

**FEBRUARY 2017 MARYLAND GENERAL BAR EXAM –  
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST**

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**MARYLAND ESSAY QUESTION NO. 1**

**Representative Good Answer No. 1**

**Conflict of Interest**

I would likely not be able to represent the Friends, Alice and TTM due to conflicts of interest. A conflict of interest exists when representing multiple parties who may have claims against each other. It would be difficult to represent the best interest of TTM and Alice as they may have claims against each other. TTM may wish to claim that Alice engaged in the loan transaction prior to the formation of the partnership, and TTM did not later ratify or adopt this transaction. It is in Alice's best interest to argue the opposite. In addition, the Friends may have a claim against Alice for her breach of the duty of care as a general partner for failing to secure the proper zoning approvals for the bed and breakfast to be used. While this conflict may be able to be waived in writing, if I obtained signatures from each party and made a full disclosure, this is not the type of case that I feel confident I would be able to diligently represent the best interests of each party, and therefore I would decline joint representation. After meeting with them jointly I may also not be able to take on any of them individually as a client due to a conflict of interest to a prospective client. Each will have provided me with information that could be used to prejudice the other parties to a legal action.

**Friends' Defense to TCU**

The Friends' defense against TCU will be that they are limited partners, and were not signatories or parties to the loan TCU made. In a limited partnership, limited partners enjoy limited liability, in that they will not be held personally liable for the debts and obligations of the partnership. While limited partners may be held responsible for obligations or debts they incurred prior to the formation of a limited partnership, here they were not parties to the loan transaction. TCU contracted with Ralph and Alice for the loan. While limited partners may be held personally liable if their level of involvement in the management of the business reaches that of a general partner, there is nothing in the facts to suggest that the Friends fall into this category. Their only actions were to contribute for shares of the limited partnership, and to sign the contract for the property with the Seller. Ralph and Alice will be personally liable for the outstanding balance on the loan by TCU to TTM, due to their status as general partners. The Friends will still likely lose whatever investment they made to the limited partnership, in this instance the \$30,000 each that was contributed.

**Alice's Defense**

Alice will likely be personally liable for the remaining balance on loan that was made by TCU. Alice is a general partner, and in a limited partnership general partners may be held personally liable for the debts and obligations of the partnership. Even if Ralph was the only party to the loan, the partnership adopted and ratified this transaction by using the loan to purchase the property, paying back \$50,000 on the loan, and investing in the property. While Alice is personally liable, TCU will have to first go after the assets of the partnership before holding Alice personally liable. Therefore, if the sale of the property is sufficient to satisfy the outstanding \$150,000, Alice will not be personally liable.

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TTM's Defense

TTM will likely not be able to avoid liability on the loan contract. Even though Ralph and Alice entered into the transaction prior to the formation of the partnership, the partnership later adopted and ratified the issuance of the loan by making \$50,000 in loan payments, using the proceeds to purchase the property to be used in the business, and making improvements to the property. TTM's only defense would be that Ralph and/or Alice should be personally liable, as the partnership had not yet been formed, and promoters of a business are held personally liable for contracts entered into prior to the formation of a business, until that business adopts and ratifies the transaction.

Alice and Friends against Ralph

Ralph, as a general partner, owed the partnership and all its partners a duty of care. Ralph needed to act with diligence and make reasonable decisions regarding the management of the business, and he has breached this duty. Ralph did not secure property approval from the zoning board for the property prior to purchasing and expending almost all of the partnership assets in renovating the building. This lack of diligence on Ralph's part likely constitutes a breach of his duty of care, as the zoning approval should have been one of the first things that he undertook. Ralph also breached his duty of care by taking the remaining \$20,000 of the partnership and going to the local casino to gamble it away. While Ralph may have had the best intentions to win and use the profits to help the business, it was irresponsible and unreasonable for him to use partnership assets in this way. Ralph could have used the \$20,000 for other purposes, such as attempting to renegotiate the loan or using the money to go towards paying the remaining balance on the loan after default. Alice and the Friends should institute an action against Ralph for his breach of the duty of care to the partnership.

**Representative Good Answer No. 2**

Alice and Friends should be advised that under the Maryland Rules of Professional Conduct, an attorney may not represent multiple parties in the same action when their interests could be materially adverse to each other. Here, Alice, Friends, and TTM all require representation after TCU has given notice that TTM was in default. Because the parties are a general partner, a limited partner, and the entity itself, it is likely that the parties possess different liabilities, interests, and may seek contribution from each other at some point. Accordingly, because the interests might become adverse to each other, each person should be advised to seek their own, separate counsel.

A1. Alice's Defenses

A Partnership is an agreement between two or more persons to carry on a business for profit. Here, despite identifying their business as a Limited Partnership, Ralph and Alice have formed a partnership because there was no filing with SDAT at the time they purchased the parcel of land, or obtained the loan from TCU.

General partners are jointly and severally liable for the debts and torts incurred by the partnership. Here, "knowing they wouldn't have the money for closing, Ralph and Alice convinced TCU to loan TTM \$200,000 payable in one year..." That the contract was signed in the name of TTM is immaterial because no documents were filed with SDAT at the time of contracting. Because the action was undertaken while TTM was a general partnership, Contribution may be sought from Alice after TTM itself is exhausted.

Under Maryland Law, parties may be excused from the obligations of a contract under certain circumstances. Here, Ralph and Alice as a general partnership, entered into a contract with TTM to obtain a loan

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to start their business. The facts indicate that "Due to zoning issues, the bed and breakfast has not yet been able to open...[and] TTM... has spent all but \$20,000 of the invested monies renovating the building.

Impracticability occurs when circumstances, unknown to the parties, creates difficulties in performance for one or both parties. Here, Alice might wish to argue that the zoning requirements and monies spent renovating the property are a valid excuse for the delayed payment of the loan. Such arguments will likely fall short, however, and it is appropriate for TCU to hold Alice jointly and severally liable for the unsatisfied debts of the partnership.

#### A2 Friends Defenses

A Limited Partnership, similar to a general partnership, is formed when the appropriate certificate is filed with SDAT. Here, the certificate was filed on May 10, 2016. A limited partnership creates both limited and general partners. General partners are the primary agents of the business and may be held jointly and severally liable. Limited partners invest in the partnership, but hold themselves at a distance to avoid liability. Here Friends "each paid \$30,000 and signed a document ratifying the contract with TTM and the Seller on May 10, 2016.

Limited partners or co-venturers in a business will generally not be liable for the debts and liabilities of an entity prior to their involvement. Here, as general partners, Ralph and Alice sought out the loan from TTM. The limited partners may argue that they were (1) not parties to the original loan, (2) they were not involved in TTM at the time, and (3) TTM was a general partnership at the time, which means Ralph and Alice are jointly and severally liable.

#### A3 TTM Defense

Creditors seeking repayment of debts from a business entity must first exhaust the business entity. Here, because the loan was taken out on behalf of TTM when it was a general partnership, TCU is permitted to exhaust the resources of TTM before seeking contribution from the general partners themselves.

#### B. Recourse against Ralph

General partners of a business entity are permitted to enter into business transactions on behalf of the entity as its agent. Here, Ralph, an agent of TTM "was granted a two-week extension" on the loan. Such an action is permitted because it is within the scope of Ralph's employment.

Generally, general partners are presumed to act with actual or apparent authority that their actions are being undertaken for the purpose of a limited partnership and within the scope of their employment. Here, Ralph "decided to take the last \$20,000 of the money provided by the Friends to gamble at a local casino in a last-ditch effort to win money to repay the debt. His effort failed." While this action arguably was done on behalf of the limited partnership, it was done without the knowledge of the limited partners or Alice.

Under Maryland law, Limited partners, while removed from day to day operations of a business, are permitted to exercise authority over significant business transactions. Here, Ralph losing the last of the partnership's money while gambling is certainly a significant business transaction. Ralph, has violated his duty of loyalty and information to the partnership by engaging in the behavior.

Embezzlement is the conversion of property that one is rightfully in possession of to a purpose that it is not intended for. Here, despite trying to raise money for the Partnership, Ralph converted the last of the money

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to a non-authorized purpose. Here, such an action was likely far outside the intended scope of use by the Limited partners and it is appropriate for friends to seek recovery of such funds from ralph.

Alice, as a fellow general partner, may seek contribution from Ralph in the amount of \$20,000 in the event that TTM is unable to fully satisfy its outstanding obligations to TCU.

**MARYLAND ESSAY QUESTION NO. 2**

**Representative Good Answer No. 1**

**A. Courts where Abel can file an action for breach of contract**

Abel wants to file a breach of contract action for \$15,000 against Baker, Charlie Inc., and Dubious LLC. Under 4-402(d), the District Court and the Circuit Court have concurrent jurisdiction over this action because it exceeds \$5000 and does not fall within the exclusive jurisdiction of either court. Thus, Abel can elect to file suit in either court. However, he may not demand a jury trial because his claim does not exceed \$15,000. 4-402(e).

Since the defendant Shiftless Partners is a general partnership, we need to evaluate the proper venue for each general partner.

Under 6-201(a), venue is proper in any county where the defendant resides, carries on regular business, is employed, or habitually engages in a vocation. However, if there is more than one defendant and no single venue is applicable to all defendants, the defendants may be sued in any county in which any one of them could be sued or in the county where the cause of action arose. 6-201(b). Here, there is no single venue applicable to defendants, so they could be sued in a venue where any one of them could be sued (Anne Arundel County, Howard County, Montgomery County, and Frederick County), or the county in which the cause of action arose, Carroll County. So Abel could elect to sue in District Court or Circuit Court in any of those counties.

**B. Serving Process**

Service on the general partnership can be made by serving any general partner. 2-124(e); 3-124(e). Thus, service on Shiftless Partners can be made by serving any one of the three general partners.

Baker is an individual, so process would be made by serving him individually or serving any agent authorized by law to accept service on his behalf, for an action in either district court or circuit court. 3-124(b); 2-124(b).

Charlie Inc. is a corporation, so service is made by serving its resident agent, president, secretary or treasurer, for an action in either the district court or circuit court. 2-124(d); 3-124(d). If such service fails, Abel can serve any manager, director, vice president or other person impliedly authorized to accept service of process. Id.

Dubious LLC is a limited liability company and service can be made by serving its resident agent, or if this fails, any member or person impliedly authorized to receive service. 2-124(h); 3-124(h).

**C. Affirmative Defenses**

The defendants may be able to raise the defense of the expiration of the applicable Statute of Limitations. The Statute begins to run when the cause of action accrues, i.e. a reasonable person knows or should have known

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that they have a claim. Here, the patio began to erode in June 2014 and completely disintegrated in September 2014. Thus, the earliest the claim could have arisen is June 2014. A breach of contract statute of limitations is 3 years in Maryland. Able is just beginning to research this claim on July 1, 2017. Thus, the statute may have run and his claim may be expired. The defendants should raise this defense in their answer if in Circuit Court, 2-323(g), or Notice of Intent to Defend, 3-307(a), if in District Court.

**Representative Good Answer No. 2**

**Question A**

Abel may file an action for breach of contract in a district court because it is a contract action for under \$30,000. §4-401(a). Abel may also file suit in a circuit court because the circuit courts have concurrent jurisdiction with district courts for actions between \$5,000 and \$30,000. §4-402.

Abel may file this action in district court in either Carroll County (where the cause of action arose), Anne Arundel County (Baker's county of residence), Howard County (Charlie Inc.'s principal place of business), or Montgomery or Frederick Counties (Dubious LLC's principal places of business). §6-201. Abel may file suit in any of these counties because when there is more than one defendant and no single venue is applicable to all defendants, all defendants may be sued in a county in which any one of them could be sued or in the county where the cause of action arose. *Id.*

**Question B**

If Abel sues in circuit court and If Abel chooses to sue Shiftless Partners in its capacity as a general partnership, Abel must serve process on any general partner. § 2-124(e). If he chooses to serve Charlie, he can serve Charlie himself or anyone authorized by appointment or by law to receive service of process for him. § 2-124(b). If he chooses to serve Charlie, Inc., he must serve its resident agent, president, secretary, or treasurer; if there is no resident agent or Abel fails in a good faith attempt to serve any of those persons, he may serve its manager, director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process. §2-124(d). If Abel chooses to serve Dubious, LLC, he must serve its resident agent, unless a good faith attempt to serve the resident agent fails or there is no resident agent, in which case Abel may serve any other member of the LLC or person expressly or impliedly authorized to receive service of process. §2-124(h).

If Abel sues in district court, service of process must be conducted in the same manner. § 3-124(b); § 3-124(d)-(h).

**Question C**

The defendants can raise the affirmative defenses of statute of limitations and laches. Statute of limitations prevents a plaintiff from filing a civil suit in Maryland when more than three years have elapsed since the time of injury. Laches is an appropriate defense when a plaintiff, knowing of the harm or injury he has suffered, unjustifiably delays in filing suit against the defendant. In this case, Shaky Foundations installed Abel's patio in May 2014, and the patio began to erode nearly immediately. The patio disintegrated fully by September 2014, where after Abel demanded and was denied a refund, yet Abel has waited approximately three years to file suit. If the court deems that the injury began in June 2014, then Abel's suit is barred by the statute of limitations. If the court deems the injury did not begin until September 2014, then laches would be the appropriate affirmative defense.

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If sued in circuit court, the defendants must raise either or both of these defenses in their answer. §2-323(g). It does not matter that the action is for breach of contract; a general denial of liability would not be sufficient. If sued in district court, the defendants need only file a notice of intention to defend and can raise the affirmative defenses before the court.

**MARYLAND ESSAY QUESTION NO. 3**

**Representative Good Answer No. 1**

Generally evidence and testimony can be admitted so long as it's relevant, unprivileged, and passes the 403 balancing test (probative value not substantially outweighed by risk of unfair prejudice, confusing the issues, misleading the jury, cumulative, waste of time, or undue delay). Evidence is legally relevant if it goes to the truth of a matter being asserted and logically relevant if it can help the finder of fact make a determination as to the outcome of the case.

A. There are two possible grounds for objection to Beth's testimony that Al admitted to hiding assets from his previous wife. The marital communications privilege is held by both spouses and either one can refuse to disclose or allow disclosure of confidential communications made between spouses during their marriage. Hearsay is an out of court statement made to prove the truth of the matter asserted in the statement.

Here, a hearsay objection would be overruled as a statement by a party opponent exception. However, A can successfully prevent B's testimony as a privileged confidential communication made during their marriage and the objection should be sustained on those grounds. May not be okay since it's husband vs. wife, but probably sustained and privileged given context is about previous marriage not this one or this divorce.

B. A may prevent his attorney from his previous divorce from testifying under the attorney/client privilege. The privilege does not end with the representation or even the death of the client; therefore, the court should sustain A's objection on the grounds of attorney/client privilege.

C. Sam's testimony about a comment made by A falls within the definition of hearsay (above) since one of the grounds for divorce is adultery. While people convicted of perjury are not competent to testify in civil matters in MD, Sam is still awaiting trial and has not yet been convicted. He may be able to testify, hearsay notwithstanding, because he has first-hand knowledge of A's comments, which are statements/admissions of a party opponent. However, while the statement is relevant, if admitted its probative value may be substantially outweighed by the risk of unfair prejudice to A. Given the situation, and depending on the strength of other evidence, and the fact that adultery does not have to be proven by direct evidence, this objection is likely to be sustained.

D. Maryland recognizes an accountant/client privilege. A will be able to prevent Dave from testifying under that privilege about any confidential information. Assuming that the information Dave intends to testify about is not public information and is in fact confidential, the objection should be sustained. However, the P&L statements are business records kept in the regular course of business and would probably be allowed admitted into evidence as exhibits.

E. Maryland does not recognize a doctor patient privilege; any communications made for the purposes of treatment must be germane to the issue at hand to fall within a hearsay exception. The fact that A contracted an STD during his marriage to B (prior to their separation) does not go toward proof that A had an affair (he may have contracted it from B herself). This statement could pass the test for hearsay but is probably not relevant enough (up to the judge). The judge may overrule the objection, but depending on the relevance (making a fact more or less true or helping the fact-finder make a decision) or risk of unfair prejudice, it may be

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sustained. However, if used to prove physical cruelty to B, it may be admissible so long as it can be established that A knew about his infection, did not contract it from B, and took the risk of transmitting it to B while they were together anyway.

F. An individual is allowed to give a lay opinion as to the value of their own property. While it is up to the court in divorce cases to assess the property values and determine what is marital and what is not, B may opine as to the value of her own property and it can be taken under advisement or disregarded entirely by the finder of fact. Objection overruled.

**Representative Good Answer No. 2**

A. Beth's testimony that Al told Beth during their marriage that he had successfully hidden marital assets from his first wife

The issue is whether communications made during marriage may be introduced as evidence. The rule is that, even if relevant, evidence may be excluded if it falls under the marital communications privilege. This privilege applies to communications made during the marriage that were intended to be confidential. In Maryland, this means that the communications were not made in front of others, including any children. This privilege survives divorce and is held by either spouse as to those communications made during the divorce unless the communications relate to a joint crime, or in a suit by one spouse against the other for abuse.

Here, the communications seem to have been confidential because we have no facts indicating eavesdroppers, and the communications occurred during the marriage. These communications are therefore privileged and may not be introduced. Additionally, this suit is for an absolute divorce in Circuit Court. The fault grounds seem to exist for cruel treatment or excessively vicious conduct for divorce, but this kind of proceeding may not allow privileged marital communications to be let in. The suit is not for a protective order, criminal charges, or damages against Al for cruel treatment. Beth can prove absolute divorce grounds in other ways. Finally, Al may claim the privilege, as either spouse may, and most likely will do so.

Therefore, this testimony should be excluded by the Court as a marital communication.

B. Testimony from Fred that Al admitted to treating his first wife cruelly

The issue here is whether the attorney-client privilege applies. The rule is that an admission by one of the parties in a suit is an exception to the hearsay rule. However, communications between an attorney and his client relating to the matter of representation or in preparation of litigation are privileged and inadmissible.

Here, even though Al supposedly said this, it was to his attorney in his first divorce. We don't know for certain, but it is likely that this conversation and admission of cruelty occurred in the course of Fred's representation of Al in that matter and pertained to preparations for litigation. It would therefore be barred by the attorney client privilege and inadmissible. Even if it were not said through Al seeking representation, the Professional Rules also prohibit an attorney from discussing *anything* related to the matter of a client. Therefore, even if not privileged, for Fred to testify as to this comment may violate his duties under Rule 1.6.

Therefore, Fred's testimony is inadmissible.

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C. Testimony from Sam that Al had bragged about being unfaithful

The issue here is whether a friend awaiting trial for perjury may testify as to hearsay. The rule is that hearsay is an out-of-court statement introduced for its truth. There is also an exception, however, for a party admission made by one of the parties to the suit out of court. There is also a rule in Maryland regarding witness competency. A person convicted of perjury is not a competent witness to testify.

Here, Al made this statement out-of-court, so it is hearsay, but it is also a party admission excepted from the Maryland hearsay rules. However, if Sam is convicted of perjury by the time of trial, he will be incompetent to testify as a witness. The other side may also attempt to enter evidence of his former perjury, but in a civil suit like this, they may not be able to unless he is convicted since he is not a party and his own perjury is not at issue.

Therefore, a court would likely allow this testimony unless Sam is an incompetent witness by the time of trial.

D. Testimony from Al's accountant concerning Al's company and Al's income

The issue is whether Dave, Al's attorney may testify. The rule in Maryland is that a valid accountant-client privilege exists. In this case, Dave is the accountant for Al's solely-owned company, and therefore has information related to the company and to Al's personal income.

Because of the accountant-client privilege, this testimony is inadmissible.

E. Testimony from Al's Doctor

The issue is whether a doctor may testify about his patient's condition. The rule in Maryland is that no valid physician-patient privilege exists. Also, hearsay does not relate to observations. Therefore, Al's doctor, George, may testify as to his observations of his patient's disease.

Therefore, this testimony is admissible under Maryland law.

F. Beth's testimony

The issue is whether a lay-person may testify as to the value of her assets. The rule is that a party in a divorce proceeding may testify as to the value of their property. A lay person may also testify as to the value of her own assets without expert testimony. This is a party statement that is relevant as to Beth's fair share of the property. It is also appropriate lay-person testimony.

This testimony is therefore admissible.

**MARYLAND ESSAY QUESTION NO. 4**

**Representative Good Answer No. 1**

Charles will argue that his testimony from his first trial is not admissible, and that the Photo and Video should be suppressed as fruits of an unlawful search.

1. Certified Transcript of Trial Testimony - admissible

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Generally, previous testimony of a witness in a proceeding is admissible as a hearsay exception. Out of court statements offered to prove the truth of the matter are hearsay. However, if the statement is one made by the defendant, then they are a hearsay exception (party admission) and are admissible. This is because the defendant can "explain" his previous testimony to the fact finder.

Here, Charles took the stand in his own defense in his previous trial. His testimony in court was therefore a party admission and is within an exception to the hearsay rule. It was testimony because he gave it under oath while on the stand. His previous testimony is admissible against him, and the Judge should deny the Motion to suppress this evidence.

The Fourth Amendment protects citizens from searches in places where they have a reasonable expectation of privacy, unless the police have a valid search warrant. People have a reasonable expectation of privacy in their person, homes and personal effects. If police conduct a search without a warrant when the search required one, then the proper remedy is suppression of the evidence from the prosecution's case in chief, as fruit of the poisonous tree.

2. Photo - admissible if the photo was visible from the outside of the phone.

Generally, police need a search warrant to search someone. However, no search warrant is required if the search is made incident to a lawful arrest. Here, the arrest of Charles was lawful. The police were therefore entitled to search him.

If a phone is otherwise lawfully obtained, the police may inspect the outside of the phone for physical evidence, such as finger prints, without a warrant. However, they may not look inside the phone unless they have a warrant. Here, it appears that the Photo on the phone was visible without looking inside of the phone. While the officer was holding it, it automatically displayed the Photo. The officer did not do anything to make the Photo appear. It appeared because someone had called Victor, and Victor had presumably set the phone to make the Photo appear when that person or any person called. Therefore, assuming the photo appeared on the outside of the phone because the officer did not do anything to make the Photo appear, and it was visible from the outside of the phone, and the phone was lawfully obtained by police, the Judge should rule that the photo is admissible.

3. Video - not admissible.

The police possession of the phone was lawful (see above). However, police may not look inside of the phone unless they have a search warrant to do so. Here, the police had no search warrant for the phone. They were therefore not allowed to look inside of the phone. The Video was obtained by the officer searching through the apps on the phone. This is "inside" of the phone, and was a prohibited warrant-less search. Thus, because the Video was inside of the phone and police lacked a warrant, the video is not admissible as the fruit of an illegal search, and the Judge should rule that it is suppressed as fruit of the poisonous tree.

**Representative Good Answer No. 2**

At issue is whether the transcript, Photo, and Video are admissible against Charles in the Appeal.

The Fourth amendment, which prohibits unreasonable searches and seizure is applicable to the states through the due process clause of the Fourteenth Amendment. Thus, when there is a search without probable cause and without a warrant, it will generally be deemed to be inadmissible against the defendant per the exclusionary rule. However, if there has been a warrantless search or seizure, there are exceptions that will permit the evidence to be admissible. These include, exigent circumstances, search incident to arrest, automobile exceptions, search incident to arrest, consent, plain view, and special needs. When there has been a search incident

to arrest, the arrest has to have been lawful and the police officer is allowed to search the wingspan of the defendant for any weapon that is under his control that could be dangerous. However, when it pertains to cellular data, the officer is not allowed to physically access the data within the phone. The officer can search the cell phone for hidden dangerous weapons. Moreover, evidence obtained in violation of the exclusionary rule is inadmissible against the defendant due to the fruit of the poisonous tree.

### **Photo and Video**

Here, Charles was arrested and searched pursuant to a search incident to arrest. The arrest was lawful, so Charles will be unable to argue that this wasn't a lawful search. A judge would find that this was a lawful search. However, when the Police was searching him, they found a phone in his pocket. Charles would argue that the photo and video that the police found were cellular data and should be excluded against him because this was a violation of his Fourth Amendment. Charles would argue in his motion to suppress that by looking through his phone and seeing the photo of him kicking the Victim and by going through the apps on the phone and finding the Video this was an intrusion on his reasonable expectation of privacy. Charles would argue that although searches incident to arrest are permitted, the act of going through his phone is limited to dangerous and armed weapons as it is for the safety of the officer and the general public. Charles would argue that once the police officer had the phone in his hand, he should've just done a cursory inspection for the weapons and not have looked at his screen nor gone through his phone.

As to the photo, the State would argue that it should be admissible because although the officer had Charles' phone in his hand, the picture that showed up on Charles's phone was in plain view. Plain view is an exception to a warrantless arrest requirement. The State would argue that the police officer did not go through the phone, but rather as he was inspecting it for dangerous weapons, the picture appeared on the screen. The police officer did not manipulate the phone in anyway and that it was open and apparent to the public in that anyone could have seen the picture. Moreover, the State could argue that Charles did not take any reasonable precaution in terms of the privacy of his incoming calls or phone as a picture incriminating him appeared on the face of his phone. While this could go either way, a judge would most likely find the photo should be admitted and deny Charles' motion to suppress as to the photo. Because the police officer was just searching his phone and the picture appeared in plain view, it was not protected by the Fourth Amendment and thus it would be admissible against him.

As to the video, Charles would probably be successful in getting it to be suppressed. As stated above, going through the cellular data is not permitted during a search to incident to arrest. When the police officer searched through Charles' apps and then found a video about the attack, this was more than just searching for dangerous weapons. This included an invasion of a reasonable expectation of privacy that Charles' had in his phone. The Supreme Court has stated that phones, in this day and age are so intimate and personal because of the private data that is on there. The State may argue that the Police officer may have believed that he had exigent circumstances in terms of being afraid that the video may be deleted. The State could argue that once he saw the photo, he developed probable cause to believe that other evidence might be on the phone. However, this would not be justified, because there are other ways to prevent this from happening. For example, the officer could have put the phone in a faraway bag to prevent the data from being wiped out. A judge would probably rule in favor of Charles and suppress the video.

### **Certified Trial Transcript**

Charles would argue that the trial evidence against him should be inadmissible against him because it is highly probative and would be unfairly prejudicial. Charles may argue that the trial transcript, where he confessed should not be allowed against him on appeal. However, a judge would most likely allow the transcript in.

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Charles may argue that he did not mean to confess on the stand and that the transcript is incriminating against him. He may also argue that the transcript is hearsay because it is an out of court statement being offered to prove the truth of the matter asserted. He would argue that the transcript is an out of court statement as it happened out of this court's the Circuit Court, and it is being offered to prove that he did in self-defense assault the Victim. However, under the rules of evidence in Maryland, an opposing party's admission can be used as evidence against him. Charles is an opposing party, and his confession is valid. Moreover, it does not appear that there was unduly coercive aspects on the stand when he testified. Thus, he could not even argue that he was forced to confess. This will be admissible against him.

**MARYLAND ESSAY QUESTION NO. 5**

**Representative Good Answer No. 1**

Amanda should have several good claims for breaches of warranty. Namely, she will have successful claims for breaches of the implied warranty of merchantability, the warranty of fitness for a particular purpose, and likely express warranty. Furthermore, the attempt to waive the warranties by way of a disclaimer on the receipt will not eliminate these warranties which the manufacturer breached.

The implied warranty of merchantability is the warranty that goods sold to consumers by a merchant are fit for the ordinary purpose the goods are intended to be used for. Here the good is a power drill, including a drill bit set. Importantly for all these warranties, Amanda bought the drill from the manufacturer's store. There is evidence that the drill did not satisfy the "fit for the ordinary purpose standard" in the fact that the drill bits constantly broke, and the drill damaged every surface she attempted to use it on. A drill fit for its ordinary purpose would not break drill bits so easily and damage the surfaces the user is drilling on. Therefore Amanda should have a claim that the manufacturer breached the implied warranty of merchantability.

Amanda also has a claim for breach of warranty of fitness for a particular purpose. When a buyer communicates to the seller what the buyer intends to use the good for - that is, in what particular way the customer intends to use the product or what time of work she/he needs a tool for - and the seller then recommends a particular product, the seller/manufacturer has created a warranty of fitness for a particular purpose. In these facts, Amanda made it clear precisely what she needed the drill for and what she intended to do with it. Since the sales person then assured her that the drill would be ideal for any use she might require, this exchange put the drill and drill bits squarely within the warranty of fitness for a particular purpose, and Amanda has a claim under such a warranty.

Amanda could also have a claim for breach of an express warranty. An express warranty comes from statements, conduct, or assurances made by a seller regarding the quality and ability of a given product. Mere statements of opinion do not create express warranties. Here, the salesperson assured Amanda that the drill would be ideal for any use she might require. The statement would likely be found to be an express warranty. Under some circumstances it is possible that saying something is "ideal" is just an opinion, or puffery, but in the context it could also be found to be an express warranty. Nonetheless, the claim for fitness for a particular purpose is stronger than the argument for breach of express warranty.

The manufacturer's attempt to waive these warranties will not succeed. Under Maryland law, in the sale of consumer goods from a manufacturer, the implied warranty of merchantability, and the warranty of fitness for a particular purpose may not be waived or disclaimed by a seller. Therefore the attempt to waive those two warranties by the manufacturer is invalid.

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Express warranties may be waived if their waiver is conspicuous, and if the merchant or manufacturer provides an adequate and prompt way to respond to and address claims of breach of warranty. Again, as said above, the argument for express warranty is not as strong, but Amanda could claim express warranty unless the manufacturer provided some means to bring her claim forth, perhaps a claims desk that repairs or replaces defective products.

The measure of damages for breach of warranty is the difference between the value of the good as warranted, and value of the good at the time of sale. Here Amanda would be entitled to the difference between what he paid for the drill and bits, and the price of a drill and bits that work for the particular purpose she explained to the salesperson and sought to buy.

**Representative Good Answer No. 2**

The UCC governs sales transactions for goods and products. The drill bit set is a good, so the UCC applies.

I would advise Amanda that she has recourse against the manufacturer/seller for the following:

**Breach of Express Warranty.** Under the UCC an express warranty is an oral or written expression about a product's quality, utility and reliability based on the representations of a manufacturer or seller; express warranties cannot be waived. Here the Sales person "assuring" Amanda that the drill would "be ideal for any use she might require" may have represented an express warranty. The seller will likely claim that the statement was mere puffery, but Amanda can still make the claim that the express warranty was breached and it cannot be disclaimed.

**Implied Warranty of Merchantability.** Under the UCC, the implied warranty of merchantability warrants that a product is good for its ordinary purpose and if it fails to satisfy that purpose, the warranty is breached by the seller. Here the ordinary purpose for a drill bit set is to drill on a surface without damaging the surface or breaking the bits; therefore, Amanda can make a claim for breach of the implied warranty of merchantability, because the drill did not drill properly.

**Implied Warranty of Fitness for a Particular Purpose.** Under the UCC, the implied warranty of fitness for a particular purpose warrants that a product is good for its special purpose if a seller knows about the buyer's special purpose. Here, Amanda informed the salesman on a "clear" and precise manner, what she intended to use the drill bit set for, thereby putting the seller on notice. The seller, after knowing Amanda's particular purpose still made a representation that the drill was "ideal" for Amanda. Because the drill failed for Amanda's purpose, this warranty was also breached.

**Implied Warranties for consumer products** cannot be waived. Under the UCC, implied warranties can't be waived for consumer products, so the attempted waiver on the receipt by the seller is not valid, because the drill set is a consumer product, sold to Amanda, a consumer.

Additionally;

**Warranty Disclaimer.** A warranty disclaimer must be clear and obvious to a consumer. Here the small print on the receipt (smaller than all other writing) was not clear and conspicuous enough to put Amanda on notice that a warranty was being disclaimed, so the disclaimer is also invalid.

**Contract of Adhesion.** The warranty disclaimer may also represent a contract of adhesion, where the consumer had no opportunity to negotiate the terms -- it was take or leave it. Contract of adhesion are invalid if found unconscionable. Here the disclaimer may be found unconscionable because it attempts to disclaim all warranties -- even express warranties and does not put the consumer on notice.

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**MARYLAND ESSAY QUESTION NO. 6**

**Representative Good Answer No. 1**

**PART A: JACK/COUNSEL**

Can Jack file for divorce? On what grounds and why?

Divorce is an order by the court signifying that a marriage has legally ended. In order to be able to file for divorce in Maryland, the plaintiff must have satisfied the immediate grounds, or satisfied the requirements for delayed grounds.

Grounds for immediate divorce, where no mandatory separation period is required, are mutual consent, excessively vicious conduct, cruelty of treatment, desertion, and adultery. Adultery is the only one of these four that could apply to Jack. Mutual consent is not an option, because even though the split was amicable and Jack and Jane have already established a shared custody agreement, mutual consent is not an available ground for couples who have a minor child (Matthew is 9). Desertion may apply, as Jane had an affair then left the marital home with the intent of separation, but because Jane moved back in and J/J attempted to reconcile, desertion is likely not an available ground.

Adultery occurs where a married person has extramarital sexual relations with a person who is not their spouse. Here, Jane committed adultery. However, because Jack "in time forgave Jane and she moved back in," his condonation likely softens any claim of adultery as a ground.

Nevertheless, Jack may file for divorce immediately, because he and Jane have been separated since Jane "moved out in June 2016."

The "delayed grounds" referenced above are 1 year separation (live separate and apart, no cohabitation, no sex); insanity (3 years institutionalized); incarceration (1 year of at least 3 year sentence served so far); and desertion (actual or constructive).

The facts do not give any indication that insanity or incarceration are available grounds.

Desertion may be a ground for Jack to file, as Jane moved out with no intent to return, nor any hope of reconciliation. Further, Jane constructively deserted the marriage by having an affair. For reasons stated above, this argument is not Jack's strongest, as he forgave Jane.

1 year separation, Maryland's version of "no fault," is the best ground for Jack to claim when he files. Because Jane and Jack have already been separated for over year, Jack may file immediately.

Will the court award Jane alimony? What factors will the Court consider?

Alimony is a monetary award ordered by the court to one spouse, generally intended as an equitable remedy during and after divorce.

Pendente lite, temporary alimony, may be ordered while the divorce proceedings occur, in order to help the less financially-able spouse until there has been a property settlement.

Generally, alimony is awarded on a rehabilitative basis, with the effort of getting the lesser-earning spouse back on their feet after divorce, to see them through until they can get job skills or financial independence back. Alimony is rarely still awarded as a permanent remedy, though there are exceptions where it is.

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In Jack and Jane's case, the court will consider that Jane and Jack are both educated, roughly the same age, and employable (both had jobs following college graduation). The court will also take into consideration that Jane and Jack made the mutual marital decision that "Jane would give up her career and stay at home to care for Matthew," as Jack was earning almost ten times Jane's income, in his highly successful business. Further, the court will consider that Jane was diagnosed and treated for cancer, then continued to be primary caregiver for Matthew, with Jack working "long hours at the office." The court will also take into consideration that Jane had an affair, moved out, and moved back in, when Jack forgave her.

The court will also consider that they were married for ten years before Jane moved out the second time, which is not an insignificant amount of time, and the general lifestyle afforded to them by Jack's substantial salary.

I would advise Jack that Jane will almost certainly get rehabilitative alimony, and the court will weigh the above factors noted. Because of Jane's relatively young age and her ability to reenter the workforce, she would most likely not be entitled to permanent alimony.

## PART B: PROFESSIONAL RESPONSIBILITY

An attorney has a duty of confidentiality to the client, which requires that an attorney not divulge personal information of the client without the client's consent, absent an emergency or life or death situation. However, an attorney also has a duty not to be complicit in perjury. Here, Jack is under oath when he appears for deposition. Because the facts do not indicate any conversation as attorney for Jack, with Jack, regarding the findings of the investigation, my role as attorney is not complicit in Jack's lying under oath. However, after learning of Jack's lie, I would meet with Jack to advise that I can under no circumstances be a part of his perjury, and that I will not lie on his behalf. I would explain to him to that he must be willing to tell the truth, or that I will have to withdraw as his attorney. I will further explain to him that I will help him tell the truth so that danger to him in the case is mitigated to the maximum extent legally possible, but again that under no circumstances will I take any action (or inaction) that condones him lying.

### **Representative Good Answer No. 2**

#### PART A. DIVORCE AND ALIMONY

This part is governed by Maryland Annotated Code for Family Law.

#### DIVORCE

Grounds for absolute divorce include, among other things, cruelty, excessively vicious conduct, one year separation, and adultery. Cruelty and excessively vicious conduct do not apply here, so Jack has the potential options of filing for absolute divorce due to adultery or one year separation.

Adultery requires both the opportunity to act and the disposition to do so. Here, Jane admitted to Jack that she had an affair with Jack's business partner in 2014 and therefore had both the opportunity and disposition to commit adultery. More than likely, however, Jack would not be able to file for absolute divorce on this ground because he forgave Jane for the affair and because he forgave her this ground more than likely would not be the best way for him to file for divorce.

One year separation requires that the married couple be separated for one year with no cohabitation or sex and without the possibility of reconciliation. Here, Jack and Jane have been separated since 2016 when Jane moved out. From the facts given, Jack could file for absolute divorce on the grounds of one year separation.

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## ALIMONY

Alimony is awarded either rehabilitatively or permanently and looks at many factors in determining whether it should be awarded. While Maryland does not usually award alimony, there is a possibility it could give Jane rehabilitative alimony in this circumstance.

Rehabilitative alimony is alimony given for a temporary period of time. Factors the court looks toward include monetary and non-monetary contributions to the home, the training and education of the parties, and a party's ability to work.

Monetary and non-monetary contributions to the home include both work income and work down around the house. Here, Jane quit her job to take care of the home and of her and Jack's son, Matthew. Additionally, she has been out of work for at least nine years and has been the primary homemaker and the court could take this into consideration.

Difference in income is the difference the parties make when working and can be a factor the court uses when awarding alimony. Here, when Jane was working she was only making \$45K a year while Jack was making \$400K a year. Because of the large difference in income, the court could use this to award Jane some form of alimony.

Jane's lack of a job and potentially needing to be retrained in order to rejoin the work force can also be a factor the court considers. Here, Jack has been working for the duration of the marriage, while Jane has been out of work for a while. Because Jane could potentially need retraining in order to get a job in her field, the court could award rehabilitative alimony until Jane is able to find a job.

## PART B. PROFESSIONAL RESPONSIBILITY FACTORS

This part is governed by the Maryland Rules of Professional Responsibility.

The obligation of confidentiality requires a lawyer to keep communications between the attorney and the client confidential with certain exceptions. Here, the investigation done by the attorney for Jack was done during the course of the attorney-client relationship and because there is a fiduciary duty to one's client, this is an implication that the attorney has to take into consideration.

An attorney cannot knowingly allow for furtherance of a crime or fraud. Here, Jack lied during his deposition, by lying about his affair with Katie. While an attorney has a fiduciary duty and has an obligation of loyalty and confidentiality, the lawyer cannot assist in furtherance of a crime and here the crime is perjury. If the attorney determines this is a violation of the Maryland Rules of Professional Responsibility, the attorney needs to be truthful to the court and this exception to confidentiality can be implicated.

Candor towards the tribunal is the requirement that an attorney be honest and open with the tribunal regarding potential evidence that can be deemed untruthful and material to a case. Here, keeping the evidence of the affair, which is a material fact, was being kept from the court and because it is material to the divorce, can cause an implication that the attorney needs to be truthful to the tribunal.

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**MARYLAND ESSAY QUESTION NO. 7**

**Representative Good Answer No. 1**

Has Ben violated his non-compete with Jerry?

In commercial leases it is not uncommon for there to be a non-compete clause between the businesses in order to effectuate the possibility of leasing the space.

Here, Ben and Jerry's 2 businesses have certain commonalities with regard to providing medical treatment to others. Presumably, both were aware of this when they entered into their respective leases. In order for Jerry to be able to seek help from Landlord for a breach of this covenant within the lease, he needs to be able to prove that Ben is actually competing with his business.

Based on the facts given, there is no evidence that Ben sought customers/patients for the exclusive purpose of treating them for conditions outside of dialysis. Nor is there any reason to believe that Ben's patients who are getting care somewhat outside the treatment for dialysis would have sought care from Jerry. In fact, it could be reasonably argued that most patients who are seeing a specialist for one thing would ask them for help with other, somewhat related, medical issues. The standard to determine this would be how other similarly situated physicians, nationally, would conduct their business.

As such, it is unlikely that Ben would have been found to have violated his non-compete covenant in his lease and, therefore, the actions of landlord seeking him to stop behaving in a reasonably prudent way, were likely unenforceable.

Effect of Landlord's office manager

Despite the fact that Landlord's letter regarding Ben's breach would not likely be enforceable, he was unaware of that. The Landlord's office manager is an agent of the Landlord. Under agency law, if the manager is acting within the scope of her responsibilities and duties then the Landlord can be held liable for the promises that she makes.

In the present case, Ben was unaware that Landlord's letter was likely ineffective, and perhaps a reasonable judge would find otherwise, so he sought guidance from the office manager. Her comment to him about this being, effectively, a form letter that he should not worry about, gave Ben the reasonable belief under her apparent authority, that he had nothing to worry about and could continue to operate as he always had done. Further, when he did continue to act as he had always done, and continued to pay rent, and the Landlord said nothing further, nor corrected the actions of the office manager, and continued to cash Ben's checks - instead of putting them into a trust account until the matter could be resolved - he effectively waived the condition in the lease that he was seeking to enforce.

Therefore, he is barred from now raising the issue of breach of the covenant in the lease.

Use of self-help

Jerry's decision to breach his lease contract with Landlord may afford Landlord certain rights against Jerry, however he does not have the right to self-help to lock out Ben who has been current on his lease and appears to be operating within the scope of his lease.

Under MD law, a landlord can use self-help only after obtaining a court order for such after an eviction proceeding in which the tenant could not be located or refused to remove their belongings. In the present case,

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there have been no eviction proceedings, and Ben is current on his lease, which would make eviction proceedings moot.

Therefore, the padlock on the two units is unjustifiable and their leases cannot be terminated in this was.

In conclusion, my advice to Landlord would be the following:

A. Ben did not likely breach the covenant in his lease not to compete with Jerry

B. Even if he did breach that covenant, the statements by the office manager, coupled with his actions in accepting Ben's rent served as his acceptance of that breach

C. As Jerry has left, without paying rent, and has made clear he is not returning, it would be proper to file a claim for back rent, and under a breach of contract, for future lost rent if he is unable to find a suitable replacement. He should begin looking for such a replacement and be prepared that he likely cannot recover the future damages until the end of the lease when those damages are clearly known. However, he is not permitted in any case, to use self-help and lock Jerry out of the space and prevent him from taking his belongings.

D. Likewise, he is not permitted based on these facts to terminate Ben's lease at all, therefore he should not look for a new tenant for Ben's lease, and he has no grounds whatsoever for self-help against Ben and therefore needs to un-padlock his door.

E. Finally, he should be advised that failure to remove the padlocks could subject him to a charge for conversion by both men.

**Representative Good Answer No. 2**

**1. Ben v. Landlord**

Ben may be able to pursue a wrongful eviction claim against Landlord. Ben will argue that he detrimentally relied on Office Manager's statements that he could continue to practice medicine unrelated to dialysis. Ben spoke to Office Manager, an agent of Landlord, about the letter he received on January 25th 2017, and was told that he could keep continuing practicing as he had been despite the letter and that "it was standard to send such letters if any tenant complains." Ben will argue that had he not been told that he "shouldn't worry about" the letter, he would have stopped practicing medicine other than dialysis, and that Office Manager's statements amounted to approval of Ben's practice and made him believe he was not in breach of his lease.

Landlord should defend that he gave written notice of a violation of the lease agreement on January 25, 2017, and that the lease permitted Landlord to terminate the lease upon written notice of any lease violation. Here, Ben violated the provision of the lease forbidding tenants from competing with the business of any other tenant in the building. Landlord determined that Ben's practice of medicine other than dialysis was competing with Jerry's urgent care center and was therefore a violation of the lease. The lease does not provide for an opportunity for the tenant to cure the breach, and Landlord was free to terminate his lease immediately upon providing the written notice of breach. Additionally, the Landlord can claim that failure to immediately pursue termination is not a waiver of the right to terminate and that any such waiver would have to be in writing. Here, the only communication Ben had with Office Manager subsequent to the January 25 letter was oral, and therefore not effective to waive Landlord's right to terminate Ben's lease.

**2. Jerry v. Landlord**

Jerry may be able to pursue a claim for replevin and for constructive eviction. First Jerry's claim for replevin is simple. Jerry has personal property within his office at Landlord's building, and Landlord has

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padlocked the door, preventing Jerry from retrieving his property to move it to a new office. An action for replevin requires that the plaintiff show that the defendant is in possession of his property and requests the court to order its return, with the aid of the sheriff if necessary.

Jerry can argue that Landlord's failure to enforce the non-compete clause of Ben's lease resulted in a constructive eviction of Jerry from the office space. A landlord has a duty to ensure that the leased space in a commercial lease is suitable for the tenant to perform his business there, and has a responsibility to enforce the lease in a way to protect the tenant's economic interest in the space. By not enforcing the non-compete clause against Ben, Landlord allowed Ben to take Jerry's patients away from him, resulting in a loss of income and possibly hindering his ability to pay rent. Jerry complained to Landlord about Ben's violation and Landlord permitted Ben to continue competing for Jerry's patients.

Jerry finally may be able to claim that Landlord actually evicted him by padlocking the door, removing Jerry's access to the leased space. Jerry will argue that he had not stopped paying his rent and had not violated the lease in any other way, making eviction improper. Even if he did violate the lease, he was given no written notice prior to termination of his lease as required. It also appears that Landlord evicted him in retaliation for complaining of Ben's violation of the non-compete clause, based on Landlord's statement that he was "through with the quarreling bums."

Landlord's best defense to any of Jerry's claims only applies to his actual eviction claim. Landlord can claim that Jerry abandoned the property, and so he was right to padlock it and prevent access so that he could attempt to relet it to mitigate his damages. However, Jerry was only gone for one day by the time Landlord padlocked the door and Jerry gave no indication that he was repudiating the lease or refusing to pay any further rent due. Jerry must be absent for longer than a day for the property to be truly abandoned.

**MARYLAND ESSAY QUESTION NO. 8**

**Representative Good Answer No. 1**

PART A

This is for services, mowing of a lawn and shrubbery, and therefore common law applies.

Contract requires offer, acceptance, and consideration.

Offer requires language of commitment and sufficient detail. Here, Beta "approached Alpha and offered to weekly mow Alpha's lawn during the spring and summer 2017 growing season (May through October 2017)," would "charge a seasonal price of \$2,400" and that Alpha could "pay \$100 following each mowing, which would total \$2,600 for the season" if he did not want to pay all at once which shows language of commitment and has sufficient detail and therefore was an offer.

Acceptance is accepting the offer and can be in any form reasonable under the circumstances unless a specific form of acceptance is provided for in the offer. Here, while Beta was mowing Alpha's lawn, "Alpha did not speak to Beta, but gave him a thumbs-up sign as he pulled his car into his garage" and later that evening paid him the \$100 and therefore there was an acceptance.

Consideration is the requirement that there be a legal detriment and that the legal detriment is bargained for. Here, Beta will mow Alpha's lawn each week and Alpha will pay \$100 and therefore there was valid consideration.

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Installment contract is a contract in which the delivery or performance is in different units. Here, the mowing will occur each week and it is paid for each time separately and therefore this was an installment contract and Alpha would argue that each service was a separate unit and Alpha would not be responsible for having to pay for it each week if it did not want to.

Modification is when the parties to an existing contract change the terms of the contract and requires an agreement and new consideration, rescission, or a good faith response to an unforeseen hardship. Here, Beta trimmed and shaped the shrubbery and requested in the letter and therefore there was an agreement to modify, but there was not sufficient consideration to support this modification as Alpha did not pay more money for the additional service and therefore this was not a proper modification.

Total Breach is when one party fails to perform as required under the contract such as a very serious breach, repudiation or material breach that has not been cured. Here, "Beta mowed Alpha's lawn at the end of the second and third weeks in July" which were during the agreed upon time period and "Alpha refused to pay Beta for any of the work Beta had done in July" and therefore there was a total breach of the contract.

Ruling - Alpha breached the contract with Beta.

## PART B

Damages - here, "Beta mowed Alpha's law at the end of the second and third weeks in July" which were during the agreed upon time period and "Alpha refused to pay Beta for any of the work Beta had done in July" and therefore Beta could seek damages for this.

Monetary damages are damages that can be obtained by the aggrieved party in order to recover for economic loss. Here, Beta could recover the \$100 for the two weeks (\$200) that he mowed the lawns at the end of the second and third weeks from Alpha.

Action for lost profits is an action brought in order to recover for the profit the individual would have obtained from another individual if party did not breach. Here, Beta could show that he would have set up another service during that time and would have made the \$100 each week from another customer if Alpha did not breach and therefore could recover this from Alpha.

Action for the price is seeking damages in the amount of the entire contract price if the buyer wrongfully obtained the services. Here, Beta could argue that he is entitled the entire contract price because he provided the services and they were not paid for, however, it was only the two weeks that were not paid for and this was an installment-type contract and therefore this would not be an available form of remedies.

Restitution is putting the party in the position they would have been in had the contract not existed.

Reliance damages are damages the individual incurred because of reliance on the other party.

### **Representative Good Answer No. 2**

This question requires analysis of common law contracts because it deals with services.

#### A. BETA V. ALPHA

Contract is made upon mutual consent and consideration. Here, there are two contract at issue

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1. B mows A's lawn

Consideration legally bargained for detriment. Here, B offered to mow A's lawn and A to pay B \$100 for each mowing.

Mutual assent requires offer and acceptance. Offer requires something that gives the buyer an opportunity to accept. Here, B offered to sell A's lawn during the growing season for \$2400 up front or for \$100 after each mow to total \$2600 for the whole growing season.

Acceptance is any conduct that a reasonable person would perceive as acceptance. Here, A accepted the \$100 a mow term when he gave B a "thumbs-up" as he pulled in car in while B was mowing and when A continued to pay B the \$100 agreed price each time he mowed.

There was a contract between A and B for, at the least, for B to get \$100 every time after he mowed A's lawn, if not for the whole growing season.

B can claim that A breached the contract when A did not pay him for the mowing he performed in July.

A could argue in defense that he never verbally accepted the terms of B's offer in April 2017. This argument will fail because acceptance does not have to be verbal and any reasonable person would assume from A's conduct that he accepted the offer.

A could also ask to partition out the contract to cover the times that B mowed the lawn instead of for the whole growing season. The Court may do this if it finds that the contract performance can be divided.

B is likely to succeed on a breach of contract claim for the mowing of the lawn.

2. B to trim and shape A's shrubbery for \$350

Contract. See above.

Consideration. Here, B would trim and shape the shrubbery and A would pay \$350.

Mutual Assent. Offer was made by B to do the job for \$350.

Acceptance has to be identical to the offer under the common law (mirror-image rule). Here, A did not simply accept the offer of B but instead offered an additional term for performance not to begin until August "after blooming had ended". Since this was not an identical acceptance, it was a rejection and considered a counter offer to B.

B could accept through his actions or verbal consent. Here, B did not respond but instead started to trim and shape the shrubbery in July.

Since there was never a clear offer and acceptance. There was no contract for the shrubbery services.

B is likely to make an argument that A's note was merely a suggestion and when A did not mention anything after B trim and shaped the first week of July, he was accepting B's offer.

A can argue that when he sent a note and counter-offer, B's original offer had died and was no longer available for acceptance, therefore when B did not accept A's offer, there was no contract.

Implied in fact contract is when benefit is conferred on someone and in an effort to avoid unjust enrichment, the court awards quantum merit for the amount of benefit that was received. Here, although there

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was no contract, B can claim that A was unjustly enriched by the services that he received from B's trimming and shaping in July.

Promissory Estoppel/Implied in fact contract - detrimental reliance. Here, B was not reasonable in relying on A's lack of response as an indication that he could trim and shape A's shrubbery especially after A did not pay a day later as he had in the past.

B will be unsuccessful for a breach of contract claim but is likely to succeed on an implied in fact claim.

## B. DAMAGES

Partial Performance is a grounds for damages when one has already begun partial performance on a contract.

Rescission and Restitution can be granted for a contract breach. Here, B can get damages for the work he has already performed on the contract.

Expectancy damages. Here, B can get damages for the money he would have received if A did not breach the contract for the mowing during the growing season.

Quantum Merit damages as discussed above under implied in fact contract for the services of trimming and shaping the shrubbery.

Compensatory damages to compensate B for the business he may have lost doing A's lawn and shrubbery and for payment of the services A already received.

## **MARYLAND ESSAY QUESTION NO. 9**

### **Representative Good Answer No. 1**

#### Car damage

Negligence: Cassie may have a cause of action based on negligence which requires the breach of a duty that causes harm. Here, Tina drove to work, and while parking, slid into Cassie's car which was parked in front of Hair Academy, causing damages to Cassie's car.

Negligence per se: Negligence per se arises from a breach of a statute, although in MD it is merely evidence of negligence. Tina did not have car insurance, meaning she breached a statutory duty for drivers to have insurance.

Vicarious liability: Vicarious liability arises for an employer under respondeat superior when the employee is negligent acting on behalf of the employer and within the scope of their employment. Tina was driving to work, meaning she was not within the scope of her responsibilities yet, meaning vicarious liability is unlikely to attach here.

#### Premises liability

Premises liability creates different duties for the owner of property depending on the owner's relationship to the injured party.

Business invitee: A business invitee is a person on the premises for the economic benefit of the property owner. Tina came to have her hair done at the Hair Academy owned by Henrietta, meaning Tina was Henrietta's business invitee.

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Duty to business invitees: The owner of land owes a duty to business invitees to inspect for concealed, dangerous conditions, to warn of concealed dangerous conditions, and take reasonable care to ensure the premises are reasonably safe. Here, Henrietta failed to clear the sidewalks and sand them, was late to work, and did not check the answering voicemail where she should have heard that she should have cleared and sanded the sidewalks.

Intervening cause: An intervening cause is an act that is reasonably foreseeable that will result from negligence that the original tortfeasor will remain liable for. Because it was reasonably foreseeable that Tina would have difficulty parking in ice, it was also reasonably foreseeable that she would slip into Cassie's car, making Henrietta liable.

Non-delegable duty: A non-delegable duty exists for property owners to keep the premises reasonably safe. Henrietta merely rents the property, and although she was told by Owner, who owned the shopping center where Hair Academy was located, to clear the sidewalks, this was a non-delegable duty to keep the premises safe, making Owner of the shopping center liable, particularly because Owner only delegated control of the sidewalk to Henrietta, not the parking lot.

#### Burning

Negligence: above. Tina had a duty of care to straighten Cassie's hair and failed to do so when she dropped the straightener on Cassie, burning her sweater and arm.

Contributory negligence: Contributory negligence arises when a plaintiff's negligence contributes to their harm and bars recovery. Here, Cassie jumped up in anger, meaning the surprise could have caused the harm suffered by Tina.

Last clear chance: Last clear chance applies when the defendant has the last opportunity to prevent the harm. Here, Tina had the last clear chance not to let go of the straightener and did, meaning last clear chance may defeat the contributory negligence claim.

Vicarious liability: above. Here, Tina was using the straightener, working on behalf of Henrietta as an intern and within the scope of her employment, meaning vicarious liability under respondeat superior attaches to Henrietta.

Negligent supervision: Negligent supervision arises after an employee is negligent, and the employer knows or has reason to know that they should supervise the employee and fail to do so. Henrietta knew that Tina was an unpaid intern and failed to supervise her, leading to burning Cassie.

#### Slip and Fall

Premises liability: Above. Business invitee: Above. Cassie was one. Duty to business invitee: above. Henrietta failed to take reasonable care to make the premises reasonably safe by coming to work late, not checking the voicemail where she would have heard a message telling her to clear and sand the walks, and failed to do so, which caused Cassie to fall, breaking her leg.

Non-delegable duty: above. It is possible that but for Henrietta's negligence and failure to listen to the voicemail informing her to clear and sand the sidewalks, the injury would have been prevented, but a non-delegable duty cannot be delegated, meaning Owner is still liable for the sidewalk, even if Owner tried to delegate it.

Contributory negligence: above. Cassie stormed out of the salon which caused her to fall.

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Assumption of the risk: Assumption of the risk arises when a plaintiff voluntarily acts knowing the risks. Cassie stormed out knowing an ice storm had just happened and that the walks were not clear, but chose to storm out anyway.

Damages: Cassie can try to recover for damages to her car from Tina, Henrietta, and Owner; Cassie can try to recover damages from the burns from Tina and Henrietta; and Cassie can try to recover damages for her leg from the slip and fall from Henrietta and Owner.

Negligent infliction of emotional distress: NIED is additional damages that can be tacked onto a tort claim based on reckless conduct that results in severe emotional crippling that also has a physical manifestation. Here, Cassie's surprise resulted in the burn, and Cassie's anger resulted in the slip and fall.

**Representative Good Answer No. 2**

Cassie (C) v. Henrietta (H)

Negligence: Negligence requires (1) duty to the plaintiff, that (2) D breaches, (3) which causes, (4) harm to P.

C can bring a negligence suit vs. H. MD operates under the traditional structure of duties to persons on your land. The highest duty is owed to licensees, those on your land with your permission. Shopkeepers owe a duty to keep the premises safe for their customers as licensees. Here, H is a shopkeeper, and C is her customer, therefore she owed her a duty to keep the premises safe.

H breached that duty when she did not clear the sidewalk.

C was harmed by that failure of H to perform her duty when C slipped on the sidewalk and fell because it was still icy from the unexpected ice storm. Causation requires both but for and proximate cause. Both are satisfied here. But for H's failure to clear the sidewalk, C would not have slipped. Slipping on ice is a foreseeable harm from failure to sand the icy sidewalk and make it safer to walk on. Thus, there is sufficient causation.

C suffered harm as a result—breaking her leg. Therefore, she can recover against H in negligence.

Defenses: H may argue C is contributorily negligent, which is a complete bar to recovery in Maryland. This occurs where the plaintiff has also not exercised their proper duty of care. H can argue that C did not pay close enough attention while walking on the sidewalk—she fell because she “stormed out.” This defense will not succeed. There is no evidence C fell because she wasn't paying attention and was upset; she fell because H didn't clear the sidewalk as instructed. Therefore, C can recover damages for her broken leg. She could also recover punitive damages if there is evidence that H's conduct was willful, malicious or wanton. This does not rise to that level—willful/malicious/wanton conduct is much more reckless than this. This was just failing to clear the sidewalk; if H had purposefully put more ice down, then maybe C could recover damages. That's not the case, so she will be limited to actual damages, but that can include subsequent medical expenses and pain and suffering caused by her broken leg.

C v. Owner (O)/LTSC

This is another negligence action, which requires the elements noted above.

Landlords are liable for the failure to adequately warn of and protect from dangers in the common areas of their property. Although landlords can delegate certain duties to their tenants, a shopkeeper or commercial retail space cannot delegate the inherent duty to keep the premises safe for the public to enter. As a shopping center, LTSC was responsible to keep the common areas, including the sidewalks in the shopping center, safe for

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the public to access and use. LTSC, via O, tried to delegate this to H. This delegation is not successful, as you cannot delegate the duty to keep the premises safe for the public.

For this reason, the defense of delegation will not succeed as this was a non-delegable duty.

For the reasons noted above, this is therefore breach of a duty owed to C. This breach caused harm. It was reasonably foreseeable that failure to ensure this duty was properly executed could mean someone would slip and fall on the ice and get hurt. This is what happened to C (proximate cause). But for the failure to uphold this duty, C would not have been hurt. Therefore, C can sue in negligence. Her damages will be limited according to the same calculation noted above under C v. H.

C v. Tina (T)

T can also be liable to C in negligence, for two different actions.

(1) Hitting C's car: T has a duty to operate her car in a reasonably safe manner. That duty was breached when she slid on the ice and hit C's car. That caused C harm, as it damaged her car. But for T's failure to drive safely, this would not have happened. Hitting the car was a reasonably foreseeable cause of failure to drive safely.

T can successfully defend on the grounds that O/LTSC should indemnify her—this was O's parking lot, and he could not delegate that duty; failure to clear the parking lot means that she hit C's car; this was reasonably foreseeable as ice causes cars to slide and that is what caused this accident. Depending on whether the parking lot is part of H's lease, H may also be liable for failure to de-ice the parking lot under the same theory.

C can recover damages to her car under this theory. As long as the damage to her car was reasonably foreseeable (it was), she can recover for the full extent of the damages, even if those damages are inflated since her car is really unique—a pink Cadillac. There is no issue with how to deal with the collateral source of insurance as T does not have insurance (but if she did, that would not reduce the amount of recovery under the traditional rule, which MD follows).

C could also sue for trespass to chattels (damage to property that temporarily deprives her of use—reasonable value of loss of use) or conversion (total destruction—market value at time of loss) depending on how severely the car was injured.

Defenses of assumption of the risk will not work, as merely parking in an icy lot is not sufficient to assume; same with contrib. negligence.

(2) Battery: Harmful, offensive contact with the person of another. T dropped the straightener that burned C's sweater and arm. This is harmful and offensive as it is not consented, and it caused her physical injury (arm burn). Fact that it touched the sweater counts, as this applies to things connected to P's person. T can defend as this was not intentional, it was accidental. Successful defense.

(3) Negligence re straightener: failure to use sufficient care in using this device. Not an abnormally dangerous device (like a bomb), so only claim in negligence, not strict liability. Duty of care to customer, breached by dropping, caused harm of burning sweater/arm. Defense of contrib. neg. successful & complete bar in MD since C jumped up; but for that, T wouldn't have dropped straightener and hurt her. Therefore, T not liable.

C v. Hair Academy (HA)

Respondeat Superior: An employer is liable for the torts of its employees, including intentional torts, where the employee is acting within the scope of her employment. This generally requires the employee to be acting for the employer's benefit.

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T was acting in the scope of her employment while doing C's hair, but since T not liable, N/A.

T not in scope of employment when driving to work, so HA not liable for accident with the car (but liable under indemnification discussed above).

H acting in scope when failed to sand sidewalks in keeping with duty; therefore, HA liable via indemnification/respondeat superior.

**MARYLAND ESSAY QUESTION NO. 10**

**Representative Good Answer No. 1**

The issue here is whether the restriction on land use is permissible, whether it amounts to a “taking,” and whether or not it’s a violation of constitutional provisions. Generally, in order for a government to take someone’s property, there must be a substantial public interest and fair compensation to the owner. It is possible for a government to enact certain restrictions, such as zoning ordinances, which are so limiting to real property that it amounts to a taking. Generally this occurs when the land was only fit for a very narrow limited purpose and the new restrictions cause the land to be unfit for any purpose at all. However, if the restriction is anything less than a total alienation of the use of the land, and the restriction’s purpose is to promote a legitimate State interest, the restriction is valid and will not amount to a “taking” which would otherwise require compensation to the owners. The restriction does not need to be the least restrictive means for achieving the goal, but must be reasonably related to that legitimate interest.

On these facts, the Maryland General Assembly passed legislation in order to “protect coastal resources.” This is a legitimate State interest. The restriction would prohibit any new structure on Atlantic beachfront property or any property within one half-mile of the Chesapeake Bay. However, “aquaculture” may be engaged in on Atlantic beachfront property. This is an important distinction between the Atlantic and Chesapeake Bay properties. For the Atlantic properties, landowners may still use their property for “aquacultural” purposes, or raising crabs, oysters, or clams for commercial or individual use. The fact that they this use is permissible for both commercial and individual use provides for many uses of the property.

However, the “aquaculture” uses are only permitted on the Atlantic beachfront property. For owners of Chesapeake Bay properties, the new legislation prevents the construction of any new structure, period. This completely and total restriction on use of the Chesapeake Bay properties likely amounts to a “taking” by the State since the properties can no longer have any new structure built on them. Since this amounts to a “taking,” the owners of the Chesapeake Bay properties will likely be entitled to a fair value for their properties from the State. A similar recourse is not available to owners of the Atlantic properties because the properties can still be used for “aquacultural” purposes.

**Representative Good Answer No. 2**

Unfortunately, there is very little that can be done about this situation. While we can argue that this was a “taking” by the government I do not believe these arguments are particularly strong. The only property owners that are likely to recover anything will be the Chesapeake Bay waterfront owners.

Few Restrictions on State Regulations.

A state has authority to regulate land use of the territory within the state where there is a legitimate state interest for a public purpose. The stated purpose of protecting coastal resources has historically been accepted as a valid state purpose and one that is for the benefit of the public. Therefore, in this case, the purpose alone will not invalidate the regulation. Further, the regulation was appropriately passed through the Maryland General

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Assembly and signed by the Governor. The requirements for passing legislation in Maryland have been appropriately met. Finally, the state is not regulating a resource outside of its territory nor is the regulation impacting on intrastate commerce. Therefore, there is no federal reason to invalidate the regulation.

A “Taking” For Chesapeake Bay Waterfront Owners.

However, when the state regulates land to such an extent that it removes all viable economic use of the land than it can be considered a “taking” under the Takings Clause of the Constitution and the state must pay fair market value for the land as just compensation. However, in order to be considered a taking the land must not have any economic value not simply a reduction in economic value. The land on the Atlantic side can be used for aquaculture which provides an economic value to that land. The land on the Chesapeake side cannot be developed at all up to one-half mile from the Chesapeake Bay. However, land that is not within a half-mile can still be developed; therefore, property that extends from the waterfront beyond that half-mile can be developed and have an economic use. We can argue that land on the Chesapeake Bay waterfront will not be able to be developed at all; therefore, that land will have no economic value and this has resulted in a taking. The state is likely to argue that while new structures cannot be built on the land it could be used for camping or agricultural use without any structures. We will need to convince a judge that the regulation prevents any viable economic use of the Chesapeake Bay waterfront properties. If you have ever been to a Chesapeake Bay waterfront on the Eastern Shore there is absolutely no use for what is arguably mostly salt marshes and swamp. Therefore, without being able to build new structures this land has no economic value and this should be declared a taking and the landowners should be paid fair market value for their land.

**MULTISTATE PERFORMANCE TEST**

**Representative Good Answer No. 1**

Memorandum

To: Carl Burns, County Attorney

From: Examinee

Date: July 25, 2017

Re: Zimmer Farm Complaints

Introduction:

I have prepared this memorandum to address the issues about Zimmer Farm raised by county board president Nina Ortiz. I have review the facts as described by Sally Wendell (“Neighbor email”) and Judy Abernathy (“Investigation memo”). I have review the local zoning ordinance (“A-1 zoning”), the Franklin Right to Farm Act (“FRFA”), and the state senate committee report on the FRFP (“committee report”). Lastly, I have review the case law to see how courts have dealt with similar issues of agricultural-residential nuisance and preemption issues.

Because I found the most significant analysis involves the issue of state law preemption of a local zoning ordinance, the analysis of that issue is the most important and in-depth part of my analysis.

Analysis:

1.) Under A-1 Zoning in Hartford County, the Zimmer’s Bird Rescue Operation is not a permitted use because it is not an “agricultural use” or “agricultural accessory use.”

A-1 zoning protects “any agricultural use” (§22(a)(1)) or “agricultural accessory use” (§22(a)(2)). “Agricultural use” protects noises or odors only if the activities produce an “income” or “livelihood” (§22(b)(2)). The bird rescue operation is alleged in the Wendell email to produce noises, smells, and flies that interfere with reasonable enjoyment. Because the bird rescue is not producing an income, it is not an “agricultural use” under A-1 zoning. The Zimmers admit that the bird rescue is a charity (see Investigative Memo). Therefore, as written, A-1 zoning does not allow the bird rescue. Accordingly, it is likely that a private nuisance action could enforce the zoning restriction.

**2.) Under A-1 Zoning, the Zimmer's Bird Festivals are not a permitted “agricultural accessory use.”**

The Wendell email and the Investigative Memo both discuss the Zimmer Bird Festivals as focused on the bird rescue operation, as including outside vendors selling products not produced on the farm, as including music, and as exceeding three days per year. Each of these characteristics place the bird festivals clearly outside of “agricultural accessory uses”, which are limited to 3 days per year and must be “directly related to the sale or marketing of one or more agricultural products produced on the premises” (§22(3)(b))(emphasis added). The birds, for which the festival is advertised, are not an “agricultural product,” as discussed supra. The vendors and musicians may be permissible, as may the solicitation of donations for a charity, but it is clear the festival itself would have to be based on the apples and/or strawberries produced on the farm.

The Zimmer counter-argument could be that their festivals do sell fruit and their advertising materials contain references to fruit and fruit-baking, but the flyer shown to the county investigator undermines that claim. As long as the festival is not directly related to fruit produced on the farm, it violates A-1 zoning. Additionally, the Zimmers admit to 4 “weekend festivals” per year (approx. 8 days), which exceeds the 3 day limit provided for this use in A-1 zoning.

**3.) The FRFA can preempt the county zoning ordinance where there is a conflict and FRFA may prevent certain nuisance claims.**

The Zimmers clearly feel that FRFA protects their bird rescue and festivals (Investigative Memo). Indeed, the Senate committee report issued for the FRFA stresses the importance of protecting agricultural uses from recently-created residential uses, which can give rise to nuisance actions. Specifically, the committee report discusses the common law “coming to a nuisance” defense (¶3). Further, the committee report made findings regarding loss of farmland, wildlife habitat, and open spaces. These finding show that FRFA was meant to address important policy goals typically seen as valid concerns for state governments.

The FRFA only preempts the local A-1 zoning ordinance where there is a conflict between the two ordinances. FRFA does not “occupy the field” (see *Shelby v. Beck*), so the county can still have agricultural zoning rules. The preemption of A-1 zoning requires a conflict that “undermines [FRFA’s] purpose” (*Shelby v. Beck*). In *Shelby v. Beck*, some similar facts (birds creating noise and attracting bugs) are in play. However, there is a big distinction because the Beck’s chickens are clearly an agricultural product – the type of commercial production of farm products that FRFA was enacted to support. The Beck’s chickens helped fund the farm and keep an agricultural use viable. This is clearly different than the Zimmers.

In *Wilson v. Monaco*, the dairy farm pre-dated the adjacent residences. Thus, even though the number of cows expanded, this was a change that was protected by FRFA because the court interpreted §3(b)(i) of FRFA to include “increased profitability.” The Zimmers cannot claim that the rescue operation or festivals are simply an expansion to increase profitability since their nature is fundamentally different from growing fruit or vegetables. Indeed, in Kuster v. Presley, a court in a neighboring state but with our Federal Circuit, a court found

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that a similar statute's plain language must control, especially because even a broad definition of "farm product" did not mention the newly-claimed use in that case.

Lastly, the "measuring date" for FRFA is the time the residential use develops. The Zimmers admit they did not begin bird rescue or festivals until recently. Edward began rescuing birds in 2015 (Investigative Memo). This means that the bird rescue and festivals were not nuisances existing when the adjacent residential areas were developed. Thus, as the court in Wilson reasoned, the new rescue and festival uses are not the types of nuisances the FRFA aimed to limit.

Conclusion:

It is clear that the Zimmers will not be able to prevail if their rescue operation or bird festival are challenged based on A-1 zoning. The county ordinance is not preempted based on the facts of the case or the intent of the FRFA.

**Representative Good Answer No. 2**

INTEROFFICE MEMORANDUM

To: Carl S. Burns

From: Examinee

Date: July 25, 2017

RE: Claims against Zimmer Farm

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This memorandum has been prepared at your request regarding the applicability of the local zoning and FRFA regulations to Zimmer Farm.

Under Section 22 of the Hartford County Zoning Code, any agricultural use is permitted within an A-1 zoning district. Agricultural use means any activity conducted for the purpose of generating income, including from crops or forage and poultry. Agricultural accessory use is permitted if the activity is a seasonal farm stand or is a special event. The special event must be held fewer than four times a year and must be directly related to the sale or marketing of one or more agricultural products produced on the premises.

Pursuant to the Franklin Right to Farm Act ("FRFA"), a farm or farm operation, meaning an activity which occurs on the farm connected to the commercial production of farm products, is not a nuisance if the operation existed prior to the change in the land use and operation was not a nuisance.

1. Zimmer's bird rescue operation is not permitted under the county zoning ordinance.

A bird rescue operation is not an agricultural use as contemplated by the Hartford County Zoning Code and the FRFA. To determine whether a use falls within the statute's authority, a court must consider the statute's text and "give the words their natural and ordinary meaning in light of their statutory context." *Koster v. Presley's Fruit*, Columbia Court of Appeal (2010). In *Koster*, the Columbia Court of Appeal reversed and remanded the lower court's decision holding that the combined activities of manufacturing and farming was subject to a nuisance claim. *Id.* The court held that there was no mention of products produced from wood in the applicable statute defining farm products. Thus, this activity fell outside of the protection of the Columbia Right to Farm Act. As

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a result, the Plaintiff could assert a claim for nuisance based on the injury caused by the assembly and manufacturing of wood pallets at the peach farm.

Zimmer Farm's operation of a bird sanctuary is not a protected farm or agricultural use and therefore is not afforded the protection of the FRFA. First, Edward operates a veterinary type clinic and sanctuary as opposed to a farm, as evidence by the intent to care for birds (including poultry) until they can be released back into the wild or kept on the farm if they are unable to be rehabilitated. The Hartford County Zoning Code requires that poultry kept on a farm be for generating an income. Edward runs the clinic as a trained veterinary assistant. Edward does not sell the birds, does not make a profit from the operation, and does not intend to do so. Therefore, as in *Koster*, an operation on a farm that falls outside of the ordinance does not receive protection of the FRFA.

2. Zimmer's festival's are permitted for a limited purpose under the county zoning ordinance.

Under *Wilson v. Monaco Farms*, the FRFA does not protect a farm whose expansion or change which creates a nuisance at the time the neighboring land changed. Franklin Court of Appeal (2008). In Wilson, that date occurred when the land was "subdivided and developed into a residential area." *Id.* In this case, the date from which the court should determine whether a nuisance has arisen from the change and expansion is from 1990, when the land was subdivided. Here the land has passed from generation to generation, but has changed dramatically from an apple and strawberry farm to a bird sanctuary. Before 1990, the land was used to grow apples and strawberries, along with some vegetables. The farm also had an annual apple festival. However, in 2015, well after the land was subdivided, the bird sanctuary started operation. As a result, the nuisance arose after the subdivision allowing Country Manors and Orchard Estates' residents to bring a claim.

A farm is permitted to hold festivals or activities related to the sale and marketing of an agricultural product. In his case, the festivals must be limited to the sale of the fruits only and should be limited to 3 or less. The purpose of supporting "injured birds, listening to music, having a good time" are not related to the sale of the fruits. The buying of apples and advertisement of recipes is permissible as related to the generation of income from the farm and because the festival was established prior to the subdivision. However, the neighbors will likely be happy with this outcome as they moved to the area to partake in the country life, which would reasonably include a couple festivals here and there throughout the year.

3. FRFA affects of ability to enforce zoning ordinance to the bird rescue operation and festivals.

The FRFA does not preclude enforcement of the zoning ordinance because there is no conflict. Preemption occurs when an ordinance conflicts with a state statute and undermines its purpose. *Shelby Township v. Beck*, Franklin Court of Appeal (2005). In *Shelby*, the court held there was a conflict between a zoning ordinance which limited the size of a property for farming and the Act which permitted raising farm animals and preserving farms in general. The court took into consideration the fact that the farm had been in use before the neighborhood changed and the abutting neighbors believed the farm was a nuisance. In this case, there is no preemption issue because the ordinance does not deny a farmer the ability to farm, just limits the use of the farm to only those uses which generate an income based on farm products.

Alternatively, the zoning ordinance does not go against the policy considerations of the FRFA and does not violate the FRFA. The FRFA explicitly protects those who farm for a living. The use of the farm for a bird sanctuary is not to generate a living, rather to heal and keep birds that cannot be released to the wild. The policy to conserve, protect, and encourage the development and improvement of agricultural land is not at odds with the intent of the ordinance. In this case, the goal is to keep the Zimmer Farm to an apple and strawberry farm. The

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ordinance and arising nuisance is solely related to the bird sanctuary, an activity outside of the FRFA, and is therefore an activity subject to regulation.

In conclusion, I believe there is a strong case against the Zimmer Farm because the bird sanctuary is not a farm use, the festival may be limited to only 3 or fewer events for only apply and strawberry advertisement, and the ordinance is not in conflict with the FRFA.