Club) and was deemed to be employee. The court there determined that the club had pervasive control over the Caddie. The Club supervised Harris's dress, the services he rendered, and administered how he got paid by the members. The Club provided the entire location that the Caddies worked and they also had duties outside of their specific caddie functions to maintain the greens and clean the balls.

Ms. Anderson did direct Mr. Greer on a number of the projects that he was hired for. However, Mr. Greer's work is more like the work done in Robbins then the work done in Doyle or Harris. Mr. Greer decided how to fix many of the items in the apartments, Ms. Anderson only told Mr. Greer what needed to be fixed. On occasion Ms. Anderson did direct Mr. Greer how a project should be done but that was only in the instance where a specific result was desired, such as when Ms. Anderson had Greer paint one of the rental projects a particular way. However, Ms. Anderson stated she does not micromanage Mr. Greer. For example, when she told him to fix a leaky toilet he would just fix it and would not do so in any particular matter, similar to Robbins when he was

hired to trim, he wasn't told how to do the trimming. On most projects Mr. Greer could come and go as needed to make the repairs and only had to let Ms. Anderson know when he was coming so that she could let him in to the units. Similar in Robbins of when he could come and go. Ms. Anderson did not determine when exactly Mr. Greer had to come do the work but stated in the email that Mr. Greer would come at a time convenient for him and the tenant. Greer could reject assignments just as Robbins did.

Ms. Anderson probably did not have the right to control Mr. Greer's work and the Right to Control Test should weigh in Ms. Anderson's favor.

Doyle Factors

The court in Doyle set forth 8 factors to consider along with the "Right to Control" Test. The factors should be looked as a whole and are a number of factors to consider, (Robbins). I have set forth and discussed each below.

1) Whether the worker is engaged in a distinct occupation or an independently established business

In Robbins, Robbins had been an independent gardener for 25 years and had many different clients. Greer is similar to Robbins in that Mr. Greer was contacted through the Yellow pages and his company Greer's Fix-Its, which shows Greer had a distinct and established business. Greer also did work for other clients as he did work on the apartment complex for Jim. In Harris vs. Workers Compensation, Harris was a caddie for the Lamar Country Club and was found to be an employee even though he could work as a caddie at other places. Greer is different from Harris, because Greer had a specific business more like Robbins.

2) Whether the worker or the principal supplies the tools of instrumentalities

As stated by Ms. Anderson, Greer supplies many of his own tools. He has his own truck with a variety of tools on it that he uses for other projects. The ladder that Greer was using owned by Greer. Similar to Robbins who supplied all of his tools. Although, Ms. Anderson supplied paint and certain fixtures to Greer these are not tools for the job but merely the result that Ms. Anderson wanted. Harris is not dispositive here, even though the Club didn't provide tools to Harris, and he was found to be an employee; the Members supplied the golf clubs which were there only for the benefit of the Club.

3) The method of payment, whether by time or by the job

Greer was paid in three different ways, he was paid hourly on some jobs, paid by project on others, and Ms. Anderson held Greer out on a retainer. The hourly rates and pay by projects weigh in favor of Greer being an independent Contractor, Robbins was also paid in a similar fashion. The retainer fee makes it seem more likely that Greer was an employee, however, that was only for a small amount of time each month, 10 hours, which is not a lot of time. Unlike in Harris, Harris could not effectively negotiate the fee.

4) Whether the work is part of the regular business or principal

Robbins, an independent contractor, was found not to be part of the principal business because Robbins was trimming and the principal was a diner. Harris, an employee, was found to be part of the principal business since he was a caddie for the golf course. Ms. Anderson stated that she is an accountant but does rent a number of properties. Ms. Anderson is not in the principal business of doing maintenance work but owning properties does require maintenance as a part of the business. Greer is slightly more like Robbins, where the trimming bushes aren't necessary for a diner they are needed. Maintenance is necessary but is not the main focus of the business.

Unlike Harris where caddying is integral to playing golf. This factor probably weighs slightly in Ms. Anderson's favor but will not be dispositive.

5) Whether the worker has a substantial investment in the workers business other than personal service

Mr. Greer has only investment in his own maintenance skill and in his tools to provide service, similar to Robbins. Greer has no investment on whether the properties get rented or not.

6) Whether the worker hires employees to assist.

There is nothing in the interview or emails to suggest that Mr. Greer hired any employees. Robbins also did not hire employees to assist him and the court did not find this factor alone to negate all of the other factors.

7) Whether the parties believe they are creating an employer-employee relationship

Ms. Anderson stated that she did not believe that she had hired Greer as an employee. There is no written agreement or proposed oral agreement stating that Mr. Greer was an employee. A written or expressed agreement is not dispositive however and one can be implied. Franklin Labor Code Article 2 §251.The email sent by Greer in June of 2013 states that he charges all of his customers $25 an hour and other projects as they come up. Mr. Greer is stating that he sees Ms. Anderson as a customer and not employee. This factor will weigh in favor of Ms. Anderson.

8) The degree of permanence in the working relationship.

Greer has been hired by Ms. Anderson for a number of years and is used regularly for a number of different maintenance jobs. Unlike Robbins, Robbins only did work twice for Parker. This is a facto to consider that weights against Ms. Anderson but is only one of many factors.

The factors as a whole will likely lead to Greer being an independent Contractor. Greer said rates by the hour and negotiated rates per project, he had his own tools, and described Ms. Anderson as a customer. Greer also had his own distinct business and worked with other clients. These factors will outweigh the long continuous relationship, and the small retainer fee each month.

Public Policy

The Court will also look at the public policy considerations. The court will look at the class of persons intended to be protected, and the relative bargaining positions of each party, Robbins. The court will also look at who primary power over work safety and the distribution of risk.

Greer is more like Robbins, then the harvesters in Doyle or caddies in Harris. Like Robbins, Greer negotiated the price of various projects. Greer could also reject work and found work with other places. Although, Harris could reject assignments, the Club still had better bargaining position as they could not place the Caddie with members and it would have a significant impact on the Caddie.

Greer provided his owns and own tools and frequently worked without Ms. Anderson's supervision. He had control of the general work safety around his area and the safety in which he conducted his work.

Conclusion

In considering the Right to Control Test, all of the Doyle Factors and the Public policy considerations. It appears that Ms. Anderson will be able to overcome the presumption that Mr. Greer is an employee and that he is really

an Independent contractor. Ms. Anderson generally paid Greer by the hour or per project with input but not control over the projects. Mr. Greer had his own business, own tools, worked his owner hours and worked for other clients. Mr. Greer was also in a strong bargaining position for negotiating payment and since he worked on his own could control the work safety of the environment around him.

## Representative Good Answer No. 2

To: David Lawrence

From: Examinee

Date: February 23, 2016

Re: Workers' Compensation Claim- Independent Contractor

The issue in our client, Nicole Anderson's, case is whether Mr. Rick Greer is considered an employee of Ms. Anderson, or an independent contractor. I have researched the issue, and believe that Mr. Greer would be considered an independent contractor under the law. §253 of the Franklin Workers' Compensation Act defines an independent contractor as a person who renders services for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished. As I will discuss below, Mr. Greer will likely be considered an independent contractor. If Mr. Greer is found to be an independent contractor, Ms. Anderson will not be personally liable for his injuries sustained on February 11, 2016. Furthermore, this would mean that Ms. Anderson's lack of insurance coverage is not a violation of the Workers' Compensation Act. The Act only covers and protects employees and their injuries.

I. Right to Control

In determining whether Mr. Greer is an independent contractor or not, we must first look to whether Ms. Anderson had the "right to control" the manner and means of Mr. Greer's work. Robbins. If Ms. Anderson has the right to control the manner and means of Mr. Greer's work, it is extremely likely that it will be concluded that an employer-employee relationship exists. However, a person who hires an independent contractor still has the right to inspect, stop the work, make suggestions as to the details of the work, and prescribe alterations without changing the independent contractor relationship. Harris.

With regards to the relationship between Ms. Anderson and Mr. Greer, the facts support a conclusion that an independent contractor relationship exists, based on Ms. Anderson's lack of control of Mr. Greer's work. Ms. Anderson stated that she occasionally will give Mr. Greer detailed directions, but that she does not micromanage him. Ms. Anderson stated that when she becomes involve Mr. Greer's work only when she wants a particular look to be achieved in the work. Generally, she does not get involved as Mr. Greer "knows what he's doing." Under Harris, Ms. Anderson's suggestions as to the detail of work does not alter the independent contractor relationship.

Mr. Greer would likely argue that he is an employee because Ms. Anderson does exert control of the manner and means of his work. Ms. Anderson provides him with a checklist, which she requires be filled out when Mr. Greer inspects the exterior of the properties monthly. Mr. Greer would further likely argue that Ms. Anderson controls the manner and means of his work because she picks out particular paint colors, ceiling fans, faucets, other fixtures, the use of a narrow brush and not rollers, and to apply three coats of paint.

Ms. Anderson's checklist requirement does not arise to the level of control. The checklist is not a control over Mr. Greer's daily work, but simply the monthly inspections. I would argue that this is simply a method Ms. Anderson

is using to inspect the work of Mr. Greer, which would not destroy his status as an independent contractor. Most of the time, Ms. Anderson's only involvement in Mr. Greer's work is to stop by once the work is complete to make sure it is done right. The occasional direction Ms. Anderson supplies to Mr. Greer, such as the use of a narrow brush and not a roller, arises only to the level of the making of a suggestion on the details of the work. Ms. Anderson does not control the means of manner which Mr. Greer executes his work. Therefore, Mr. Greer is an independent contractor.

II. Doyle Factors

The right to control test is not exclusive. The Doyle factors are also relevant in determining if an independent contractor or an employment relationship exists. Robbins. The factors are to be weighted, and are intertwined with each other. No factor is more or less conclusive than the others.

The factors are as follows:

1. engaged in a distinct occupation or independently established business

2. who supplies the tools

3. what is the method of payment (by time or by job)

4. is the work part of Principal's regular business.

5. does the worker have a substantial investment in the worker's business other than personal services

6. does the worker hire employees to assist

7. parties belief of employment relationship

8. degree of permanence of the working relationship

First, it appears that Mr. Greer had an independently established business. Mr. Greer has other clients, such as Jim, who use his services. Mr. Greer advertised in the Yellow Pages "Greer's Fix-Its," which suggests he owns a company or is trading as a company, and not an employee seeking work.

Second, Mr. Greer supplied most of his own tools. Mr. Greer supplied the ladder, has a built-in toolbox in his truck with a large assortment of tools, and keeps a lot of these tools on hand. Even for the larger projects such as a remodel, Mr. Greer appears to supply his own tools. Ms. Anderson supplies tools when it deals with the aesthetic look of her property, such as a particular paint color, ceiling fan, and faucets. These tools are not used daily by Mr. Greer, and are provided only on certain projects. For his daily performance, Mr. Greer supplies his own tools.

Third, the method of payment is at a fixed rate of minimum of $250 a month, so that Mr. Greer is available for Ms. Anderson. Mr. Greer works in general 10 hours a month, but it may be more or less, depending on the project. The fixed rate of $250 indicates that Mr. Greer may be an employee of Ms. Anderson. However, Mr. Greer does have the power to negotiate the amount he is paid for each project. I would argue that the fixed rate of $250 does not rise to the level of an employee's salary, and that it is merely a means to ensure that Mr. Greer is available. Because Mr. Greer is able to make negotiations on the amount that he is paid per project, it is more likely that he is an independent contractor. Furthermore, Ms. Anderson does not withhold taxes from her payments to Mr. Greer, as an employer would with her employee's salaries.

Fourth, the work Mr. Greer provides is not the regular business of Ms. Anderson, the principal. Ms. Anderson's business is the operation of rental properties. Ms. Anderson is a landlord, who rents out properties to tenants. Mr. Greer's work is maintenance and repair of those properties. Mr. Greer's work is not the running of rental properties, which is Ms. Anderson's regular business.

Fifth, Mr. Greer may have a substantial investment in the business, as he has a truckload of equipment to assist him in his business of maintenance and repair. It is unclear how long Mr. Greer has been working in the business of repair, but he has worked for Ms. Anderson for over two and a half years. I believe the fifth element is met.

Sixth, Mr. Greer does not hire employees to assist him, which weighs more in favor of a finding that Mr. Greer is an employee. As state above, however, these factors are to be weighed as a whole.

Seventh, Ms. Anderson indicated it never occurred to her that Mr. Greer was an employee of hers. Based on the fact that Mr. Greer is filing a Workers' Compensation Claim form, it is assumed that he views himself as an employee of Ms. Anderson

Eighth, the degree of performance may not be found to be present. Ms. Anderson pays $250 a month to ensure that Mr. Greer is available to her, should she need his services. Arguably, Mr. Greer is contacted only when his services are needed, much like the gardener in Robbins. Mr. Greer does not have a degree of performance that would rise to the level of an employee, who would be expected to come to work daily.

In weighing all the factors, I believe that Mr. Greer is an independent contractor, and not an employee of Ms. Anderson.

III. Policy Consideration

Finally, we must consider the reason the Act was created in the first place. The Act was implicated because an employer has the primary power to protect its employees and keep them safe, as well as distribute the risk of injury as an expense of the business. It appears from the facts that Mr. Greer had the power to accept or reject projects, as he could negotiate his payment for them. As such, Mr. Greer is seen as an independent contractor, who is not afforded the protection of the Act.

Ms. Anderson should not be personally liable for his injuries sustained on February 11, 2016. Furthermore, Ms. Anderson's lack of insurance coverage is not a violation of the Workers' Compensation Act. The Act only covers and protects employees and their injuries.

In conclusion, based on the facts provided and the application of the law, I believe that Mr. Greer is an independent contractor of Ms. Anderson.