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Monroe v. Franklin Flags Amusement Park

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Monroe v. Franklin Flags Amusement Park

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Teasdale, Gottlieb & Lasparri, P.C.

111 S. Jefferson Street
Cooper City, Franklin 33812

TO: Examinee
FROM: Rick Lasparri
DATE: July 30, 2013
RE: Monroe v. Franklin Flags Amusement Park

We are defending our client, Franklin Flags Amusement Park, against a negligence claim made by Vera Monroe, who seeks damages for multiple injuries she suffered at the client's amusement park.

Last Halloween, Ms. Monroe went through the Haunted House attraction at the amusement park, on the attraction's first day of operation. The Haunted House attraction consists of a building, made to replicate a haunted house, and a mock graveyard. Ms. Monroe claims that, as a result of the Park's negligence, she suffered injuries, for which she is claiming damages of $250,000.

Ms. Monroe has made three separate claims of injury due to negligence: 1) she was injured when, frightened by a staff member in costume in one of the rooms of the attraction, she ran into a wall and broke her nose; 2) after exiting the building, and while going through the mock graveyard, she slipped on the muddy path and injured her ankle; and 3) after exiting the graveyard and the attraction, she was again frightened on the way to the parking lot by a staff member in costume, fell, and broke her wrist.

We have concluded discovery and will now move for summary judgment. I am attaching relevant excerpts from the deposition transcripts and case law.

Please prepare the argument section of our brief in support of our motion for summary judgment. Do not prepare a statement of facts, but incorporate relevant facts into your argument. Do not concern yourself with issues of the plaintiff's comparative negligence or damages. Be sure to follow the attached guidelines for the preparation of persuasive briefs.

Teasdale, Gottlieb & Lasparri, P.C.

TO: All Attorneys
FROM: Firm
DATE: June 6, 2012
RE: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to persuasive briefs filed in support of motions for summary judgment in trial courts.

I. Caption

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

The body of each argument should analyze applicable legal authority and persuasively argue that both the facts and the law support our position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Courts are not persuaded by exaggerated, unsupported arguments.

We follow the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments each covers. A brief should not contain a single broad argument heading. The argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. Examples:

Improper: The Applicable Standard of Care

Proper: Because the applicable standard of care in a professional negligence case is not within the realm of common knowledge, the plaintiff must introduce expert testimony to establish the standard of care allegedly violated by the defendant.

Do not prepare a table of contents, a table of cases, a statement of the case, or an index; these will be prepared, as required, after the draft is approved.

Excerpts of Deposition Transcript of Vera Monroe

Present: Ms. Vera Monroe, Plaintiff; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Ms. Wahl):

* * *

Ms. Wahl: What did you do last Halloween evening—that would be October 31, 2012?

Ms. Monroe: My husband and I went to the Franklin Flags Amusement Park, around 8:00 p.m. We figured it would be great fun, it being Halloween and all.

Ms. Wahl: Had you been there before?

Ms. Monroe: Oh yes, many, many times.

Ms. Wahl: And what did you do when you got there?

Ms. Monroe: We first went to the go-kart ride, then had a bite to eat at one of the food stands, and then went into the Haunted House they had set up there.

Ms. Wahl: Had you been in that attraction before?

Ms. Monroe: No, we had never seen it there before.

[Discussion off the record]

Mr. Lasparri: We will stipulate that the Haunted House attraction was first opened to the public on that date, October 31, 2012.

Ms. Wahl: What happened when you entered?

Ms. Monroe: Well, you go into this house, which has all these rooms with spooky stuff—spiderwebs and howling sounds and stuff like that. It was kind of scary, and every time something would appear, like an image of a ghost, or a guy dressed like a vampire lying in a coffin, I would let out a little scream, which amused my husband no end. Then we went into this room—it turned out to be the last one before the exit—it was real dark—just a couple of dim lightbulbs and the illuminated "exit" sign—and this woman dressed up as a zombie jumped out of some hiding place, yelling at the top of her lungs, and I just lost it.

Ms. Wahl: What do you mean by that?

Ms. Monroe: Well, she scared me to death—I wasn't expecting anything like that, because none of the other characters had come right up to us like that. So I let out a

real shriek and just ran away from her. I took four or five steps, running like crazy, ran into the wall face-first, and knocked myself silly. It turned out I had a broken nose, and it was bleeding, although I didn't know it at the time. I screamed for my husband, and he grabbed my arm, and I said, "Get me out of here!" So he led me to the exit door and we got out of there.

Ms. Wahl: Did anybody from the park try to help you?

Ms. Monroe: No, this zombie person just kept coming toward us, so we wanted to get out of there as quickly as we could.

Ms. Wahl: Go on, what happened then?

Ms. Monroe: Well, we went out the door, and there was this kind of pathway outside through a mock graveyard. The ground was really muddy, and in my panic, I slipped on the mud and fell down, twisting my ankle.

Ms. Wahl: Was anybody from the park around?

Ms. Monroe: No, the mock graveyard was completely deserted.

Ms. Wahl: And what happened then?

Ms. Monroe: My husband helped me up and supported me, because now I was limping. The graveyard was enclosed by a fence with a gate that led back onto the park grounds. We left the graveyard through the gate, and we were outside heading for the parking lot and our car when another guy in a bizarre outfit and a hockey mask, holding what looked like a chain saw, jumped out from behind the outside of the fence. He so startled us that my husband let go of me, and I fell and felt a crack in my wrist.

Ms. Wahl: Why were you startled at that point?

Ms. Monroe: Once we were out of the graveyard and back on the park grounds, I thought that whatever they might do to scare people was behind us. I was breathing a sigh of relief that we were out of the Haunted House attraction. I mean it was an entirely different situation—there was nothing scary, like in the Haunted House, and I figured we were back to normal surroundings. So the appearance of this guy with a chain saw was completely unexpected and unnerving and really frightening.

Ms. Wahl: What happened next?

Ms. Monroe: My husband picked me up and helped me to our car—I was a wreck, crying and in a lot of pain. We went to the emergency room of Franklin General Hospital, and they told me I had a broken nose, a sprained ankle, and a broken wrist. I needed surgery to repair my wrist.

Ms. Wahl: Mr. Lasparri, we will introduce documentary and expert evidence as to the extent of Ms. Monroe's injuries.

* * *

Cross-examination (by Mr. Lasparri):

* * *

Mr. Lasparri: Ms. Monroe, when you entered the Haunted House attraction at the park, what did you expect?

Ms. Monroe: To have a good time.

Mr. Lasparri: Did you expect to be frightened or scared once you were inside?

Ms. Monroe: Well, I guess, sure, that's part of the fun on Halloween, isn't it? But there's being frightened for the fun of it, and then there's being terrified.

Mr. Lasparri: When you were injured inside the room, did you or your husband ask for help?

Ms. Monroe: No, we wanted to get out of there as quickly as possible. Besides, there was no one to ask.

Mr. Lasparri: You said that the person dressed up as a zombie kept coming toward you. Did you or your husband ask her for help?

Ms. Monroe: No, she was the reason I ran into that wall!

Mr. Lasparri: Do you know why she kept approaching you?

Ms. Monroe: I assume it was to keep playing the part of a scary zombie and frighten us—she was saying something to us, but I was crying and screaming and didn't hear what she was saying.

Mr. Lasparri: You said there was no one else present in the graveyard other than your husband and yourself when you slipped and fell there. Did you ask for help after you left the graveyard?

Ms. Monroe: No, the only person we saw after we left the graveyard was that creep with the chain saw. My husband yelled at him to get away from us, and he backed off.

Then, as I said, my husband helped me up and supported me as we went right to our car and to the emergency room of the nearest hospital.

* * *

Mr. Lasparri: Was the graveyard illuminated?

Ms. Monroe: There were little lights along the pathway.

Mr. Lasparri: How about outside the graveyard fence?

Ms. Monroe: That was lit by lampposts, like the rest of the park, and we could see okay.

* * *

Mr. Lasparri: Do you remember what the weather was like in the days preceding Halloween?

Ms. Monroe: Yes, I remember it had been really raining a lot, without letup, for the previous three days.

* * *

Mr. Lasparri: Do you normally celebrate Halloween?

Ms. Monroe: Sure, we do it every year and, up to now, we've really enjoyed it—you know, seeing people dressed up in costumes and having fun trick-or-treating and trying to scare people and stuff like that.

* * *

Excerpts of Deposition Transcript of Mike Matson

Present: Mr. Mike Matson, called by Defendant; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Mr. Lasparri):

Mr. Lasparri: Please state your name, occupation, and employer.

Mr. Matson: My name is Mike Matson, and I am General Manager of the Franklin Flags Amusement Park.

Mr. Lasparri: Can you describe the Haunted House attraction at the park?

Mr. Matson: It's a new attraction which we opened this last Halloween. It's a house with a series of rooms with scary interiors, suitable for a haunted house—things like spiderwebs and moving images of ghosts and moaning sounds played over the loudspeakers. It's dimly lit, of course, and we also have people playing the part of zombies and goblins and vampires and devils and stuff like that, who are supposed to scare the patrons who go through the attraction.

Mr. Lasparri: Once a patron exits from the house itself, is that the end of the attraction?

Mr. Matson: No, we rigged it up so that there's a mock graveyard that people have to walk through to exit the attraction, and it's very spooky too; it continues the effect.

Mr. Lasparri: And once a patron exits from the graveyard, is that the end of the attraction?

Mr. Matson: Well, we thought it would be fun if, once people thought they were out of the house and the graveyard, and thought they were safe, we would play one more trick to frighten them. So we set it up so that the graveyard was enclosed with a fence, and when you went through the gate to leave, we'd have a staff member dressed up like a character from a horror movie wielding a fake chain saw jump out from behind the outside of the fence for one last "boo," so to speak.

* * *

Mr. Lasparri: What steps do you take to ensure the safety of your patrons in the Haunted House attraction?

Mr. Matson: Well, we have several individuals stationed around the various points of the attraction to keep an eye on everyone. For example, we have at least one staff

member in every room of the house in case a patron gets into some sort of trouble or needs help. And we have a doctor present at the park at all times.

Mr. Lasparri: Did you have a staff person stationed in the last room of the house?

Mr. Matson: Yes, that function was filled by the individual playing the part of a zombie in that room.

Mr. Lasparri: What about in the mock graveyard?

Mr. Matson: We don't have anyone there, because there's nothing going on there except that patrons are walking through it.

Mr. Lasparri: And what about outside the exit from the graveyard?

Mr. Matson: Again, the employee with the fake chain saw has that responsibility. All our employees are instructed to offer assistance to patrons, and to call the doctor if there's a medical emergency.

* * *

Cross-examination (by Ms. Wahl):

* * *

Ms. Wahl: Mr. Matson, can you describe the grounds of the park—more particularly, what are they made of—are they paved, dirt, what?

Mr. Matson: The overwhelming bulk of the park—where people walk—is paved. We have some landscaping, trees and flower beds and such, which are of course planted in earth covered in grass or flowers, but they are fenced in because we don't want people trampling them.

Ms. Wahl: Was any part of the mock graveyard outside the house paved—the path, for instance?

Mr. Matson: No, it was all left as natural earth, you know, for purposes of verisimilitude—you know, realism.

* * *

Ms. Wahl: Aside from the person with the mock chain saw, were there any other employees on the grounds outside the Haunted House attraction who were in costume and instructed to frighten patrons?

Mr. Matson: No.

Excerpts of Deposition Transcript of Camille Brewster

Present: Ms. Camille Brewster, called by Defendant; F.J. Wahl, Esq., counsel for Plaintiff; R. Lasparri, Esq., counsel for Defendant

Direct Examination (by Mr. Lasparri):

Mr. Lasparri: Please state your name, occupation, and employer.

Ms. Brewster: Camille Brewster. I work for Franklin Flags Amusement Park as a staff member.

Mr. Lasparri: And what are your duties as a staff member?

Ms. Brewster: To do pretty much whatever my boss tells me to do.

Mr. Lasparri: What duties were assigned to you last Halloween?

Ms. Brewster: We had opened this new attraction, the Haunted House, and I was made up to play a zombie. I was told to hide in the last room of the house, and when people came through, to jump out and try to scare them.

Mr. Lasparri: Were you given any guidelines as to what you could and could not do?

Ms. Brewster: We were told that we couldn't touch or make any physical contact with the patrons and to make sure people were having fun in the spirit of Halloween. That was about it.

Mr. Lasparri: And as a general matter, what instructions are you given should a patron need help of any sort?

Ms. Brewster: To help them—and if there's some medical emergency, we're supposed to call the doctor who's on duty in the main office.

Mr. Lasparri: Do you remember any untoward incidents that occurred last Halloween?

Ms. Brewster: Well, there was only one, involving a couple that came through. I did what I had been doing all night—jumping out at people and scaring them. But the woman just seemed to freak out. She let out a shriek and turned and ran away from me like a bolt of lightning. She ran right into the wall—there was an awful crack—and fell down.

Mr. Lasparri: What did you do then?

Ms. Brewster: Her husband was helping her get up, and I went toward them to see if I could help them and said, "Are you okay?", but they just rushed out of the exit door, and that was the last I saw of them.

* * *

Cross-examination (by Ms. Wahl):

Ms. Wahl: Ms. Brewster, how old are you?

Ms. Brewster: Seventeen.

Ms. Wahl: Do you have any training in first aid of any sort?

Ms. Brewster: Well, I do have a junior lifeguard certificate that I got at summer camp two years ago, which included basic first aid stuff like bandaging and all that.

Ms. Wahl: You said that if patrons needed help, you were instructed to help them or call a doctor for a medical emergency. Were you given any more explicit or specific instructions as to what to do in such a case?

Ms. Brewster: No, not really, just to do whatever is necessary to help them.

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Larson v. Franklin High Boosters Club, Inc.

Franklin Supreme Court (2002)

Two years ago, the Franklin High Boosters Club decided to run a fund-raiser for the school's cheerleading team on Halloween. They rented a local warehouse and constructed what they called a "House of Horrors" inside. The "House of Horrors" included a path to follow with various stops in rooms along the way. At each stop, the room was appropriately decorated so that some mock "horror" awaited those who entered—including individuals playing headless ghosts, zombies, vampires, werewolves, Frankenstein monsters, and the like. These roles were played by members of the club, made up and dressed appropriately. They were instructed to play the parts to the hilt. Their aim, simply put, was to scare the customers, who had each paid $20 for the privilege of being frightened.

The fund-raiser netted $4,800 for the club and would have been an unqualified success but for one incident. John Larson, a 72-year-old gentleman, entered the "House of Horrors" with his two grandchildren. At one of the stops, when one of the "vampires" came at him suddenly, Larson, startled, reeled backward, tripped over his own feet, and fell, breaking his arm and dislocating his shoulder. He sued the club for negligence, seeking recompense for his medical expenses and pain and suffering.

The trial court granted the club's motion for summary judgment, and the court of appeal affirmed. For the reasons stated below, we reverse and remand.

A court will grant a motion for summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. A "material fact" for summary judgment purposes is a fact that would influence the outcome of the controversy.

Larson cites *Dozer v. Swift* (Fr. Ct. App. 1994) as establishing the standard for liability for negligence in cases of this sort. In *Dozer*, the defendant was a coworker of the plaintiff. The defendant knew that the plaintiff was of a frail constitution and had arachnophobia—an inordinate fear of spiders. Solely to play a prank on the plaintiff, the defendant obtained a number of live but harmless spiders and dropped them over the wall of the plaintiff's cubicle while the plaintiff was sitting at his desk eating

lunch. The plaintiff, in utter panic, fell backward from his desk chair and sustained a serious head injury. The defendant was found liable in negligence.

As the courts below correctly held, Larson's reliance on *Dozer* is misplaced. The first question is whether there is a duty. In all tort cases, the duty is to act reasonably under the circumstances and not to put others in positions of risk. In *Dozer*, the defendant did not live up to that duty and therefore negligently caused the injury to the plaintiff, for which the defendant bore liability.

But to say that individuals have a duty to act reasonably under the circumstances—that is, to avoid risk—is only the starting point of a negligence analysis. Once the court has determined that there is a duty, it must next determine 1) *what* duty was imposed on the defendant under the *particular circumstances* at issue, 2) whether there was a breach of that duty that resulted in injury or loss, and 3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty.

The question of the defendant's duty is not whether the plaintiff was subjectively aware of the risk. Rather, the question is whether the defendant acted unreasonably under the circumstances vis-à-vis the plaintiff.[1]

As the courts below also correctly held, the particular circumstances here differ from those in *Dozer*, because they occurred in a different setting. Therefore, the duty that the defendant owed to the plaintiff here must be analyzed in those particular circumstances.

Patrons at an event which is designed to be frightening are expected to be surprised, startled, and scared by the exhibits; the operator does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways. Patrons obviously have knowledge that they can anticipate being confronted by exhibits designed to startle and instill fear. They must realize that the very purpose of the attraction is to cause them to react in bizarre, frightened, or unpredictable ways. Under other circumstances, presenting a frightening or threatening act might be a

[1] It is well settled that assumption of the risk is no longer a valid defense under Franklin law. The plaintiff's knowledge and conduct may be considered in determining whether, under the particular circumstances at issue, the defendant breached a duty to the plaintiff. If the defendant is found to have breached that duty, then the plaintiff's knowledge and conduct are considered to determine the extent of the plaintiff's comparative negligence.

violation of a general duty not to scare others. *Dozer*. For example, being accosted by a supposed "vampire" in the middle of a shopping mall on a normal weekday in July might indeed be a violation of the general duty. But in this setting, on Halloween, the circumstances are different.

Larson, by voluntarily entering a self-described "House of Horrors" on Halloween, accepted the rules of the game. Hence, Larson's claim—that the club was negligent in its very act of admitting him to the "House of Horrors" because the establishment of the exhibit itself, with features designed to frighten patrons, breached the club's duty to act reasonably—must fail.

The courts below ended their analysis on that point and granted and affirmed the club's motion for summary judgment. But therein lies their error, for the proper analysis does not end there. Here, the further question is what additional duty is owed by a party which invites a patron for business purposes—in this case, what is the duty of the proprietor or operator of an amusement attraction to his patron who is an invitee. The operator impliedly represents that he has used reasonable care in inspecting and maintaining the premises and equipment furnished by him, and that they are reasonably safe for the purposes intended. The operator is not bound to protect patrons from every conceivable danger, only from unreasonably dangerous conditions. More specifically, such proprietors and operators have an obligation to ensure that there are not only adequate physical facilities but also adequate personnel and supervision for patrons entering the establishment.

Larson claims that the record shows that there is a question whether such adequate personnel and supervision existed here—most particularly, whether the role-playing individuals who were part of the experience in the "House of Horrors" were adequately instructed should some unfortunate event occur which injured a patron. Larson raised that question in his brief opposing the club's motion for summary judgment, but neither the trial court nor the court of appeal addressed that claim. We cannot, on the record presented, determine if such adequate personnel, supervision, and instruction existed.

Accordingly, a genuine dispute of material fact exists which precludes granting the club's motion for summary judgment.

Reversed and remanded.

Costello v. Shadowland Amusements, Inc.

Franklin Supreme Court (2007)

This is an appeal from a judgment of negligence against defendant Shadowland Amusements, entered by the Franklin District Court and affirmed by the Franklin Court of Appeal. On May 22, 2005, plaintiff Evelyn Costello had entered a "haunted house" at Shadowland's amusement park and gone into a room which was only dimly lit. In this room, the operators of the amusement park had projected ghoulish apparitions on the wall using laser holograms for realistic effect. Startled by these apparitions, Costello backed up and tripped over a bench that Shadowland had placed in the middle of the room, injuring herself. She sued for damages for both medical expenses and pain and suffering.

Defendant Shadowland cites our decision in *Parker v. Muir* (Fr. Sup. Ct. 2005) as a defense. There, plaintiff Parker sued defendant Muir for negligence, claiming damages for injuries she suffered as a result of her patronage of Muir's cornfield maze. The maze consisted of five miles of paths cut into the cornfield. Parker accompanied the youth group from her church to the maze. She had specifically suggested that the group go to the maze on their outing because she had been through the maze "at least twice" before, by her own admission. While venturing through the maze, she mentioned to the group that the paths were very rocky and that they should be careful. However, she tripped over a large rock in the path, fell, and broke her wrist. She sued Muir for negligence. The record showed that for the entire season during which the maze was open, this was the only reported accident.

As we noted in *Parker*, Franklin law provides that the owner or custodian of property is answerable for damage occasioned by its dangerous condition, but only upon a showing that the owner knew (or, in the exercise of reasonable care, should have known) of the dangerous condition, that the damage could have been prevented by the exercise of reasonable care, and that the owner failed to exercise such reasonable care. We also noted that the fact that an accident occurred as a result of a dangerous condition does not elevate the condition to one that is unreasonably dangerous. The past accident history of the condition in question and the degree to which the danger may be observed by a

potential victim are factors to be taken into consideration in the determination of whether a condition is unreasonably dangerous. Further, the condition must be of such a nature as to constitute a danger that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances.

In *Parker*, we concluded that the mere presence of rocks on a path through a cornfield did not meet the standard for imposing liability. The plaintiff there knew of the condition from her prior trips through the maze. She warned the members of her group about it. She voluntarily entered the maze with that knowledge. No prudent person in such circumstances, using ordinary care, would incur injury. Indeed, any reasonable person would not be surprised to find rocks in a dirt path. The otherwise unblemished safety record of the maze prior to the accident bore out this conclusion.

Here, defendant Shadowland's reliance on *Parker* is misplaced. As we noted in *Larson v. Franklin High Boosters Club, Inc.* (Fr. Sup. Ct. 2002), every individual has a duty to act reasonably and not to put others in positions of risk. Shadowland did not act reasonably here. It was obviously aware of the dim lighting, the placement of the bench (it had itself put it there), and the hazard the bench might present. This dim lighting combined with the bench placement was a dangerous condition, one of which visitors were unaware, and the injury which resulted was one that Shadowland could have prevented using reasonable care. Shadowland did unreasonably put plaintiff Costello at risk and is therefore liable for Costello's injuries.

Affirmed.

1) MPT1 - Please type your answer to MPT 1 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #1 (1923 words) ========

Monroe

v.

Franklin Flags Amusement Park

Defendant's Brief in Support of Motion for Summary Judgment

II. Statement of Facts

(omitted)

III. Legal Argument

A. Franklin Flags Amusement Park did not breach its duty to Ms. Monroe when Ms. Monroe became frightened in the haunted house, ran into a wall, and broke her nose, because there was no duty imposed on the amusement park under the particular circumstances. Ms. Monroe entered the haunted house expecting to be frightened.

Franklin Flags Amusement Park did not breach its duty of care to Ms. Monroe when its employee frightened Ms. Monroe in the haunted house. This issue does not present a genuine dispute of material fact; rather, it presents a question of law. Therefore, Franklin Flags is entitled to summary judgment.

In all tort cases, a defendant has a duty to act reasonably under the circumstances and not to put others in positions of risk. Larson v. Franklin High Boosters (2002). In order to determine the extent of this duty, courts analyze the following factors: (1) what duty was imposed on the defendant under the particular circumstances at issue; (2) whether there was a breach of that duty that resulted in injury or loss; and (3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty. Id.

For example, in Larson v. Franklin High Boosters Club (2002), a grandfather was injured in a haunted house when he was started, reeled backward, tripped over his own feet, and fell, breaking his arm and dislocating his shoulder. In analyzing the haunted house's duty toward the plaintiff, the court held that patrons of haunted houses expected to be surprised, startled, and scared. Id. Thus, the operator does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways. Id. Patrons anticipate being frightened; therefore, in a haunted house, it is not a breach of duty to frighten a patron.

In the present case, Ms. Monroe entered the haunted house expecting to be frightened. Ms.

Monroe was frightened in the last room of the haunted house, when an employee dressed as a zombie jumped out and screamed. Ms. Monroe turned and ran away from the zombie, and she ran into the wall face-first, breaking her nose. This last room was dim, but it was nonetheless lit by two lightbulbs and an illuminated exit sign. Unlike in Costello v. Shadowland Amusements, Inc. (2007), where the haunted house was dimly lit and a bench was placed in the path of a patron, here there was an illuminated exit sign with nothing placed in the path of Ms. Monroe. When Ms. Monroe became frightened in that room, she could have easily ran toward the exit sign and out of the house. Instead she turned and ran straight into a wall.

Because Ms. Monroe entered the haunted house anticipating being frightened, Ms. Monroe "accepted the rules of the game," and the haunted house was not negligent when it frightened her. Larson v. Franklin High Boosters Club, Inc. (2002). Therefore, there was no duty, under the circumstances, imposed on the defendant to refrain from frightening Ms. Monroe. Additionally, by displaying an illuminated exit sign in the final room of the house, the amusement park did everything it should have to help Ms. Monroe find her way safely out of the haunted house. Had the park done more, such as putting in more lighting, it would have decreased the fun and scariness of the haunted house.

The court in Larson also held that a proprietor and operator of a haunted house has an obligation to ensure that there are adequate personnel and supervision for patrons entering the establishment. Id. In the present case, Franklin Flags met this obligation. The amusement park had several individuals stationed around the various points of the attraction to keep an eye on

everyone. It had at least one staff member in every room of the house in case a patron needed help. In the particular room in which Ms. Monroe was frightened, the woman dressed as a zombie was responsible for helping injured patrons. The woman was adequately trained, given that two years earlier she had received training in basic first aid. Moreover, the amusement park had a doctor present at the park at al times.

Under the circumstances, Franklin Flags did not owe a duty to Ms. Monroe to refrain from frightening her. Franklin Flags owed a duty to guide Ms. Monroe safely out of the haunted house, a duty which it satisfied by placing an illuminated exit sign over the door. It also owed a duty to place supervision and assistance in every room of the haunted house, a duty which it also satisfied. Therefore, Franklin Flags is not liable to Ms. Monroe for her broken nose.

B. Franklin Flags did not breach its duty to Ms. Monroe when Ms. Monroe slipped in the graveyard and injured her ankle because the condition of the dirt path was clearly observable, because its condition should have been anticipated by Ms. Monroe, and because no other patrons were injured on the path.

Franklin Flags did not breach a duty to Ms. Monroe when Ms. Monroe slipped and fell on a muddy pathway in the graveyard. This issue does not present a genuine dispute of material fact; rather, it presents a question of law. Therefore, Franklin Flags is entitled to summary judgment.

An owner or custodian of property is answerable for damage occasioned by its dangerous

condition, but only upon a showing that (1) the owner knew or should have know of the dangerous condition, (2) the damage could have been prevented by the exercise of reasonable care, and (3) the owner failed to exercise such reasonable care. Costello v. Shadowland Amusements, Inc. (2007). The fact that an accident occurred as a result of a dangerous condition does not elevate the condition to one that is unreasonably dangerous. Id.

In determining whether a condition is unreasonably dangerous, courts look to (1) the past accident history of the condition in question, (2) the degree to which the danger may be observed by a potential victim, and (3) whether the condition is of such a nature as to constitute a danger that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances.

For example, in Parker v. Muir (2005), a patron of a cornfield maze tripped over a rock on a path through the cornfield and broke her wrist. The court held that the owner of the maze was not liable because the patron was aware of the condition of the maze and because she voluntarily entered the maze. Id.

In the present case, Ms. Monroe voluntarily entered the haunted house exhibit. Upon exiting the haunted house, patrons walked through a fake cemetary. The paths through the cemetary were dirt. Ms. Monroe knew that it had been raining a lot, without letup for the previous three days. Furthermore, there were lighted along the graveyard pathway. Given that Ms. Monroe could observe the condition of the dirt pathway, and given that she should have expected the dirt

pathway to be muddy after the rain, the condition of the pathway was not unreasonably dangerous. Furthermore, there is no indication that any other patrons were injured on the dirt pathway. Given this unblemished safety record of the haunted house, other than for Ms. Monroe's accidents, it is apparant that any reasonable person would have anticipated the muddiness of the pathway. In other words, no prudent person in these circumstances would have been injured.

Therefore, because the condition of the pathway was observable by Ms. Monroe, because Ms. Monroe should have anticipated the condition of the pathway, and because no one else was injured on the pathway, Franklin Flags did not breach a duty to Ms. Monroe and is entitled to summary judgment.

C. Franklin Flags did not breach its duty to Ms. Monroe when Ms. Monroe fell and broke her wrist immediately outside of the graveyard because under the circumstances, there was no duty on the amusement park to refrain from scaring Ms. Monroe. She had just exited a haunted house and should have expected to be frightened again.

Franklin Flags did not breach a duty to Ms. Monroe when Ms. Monroe was injured upon exiting the graveyard and attraction. This issue does not present a genuine dispute of material fact; rather, it presents a question of law. Therefore, Franklin Flags is entitled to summary judgment.

In all tort cases, a defendant has a duty to act reasonably under the circumstances and not to put others in positions of risk. Larson v. Franklin High Boosters (2002). In order to determine the

extent of this duty, courts analyze the following factors: (1) what duty was imposed on the defendant under the particular circumstances at issue; (2) whether there was a breach of that duty that resulted in injury or loss; and (3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty. Id.

For example, in Larson v. Franklin High Boosters Club (2002), a grandfather was injured in a haunted house when he was started, reeled backward, tripped over his own feet, and fell, breaking his arm and dislocating his shoulder. In analyzing the haunted house's duty toward the plaintiff, the court held that patrons of haunted houses expected to be surprised, startled, and scared. Id. Thus, the operator does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways. Id. Patrons anticipate being frightened; therefore, in a haunted house, it is not a breach of duty to frighten a patron.

In the present case, Ms. Larson fell and broke her wrist when she was frightened upon leaving the graveyard. Ms. Larson claims that she did not expect to be frightened at this point because she thought she had left the haunted house and was back to normal surroundings. However, the man who frightened her was an employee of the amusement park, and he jumped out from behind the fence enclosing the graveyard. Thus, he was still within the zone of the haunted house. Furthermore, he was hiding in an area well lit by lampposts.

The court in Larson stated that "being accosted by a supposed 'vampire' in the middle of a shopping mall on a normal weekday in July might indeed by a violation of the general duty. But

in this setting, on Halloween, the circumstances are different." Id. The point of the haunted house was to confront patrons with exhibits designed to startle and instill fear. In the present case, the amusement park placed a man with a chainsaw outside of the graveyard to give patrons one last boo, as the general manage of the park stated. Patrons entered the haunted house to be scared, and they should not be allowed to complain when the haunted house succeeds.

Because the man with the chainsaw was located in a well lit area immediately outside of the graveyard, and because Ms. Monroe entered the haunted house hoping to be frightened, Franklin Flags did not breach a duty that it owed to Ms. Monroe. Indeed, Franklin Flags was under no duty to refrain from scaring Ms. Monroe. Given the circumstances of Halloween, and given that Ms. Monroe was scared immediately outside of a fake graveyard, Ms. Monroe should have anticipated the man with the chainsaw.

======== End of Answer #1 ========
END OF EXAM

Applicant Number

10411

MPT-2
713

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Palindrome Recording Contract

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Palindrome Recording Contract

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MORRIS & WESTMAN, LLP
2932 Sheffield Court
Franklin City, Franklin 33026

TO: Examinee
FROM: Levi Morris
DATE: July 30, 2013
RE: Palindrome Recording Contract

We have been retained to represent the members of the rock band Palindrome. The band has had considerable success in the tri-state area of Franklin, Columbia, and Olympia and has received an offer from Polyphon, an independent record label, which wants to sign the band to a long-term recording contract.

The contract submitted by Polyphon is complex and voluminous (it runs over 50 pages of single-spaced type). The band has asked us to negotiate the contract with the record label. There are some key provisions that we must redraft to meet the band's contractual desires. We can then present the redrafted contract to Polyphon, as a step in negotiating with the label. I am attaching the provisions from the contract Polyphon submitted that I would like you to look at. I have also attached other material to give you some background and from which you may glean the band's wishes and the applicable law. For your purposes, assume that the agreement among the various band members is a binding contract and that they have formed a valid partnership.

Please draft a memorandum in which you identify those contract provisions that need to be redrafted to meet the band's wishes and to comply with the law. For each provision that you identify,

1. redraft the provision, indicating your changes from the original text, and

2. explain the reasons for your redraft, including the legal reasons (if any) for changing the provision, to guide me in conducting the negotiations over these points.

Transcript of Interview between Levi Morris and Otto Smyth (July 12, 2013)

Levi Morris: Otto, it's good to see you. How are things going?

Otto Smyth: Great, really great. As I told you over the phone, we've got a mega-offer from Polyphon to sign with them, and the band asked me to take the lead in negotiating.

Morris: Excellent. What's Polyphon's offer?

Smyth: We've had a few offers in the past, but from labels that wanted to take everything we had. We really want to sign with an independent label, because they treat artists like us better, and Polyphon has a reputation for treating artists reasonably and being willing to negotiate terms. They sent our manager this huge contract—here's a copy. We'll need your help to deal with them.

Morris: That's what we're here for. Bring me up-to-date on what's happening with the band.

Smyth: Well, as you may know, about nine months ago, Al, our bass player, was injured by a drunk driver. He's okay now, thank goodness. Abby, our lead guitarist, and Coco, our drummer, are still going strong, and, as leader of the group, I'm still playing rhythm guitar, singing lead vocals, and doing all the songwriting. Our fan base really has grown here in the tri-state area, and that must've gotten the attention of the label, because they really came after us hard.

Morris: How do the members of the band get on as far as business arrangements go?

Smyth: We're fine together—when we first formed 10 years ago or so, we made an agreement among ourselves which I cobbled up out of a music book I read. Here's a copy. We do business as a partnership under the name Palindrome Partners, and everything we make has to go through the partnership into a partnership bank account. We then divide up the money in accordance with our partnership agreement.

Morris: Thanks. We'll look the agreement over. Let's turn to the label's offer, and—first things first—how's the money?

[*Discussion of financial terms of advance and royalties offered by label omitted.*]

Morris: Now, what else do you want us to negotiate with them?

Smyth: Well, I'm not really sure what's in there—I really don't understand this legal stuff. But we're all pretty much in agreement over some things that are important to us. First, we

don't want to be tied up with the label for too long unless they really do a good job for us—maybe for three albums at most, and only for four years.

Second, our artistic integrity is really important—we've got to make all the artistic decisions about the songs that go into our albums, and the recordings, and the producer we want, and what gets released.

Third, since Al nearly died because of that drunk driver, we've become fanatic about drugs and booze—we've sworn off, and we owe it to him to get the message out. We'd hate it if our music didn't get that message across, or worse, if people thought we were the stereotypical drink-and-dope rockers, or if our songs were used in, like, a beer commercial. I never want to see a picture of me in some magazine holding a bottle.

Morris: Understood—we'll try to make sure that you have the right to approve of marketing and promotional efforts. You know, my daughter loves your band and wears a Palindrome T-shirt she got at one of your concerts.

Smyth: Yeah, we make a nice amount from our merchandise sales. At every show we do, and on our website, we sell T-shirts, baseball caps, tank tops, stuff like that.

Morris: Who makes them for you?

Smyth: Our manager found the various manufacturers. We're really careful to treat our fans well and give them good value for their money, using top-quality materials, making sure the merchandise is high quality—like the T-shirts, we could use some cheap cotton blends and make a few bucks more, but instead we always use those thicker Ts, with high-quality fabric. We think that if we treat our fans well, they'll stay loyal to us.

You know, we've been together for almost 10 years now, and we've always been careful of the Palindrome name and what it means to our fans. We've worked really hard to build it up to where it is now, and it means a lot to us. We put our name on every piece of merchandise we have. Our manager even got a registered trademark for us in our name, and she tells us that all of our merchandise deals are nonexclusive, which means we can license our name to more than one manufacturer. And we want to keep it that way. It's really important to us to keep control of everything that has to do with our merchandise, and the money it brings in, because it's a real source of income for us.

We understand that Polyphon is offering us a higher royalty rate for our records in exchange for a piece of our merchandise action, and that's OK with us—we'd be willing to give them a quarter of the revenue for the stuff they produce and sell—but we've got to keep that trademark, and we've got to be able to use it ourselves without cutting Polyphon in on money from products it doesn't make or sell.

Morris: So you wouldn't mind licensing your trademark to Polyphon?

Smyth: Not as long as we own it, can still do our own thing with it, and can control what they do with it.

Morris: We'll see to that. We don't have to itemize the things they can produce; we just have to be sure that you can approve of what they make and the quality of it as well.

[*Discussion of other points omitted.*]

AGREEMENT AMONG MEMBERS OF PALINDROME

AGREEMENT, by and between Otto Smyth, Abby Thornton, Coco Hart, and Al Laurence (collectively, "the Band"), all citizens of the United States of America and the State of Franklin, as follows:

WHEREAS, the individual members of the Band have formed a musical group known professionally as Palindrome; and

WHEREAS, the individual members of the Band wish to set forth the terms of their affiliation;

NOW, THEREFORE, the individual members of the Band agree as follows:

1. All property created by the Band as a collective entity (including both intellectual and material property) shall be jointly owned by all members of the Band. All income earned by the Band as a collective entity for its collective efforts or from that collective property (e.g., from recordings made as a musical group) will be divided equally among the individual members of the Band. Should any individual member of the Band voluntarily or involuntarily withdraw from the Band, that member will receive his or her proportionate share of income earned by the Band as a collective entity from undertakings made before that member's withdrawal from the Band.

2. All actions taken for the Band as an entity will require the unanimous approval of all the individual members of the Band.

3. The Band shall form a partnership and do business under the name Palindrome Partners.

Signed this 15th day of March, 2003.

Otto Smyth
Otto Smyth

Abby Thornton
Abby Thornton

Coco Hart
Coco Hart

Al Laurence
Al Laurence

Excerpts from Contract Presented by Polyphon

1. DEFINITIONS

"Album" shall mean a sufficient number of Masters embodying Artist's performances to comprise one (1) or more compact discs, or the equivalent, of not less than forty-five (45) minutes of playing time and containing at least ten (10) different Masters.

"Artist" or "you" shall mean each member of the band Palindrome, individually, and the band collectively.

"Contract Period" shall mean the term set forth in Paragraph 3.03.

"Master" shall mean any sound recording of a single musical composition, irrespective of length, that is intended to be embodied on or in an Album.

* * *

3. TERM AND DELIVERY OBLIGATIONS

3.01 During each Contract Period, you will deliver to Polyphon commercially satisfactory Masters. Such Masters will embody the featured vocal performances of Artist of contemporary selections that have not been previously recorded by Artist, and each Master will contain the performances of all members of Artist.

3.02 During each Contract Period, you will perform for the recording of Masters and you will deliver to Polyphon those Masters (the "Recording Commitment") necessary to meet the following schedule:

Contract Period	Recording Commitment
Initial Contract Period	one (1) Album
Each Option Period	one (1) Album

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon eight (8) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled.

4. APPROVALS

4.01 Polyphon shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with you on the production of each Master and each Album.

* * *

8. MERCHANDISE, MARKETING, AND OTHER RIGHTS

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby transfers all right, title, and interest in that trademark to Polyphon. Polyphon may use the trademark on such products as, in its sole discretion, it sees fit to produce or license, and all income from such use shall be Polyphon's alone.

8.02 Artist hereby authorizes Polyphon, in its sole discretion, to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services.

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Franklin Statute re Personal Services Contracts

Franklin Labor Code § 2855

(a) Except as otherwise provided in subsection (b), a contract to render personal service may not be enforced against the employee or person contracting to render the service beyond five years from the commencement of service under it. If the employee or person contracting to render the service voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation due the employee or person rendering the service.

(b) Notwithstanding subsection (a), a contract to render personal service in the production of phonorecords in which sounds are first fixed may not be enforced against the employee or person contracting to render the service beyond 10 years from the commencement of service under it. For purposes of this subsection, a "phonorecord" shall mean all forms of audio-only reproduction, now or hereafter known, manufactured and distributed for home use.

Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC

United States District Court (District of Franklin, 2004)

Panama Hats of Franklin, Inc., manufactures hats which it sells to the public. In 2000, it entered into an agreement with the Allied Hat Co., which owned a federally registered trademark in the word "Napoleon" for a style of men's hat. Other than the financial terms, the only operative term of that agreement reads as follows: "Allied owns the federally registered trademark 'Napoleon' for men's hats (Reg. No. 3,455,879). Allied hereby transfers that trademark to Panama for the monetary consideration set forth below." The agreement did not make any other transfer of tangible or intangible property, good will, or business assets to Panama. Two years later, Allied went out of business—all its other assets have been liquidated, and it no longer has any legal (or other) existence.

In 2003, Elson Enterprises, LLC, a company unrelated to Panama or Allied, began manufacturing a style of men's hat, which it marketed as the "Napoleon" style. Panama had never used the mark, but it sued Elson, claiming that it owned the federally registered trademark in the word "Napoleon" for hats by virtue of the assignment from Allied and that Elson had infringed that mark. Elson now moves for summary judgment, claiming that Panama has no interest in that trademark and so has no basis for a claim of trademark infringement against Elson.

The purpose of a trademark is clear from the definition of the term in the federal trademark statute: "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof — (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127. Some examples of well-known trademarks are Coca-Cola, Exxon, and Sony.

From this it is apparent that the trademark cannot be divorced from the goods themselves—as the trademark is the assurance to the consumer of the source of the goods, the trademark cannot exist independently of the goods. Hence, if one company purchases the assets of another and becomes the manufacturer of the goods previously manufactured by the purchased company, the trademark that was associated

with those goods may now become the property of, and be associated with, the new manufacturer of the goods, for the trademark is now the new manufacturer's indication of source. Short of a transfer of other assets of a business with the trademark, a trademark cannot be transferred without, at the very least, a simultaneous transfer of the good will associated with the mark, for that good will has developed from the actual product itself and so binds the trademark to the goods or services with which it is associated. In essence, the mark cannot exist in a vacuum, to be bought and sold as a freestanding property. This policy is made explicit in the federal trademark statute: "A registered mark . . . shall be assignable *with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark.*" 15 U.S.C. § 1060(a)(1) (emphasis added).

In the parlance of the trademark law, the sale of a trademark without any other asset of the business—without, at the very least, the good will associated with the trademark —is termed an "assignment in gross" or a "naked" assignment of the trademark. Given the policy considerations set forth above, without the necessary inclusion of the assets of the business or the good will associated with the mark, the law holds that a "naked" "assignment in gross" of a trademark is not valid. Further, such a "naked" "assignment in gross" may cause the assignor to lose all rights in the trademark and leave the trademark open for acquisition by the first subsequent user of the mark in commerce.

Because the purported assignment of the federally registered trademark "Napoleon" from Allied to Panama was just such a "naked" "assignment in gross" of the mark, it has no validity—the purported assignment conveyed no rights. Because the assignment was invalid, the mark was free for anyone to acquire, and anyone could acquire the right to the mark by using the mark in commerce, which is precisely what Elson did. (Panama never used the mark.) Therefore, Elson did not infringe on any rights of Panama because Panama had no rights in the "Napoleon" trademark. Elson's motion for summary judgment is granted.

M&P Sportswear, Inc. v. Tops Clothing Co.

United States District Court (District of Franklin, 2001)

The facts giving rise to this lawsuit for trademark infringement, stripped to their essentials, are these: M&P Sportswear designs T-shirts and other items of apparel, and is the owner of the federally registered trademark "Go Baby," which it uses as the brand name of a line of T-shirts. Tops Clothing is an offshore manufacturer of clothing. In 1998, Tops entered into an agreement with M&P, under which M&P licensed the use of its "Go Baby" trademark to Tops. The agreement provided that Tops would pay a specified licensing fee to M&P, which would entitle Tops to manufacture, import into the United States, and sell T-shirts under the "Go Baby" brand. The agreement contained no other substantive provisions, and Tops immediately began the manufacture, importation, and sale of the T-shirts. Tops made the requisite licensing payments to M&P.

In 2000, M&P representatives purchased samples of Tops's "Go Baby" T-shirts at a "99-cent" store in Franklin City; this was the first sample of the Tops T-shirts M&P had obtained. M&P's representatives found that the T-shirts were, in their opinion, of the poorest quality imaginable—according to the deposition testimony of one of M&P's principals, "they were so thin and cheaply made that they would dissolve in a rainstorm." M&P then sent a purported "notice of termination" of the trademark license agreement to Tops (this notwithstanding that the license agreement did not make any specific provision for termination). When Tops continued to manufacture, import, and sell the branded T-shirts, M&P brought this action for trademark infringement against it. Tops now seeks summary judgment against M&P, on the ground that, as the license agreement contained no provisions for quality control, M&P no longer has any rights in the "Go Baby" trademark.

It is a basic tenet of trademark law that a trademark is an indication of the source or origin of goods or services to the public, enabling the public to expect that the goods or services bearing the trademark will comport with a certain uniform standard of quality, whatever that quality may be. A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or services sold under the mark. Thus, not only does a

trademark owner have the *right* to control quality—when it licenses, it has the *duty* to control quality.

Accordingly, it is also a basic tenet of the trademark law that any trademark proprietor who licenses the trademark to another must assure, in the license agreement, that the goods or services offered by the licensee meet the standards of quality of the trademarked goods established by the trademark proprietor. Failure to do so causes the mark to lose its significance as an indication of origin. Indeed, many Circuits have held that such action may be seen as an abandonment of the mark itself; the federal trademark act provides, "A mark shall be deemed 'abandoned' if either of the following occurs: . . . (2) when any course of conduct of the owner, including acts of omission as well as commission, causes the mark . . . to lose its significance as a mark." Uncontrolled licensing as a course of conduct is inherently deceptive, constitutes abandonment of all rights in the trademark, and results in cancellation of its registration.

Here, M&P made no quality-control provision whatsoever in its license agreement. Accordingly, by failing to assure the public of any standard of quality of the goods and services manufactured and sold under the mark, M&P has lost its rights to the mark.

Tops's motion for summary judgment is granted.

2) MPT2 - Please type your answer to MPT 2 below *(Essay)*

======== Start of Answer #2 (774 words) ========

TO: Levi Morris

FROM: Examinee

DATE: July 30, 2013

RE: Palindrome Recording Contract

As instructed, I have made the appropriate changes and have indicated the corrections in underlined font.

I. Definition of Parties in Contract.

1.DEFINITIONS: "Artist" or "you" shall mean the partnership named Palindrome Partners.

2. The band operates everything through the Palindrom Partners name and thus the band should only bound through the Palindrome Partners partnership and not individually. The band 's partnership agreement requires that all actions taken for the Band as an entity will require the unanimous approval of all the individual members of the Band.The Band does its business solely as partnership, not as individuals.

II. Contract Period

1. 3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon two separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do no fulfill your Recording Commitment for the initial Contract Period, that period will cointinue to run and the next Option Period will not being until the Recording Commitment in question has been fulfilled but the term of the contract shall

not exceed four years and shall not result in more than three albums.

2. The changes are consistent with the Band's wishes of not being bound for more than three albums in four years. The record company's terms are inconsistent with the state statute Section 2855(b) which prevents personal services contracts to run more than 10 years for personal services in relation to the production of phonorecords. The terms of the contract allow for 8 options which could allow for the contract to run more than 10 years because of the original language that rolls over the time period until the album requirement is adjusted. This could lead to 8 albums in 20 years which would violate the statute. The altered langauge brings the contract within the statute and to the Band's requests.

III. 4. APPROVALS

1. 4.01 The Artist, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with the Artist on the production of each Master and each Album.

2, The changes indicate the Band's intentions to have artist freedom to choose the album content and its choice of producer as indicated in their interview.

IV, 8. MERCHANDISE, MARKETING, AND OTHER RIGHTS

1,

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and agrees to license the use of the trademark to Polyphon. Polyphon may use the trademark on such products, subject to Artist approval in use and in quality of products, as it sees fit to produce or license

with one quarter of all income from such use shall be Polyphon's alone. Polyphon's use of the trademark is nonexclusive with Artist retaining the right to produce and license products as it sees fit.

2. By only licensing the use of the trademark and retaining the ability to approve or disapprove the Polyphon's use of its trademark, the Band is protecting itself image and trademark. If the Band were to transfer the trademark to Polyphon the Band and Polyphon could lose the trademark all together. In Panama Hats, the court held that an assignment of a trademark without the attached goodwill could consitute a assignment in gross which invalidates a trademark. By retaining the trademark and only allowing a license in the trademark the band is protectings its trademark. Further, the veto power allows Band to prevent the degradation and eventual loss of the significance of the mark. In M&P the court held that license agreements without the standards of quality of trademark lead to the abandonment of the mark. Here by allow for the veto power and such quality standards as it sees fit, the Band is protecting itself from losing its trademark and fullfilling its duty to control quality.

1.

8.02 Artisit hereby authorizes Polyphon, subject to Artist approval,... [no other changes to paragraph].

2. This change allows Artist to approve any marketing materials used by Polyphon in order to protect its imagine as requested by the Band. This change would allow the Band to prevent Polyphon from producing anything that is contrary to what the Band want its image to be.This would prevent the instance that Mr. Smyth warned about regarding the bottle on a magazine cover and would allow them the control over their brand name while allowing Polyphon to market them as well.

======== End of Answer #2 ========

END OF EXAM

MEE Question 1

A woman was born and raised in the largest city ("the city") of State A, where she also attended college.

Three years ago, the woman purchased a 300-acre farm and a farmhouse in neighboring State B, 50 miles from the city. She moved many of her personal belongings to the State B farmhouse, registered her car in State B, and acquired a State B driver's license. She now spends seven months of the year in State B, working her farm and living in the farmhouse. She pays income taxes in State B, but not in State A, and lists State B as her residence on her federal income tax returns.

However, the woman has not completely cut her ties with State A. She still lives in the city for five months each year in a condominium that she owns. She still refers to the city as "home" and maintains an active social life there. When she is living on the farm, she receives frequent weekend visits from her city friends and occasionally spends the weekend in the city at her condominium. She is a member of a health club and a church in the city and obtains all her medical and dental care there. She is also registered to vote and votes in State A.

A food product distributor sells food items to grocery stores throughout a five-state region that includes States A and B. The distributor is a State C corporation. Its corporate headquarters are in State B, where its top corporate officers, including its chief executive officer (CEO), have their offices and staff. The distributor's food processing, warehousing, and distribution facilities are all located in State A.

Three years ago, the woman and the distributor entered into a 10-year written contract providing that the woman would sell all the produce grown on her farm each year to the distributor. The contract was negotiated and signed by the parties at the distributor's corporate headquarters in State B.

The woman and the distributor performed the contract for two years, earning her $80,000 per year. Recently, the distributor decided that the woman's prices were too high. At a meeting at its corporate headquarters, the distributor's CEO asked the woman to drop her prices. When she refused, the CEO informed her that the distributor would no longer buy produce from her and that it was terminating the contract.

The woman has sued the distributor for anticipatory breach of contract. She seeks $400,000 in damages. She has filed suit in the United States District Court for the District of State A, invoking the court's diversity jurisdiction.

State A's long-arm statute provides that "a court of this State may exercise personal jurisdiction over parties to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution."

The distributor has moved to dismiss the woman's action for lack of subject-matter jurisdiction and for improper venue.

1. Should the court grant the motion to dismiss for lack of subject-matter jurisdiction? Explain.

2. Should the court grant the motion to dismiss for improper venue? Explain.

1) Please type your answer to MEE 1 below

Â

Â

When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #1 (890 words) ========

1. Lack of Subject Matter Jurisdiction.

The court should not grant the motion to dismiss for lack of subject matter jurisdiction. The issue is whether there is complete diversity among the parties to qualify for diversity jurisdiction.

Federal subject matter jursidiction is appropriate when there is either a (i) federal question at issue or (ii) complete diversity. To invoke federal question jurisdiction, the plaintiff must present a federal question (a question arising under the laws of the U.S., Constitution, or treaty) that is apparent on the face of a well pleaded complaint. Since the woman is suing the distributor for anticpatory breach of contract, a state law claim, there is no federal question jurisdiction available.

To invoke diversity jurisdiction, there must be (1) complete diversity (each plaintiff has a diverse domicile from each defendant), and (2) damages in excess of $75,000 (not including interest and costs) plead in good faith by the plaintiff. Diversity is determined at the time the lawsuit is commenced (pleading is filed). First, the domicile of an individual is determined by her domicile. Domicile requires physical presence and an

intent to permanently remain. Here, the woman was born and raised in State A, where she also attended college, thereby presuming she has lived in State A for at least 22 years (average age upon graduting from college). Woman lives in State A for five months in a condominium she owns there, and frequently visits State A on the weekend to see friends and family. Moreover, State A is where woman has memberships and receives fundamantal healthcare, and where she is registered to vote. Although woman now has a second home in State B, which is where the land is located that concerns the contract, woman has only lived in State B for three years, which is also when she entered the contract with distributor. Since the woman has lives the majority of her personal life in State A and still has significant ties to state A, and the facts indicate that she has only been in State B a short time for the primary purpose of earning a living on her recently purchased farm (most state B activity revolves around the farm as a business - income taxes paid, federal income taxes, driving), a court is likely to conclude that woman is domiciled in State A for diversity jurisdiction purposes.

Second, the domicile of a corporation (defendants here) for diversity jurisdiction purposes is determined by any state in which the corporation is incorporated and the one state where the corporation has its primary place of business, typically the corporate headquarters. Distributor is incorporated in State C, and has it's corporate headquarters in State B. Although distributor's food processing, warehousing, and distribution facilities are in State A, that is of no consequence to determing diversity jursidiction. Distributor is domiciled in both State B and C for purposes of diversity jursidiction.

Finally, woman plead $400,000 in damages from anticipatory breach of the contract, which looks to be a good faith estimate since she has earned $80,000 per year for hte past two years from the contract and still has 8 years left on the contract ($80,000 x 8).

Therefore, there is complete diversity among the parties and the woman has plead in excess of $75,000 (exclusive of interest and costs) for the court to properly invoke subject-matter, diversity jurisdiction in this case.

*Personal Jxd

*Statutory - long arm

*Constitutional (Int. Shoe)

*Minimum Contacts (Availment; Foreseeability)

*Fairness

*Notice

2. Improper Venue. The court should not grant the motion to dismiss based on improper venue. The issue is whether State A has personal jurisdiction over distributor.

Venue is not whether the court has the power to hear the case (like subject matter jurisdiction), but whether the court is the proper court to hear the case. Venue is proper in the jurisdiction where the defendant is domiciled or where a substantial amount of the events that give rise to the action occurred. For the corporate defendant in this case, domicile is determined by whether the court would have proper personal jurisdiction. Personal jurisdiction has both a statutory and a constitutional due process aspect. The

statutory component is satisfied by State A's long-arm statute that provides the State A court to "exercise personal jurisdiction to the full extent allowed by the due process clause of the 14th Amendment" (same as Arkansas). The due process requirements for personal jurisdiction were outlined in International Shoe (1945) and require (1) minimum contacts (purposeful availment and foreseeability) (2) "traditional notions of fair play and substantial justice" and (3) reasonably calculated notice.

Here, distributor has minimum contacts with State A. Distributor has various warehouses, etc. in State A and has thereby purposefully availed itself to the benefits and protections of State A's laws, and it is foreseeable for distributor to be sued in State A based on these contacts. Second, it is fair to bring suit against distibutor in State A because distributor has systematic and continuous contact with State A (specific jxd) based on all of distributor's facitilities being located there. The facts do not provide information about the notice delivered to distributor, but since they have already filed motions, it is obvious they received notice of the suit.

Therefore, State A has proper personal jurisdiction over distributor for venue to be proper in State A.

======== End of Answer #1 ========
END OF EXAM

MEE Question 2

After a dump truck unloaded gravel at a road construction job site, the trucker negligently drove away with the truck bed still in a raised position. The raised truck bed hit an overhead cable, causing it to fall across the highway.

The telephone company that owned the fallen cable sent one of its employees to the scene in a company vehicle. The employee's responsibilities were expressly limited to responding to cable-damage calls, assessing damage, and reporting back to the telephone company so that a repair unit could be dispatched.

The foreman of the road construction job site asked the telephone company employee if the foreman's crew could lift the cable off the highway. Fearful that the cable might be damaged by traffic, the telephone company employee said, "Go ahead, pick it up. Just don't damage the cable." The foreman then directed his crew to stretch the cable over the highway so that traffic could pass underneath.

Shortly thereafter, a bus passing under the telephone cable hit the cable and dislodged it, causing the cable to strike an oncoming car. The driver lost control of the car and hit a truck carrying asphalt to the road construction site. As a result of the collision, hot asphalt spilled and severely burned the foreman.

The foreman is now threatening to sue the telephone company on the ground that it is responsible for its employee's negligence in authorizing the road construction crew to stretch the cable across the highway. The telephone company argues that, even assuming that its employee was negligent, the telephone company is not liable because:

1. the telephone company employee's acts were outside the scope of his employment and thus cannot be attributed to the telephone company;

2. there is no other agency theory under which the foreman could hold the telephone company liable for its employee's acts; and

3. the telephone company employee's acts were not the proximate cause of the foreman's injuries.

Assess each of the telephone company's responses.

2) Please type your answer to MEE 2 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #2 (1114 words) ========

1. Respondiat Superior

It is likely that the employee's acts were not outside the scope of his employment because the employee was acting for the benefit of the employer. The issue is whether an employee who takes actions beyond his express authority will relieve the employer from vicarious liability. An employee is considered an agent of the employer, and the acts taken in the scope of employment are attributed to the employer. Accordingly, the tortious acts of an employee are also attributed to the employer through vicarious liability under the doctrine of Respondeat Superior. Whether or not the telephone company will be held liable under Respondiat superior depends on whether the employee acted within the scope of his employment when he told the foreman that the contruction crew could raise the fallen wire above the street.

Like other agency relationships, an employee owes a duty to the employer to reasonably follow directions and to exercise ordinary care while doing so. An agent who fails to do so may may relieve the employer of liability in certain situations. The court looks to several factors in determining whether the employee's acts were within the scope of employment, including whether the agent was on a detour or a frolic, for

whose benefit the employee's actions were taken, and the degree to which the employee departed from his express authority. Here, the detour/frolic analysis does not really apply, as the agent did not depart from the immediate task. The employee told the worker that they could raise the cable above the highway because he was fearful that passing traffic would damage the company's property. In so doing, the employee was acting for the employer's benefit, and not his own. Finally, the employee's express authority was limited to responding to calls, assessing damage, and reporting back to the company. He did not have the express authority under his employment to direct the workers to raise the line. This is a strong factor showinfg that the employee acted beyond the scope of employment. However, these actions could arguably be considered to be incidental to the scope of his employment. He was authorized to report damage to wires and to assess the situation. He was fearful that the situation could get worse without further action, and his action was taken to protect company property. For these reasons, the employee's acts were most likely not outside the scope of his employment.

2. Other Agency Theories

Even if the employee's actions were considered to beyond the scope of his employment, the telephone company will most likely be liable for his actions because the employee had apparent authority. The issue is whether the employee had apparent authority.

Apparent authority arises when the principal's words or conduct to the third party

reasonably indicate to the third party that the agent has authority to act on its behalf. Apparent authority can arise in seversal situations, including where the principal negligently allows the agent to act on its behalf and does nothing to prevent it, past dealings with the third party or ratification of the agent's conduct, and where express authority has terminated but notice of the termination has not been relayed to the third party. An agent can also have implied actual authority that is incidental to the agent's express actual authority. Here, the issue is whether the telephone company's words or conduct to the foreman made it reasonable for the foreman to believe that the employee had authority, or whether the employee's actions were taken incidental to his express actual authority.

Here, the facts show that the telephone company responded to the fallen wire by sending the employee to the scene in a company vehicle. The foreman asked the employee if they could raise the wire, to which he responded in the affirmative. These actions, alone, probably made it reasonable for the foreman to believe that the employee had authority to act on behalf of the employer. If the company truck had company logos or other identification marks on the truck, it would be even more likely that the employee had apparent authority.

Alternatively, the employee had express authority to assess damage and report the damage to the employer. It would be reasonable to conclude that, incidental to that authority, the employer had the ability to remove damages wires that could cause a greater harm to company property and to third parties. Thus, even if it was not reasonable for the foreman to believe the employee had authority, it is possible that that

he had implied actual authority, incidental to his express authority.

3. Proximate Causation

The telephone company employee's negligence was most likely considered the proximate cause of the foreman's injuries. At issue is whether there was an independent intervening force that would cut off the company's liability for negligence.

An essential element of a negligence claim is that the plaintiff's injuries have to be caused by the defendant's negligence. This requires the conduct to be both the actual and proximate cause. Actual cause is a but-for cause, that is easily satisfied here. Proximate cause deals more with the foreseeability of the harm that occured and whether it was reasonable for the defendant to foresee the harm to the plaintiff. Because negligence is based in the policy of requiring people to exercise due care, if the type of harm that occured was unforeseeable to the defendant, there is no reason to punish him for his conduct. If another cause of the plaintiff's injuries that was both independent of the defendant's conduct and unforeseeable, occured after the defendant's negligent conduct, the defendant's negligence will not be considered to be the proximate cause.

Here, the employee instructed the workers to raise the cable. The cable was then hit by an oncoming car, causing it to fall on another oncoming car. The driver of that car lost control of his car and hit a truck travelling to the construction site carrying hot asphault, which then spilled on the foreman and causing his injuries. The defendant's negligent

conduct was telling the workers that they could raise the wire. Raising a fallen wire over a road, where traffic is still present, creates the foreseeable risk that the wire may fall again and cause damage to a car travelling underneath. That is exactly what happened here. The car that was hit by the wire then lost control and hit a truck carrying asphault to a contruction site, which is also foreseeable based on the circumstances. None of the acts that occured after the defendant's negligence were independent of the defendant's conduct; rather, they were all a direct consequence of his negligence. As such, the defendant's conduct was the procimate cause.

======== End of Answer #2 ========
END OF EXAM

MEE Question 3

Seven years ago, a married couple had a daughter.

Recently, the mother joined a small religious group. The group's members are required to contribute at least half their earnings to the group, to forgo all conventional medical treatments, and to refrain from all "frivolous" activities, including athletic competitions and sports. The mother has decided to adhere to all of the group's rules.

Accordingly, the mother has told the father that she has given half of her last two paychecks to the group and that she plans to continue this practice. The father objects to this plan and has accurately told the mother that "we can't pay all the bills without your salary."

The mother has also said that she wants to stop giving their daughter her prescribed asthma medications. The father opposes this because the daughter has severe asthma, and the daughter's physician has said that regular medication use is the only way to prevent asthma attacks, which can be life-threatening. The mother also wants to stop the daughter's figure-skating lessons. The father opposes this plan, too, because their daughter loves skating. Because the father works about 60 hours per week outside the home and the mother works only 20 hours, the father is afraid that the mother will do what she wants despite his opposition.

The mother, father, and daughter continue to live together. They do not live in a community property jurisdiction.

1. Can the father or the state child welfare agency obtain an order
    - (a) enjoining the mother from making contributions from her future paychecks to the religious group? Explain.
    - (b) requiring the mother to take the daughter to skating lessons? Explain.
    - (c) requiring the mother to cooperate in giving the daughter her prescribed asthma medications? Explain.

2. If the father were to file a divorce action against the mother, could a court award custody of the daughter to him based on the mother's decision to follow the religious group's rules? Explain.

3) Please type your answer to MEE 3 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #3 (593 words) ========

1. The father or the state child welfare agency will not be able to obtain an order enjoining the mother from making contributions from her future paychecks to the religious group or requiring the mother to take the daughter to skating lessons, but may be able to obtain an order requiring the mother to cooperate in giving the daughter her prescribed asthma medications.

The issue is whether a court will issue an order relating to private matters between married parties when the parties differ as to spending and rearing of a child.

A court will normally abstain from issuing orders relating to the management of money or the raising of children when the parties to the action are married. The right to raise a child as the parents see fit is protected by the courts. However, when the conduct of the parties rises to the level of endangering the life of the child, a court will issue an order requiring the parents to provide medical care for the child.

The wife's contributions of her paycheck to the religious group will not be regulated by the court as it is a matter for the married parties to decide how they will spend their money and the qualify of life they wish to live. The court does not require married parties to make contributions to each other, except for necessities such as medical care and food. While the husband is fearful that he will not be

able to pay all of the family's bills without the wife's income, the facts do not state that he will be unable to pay for necessities.

For the same reasons the court will not require the wife to take the child to figure skating lessons. This is a private matter to be determined by the married parties, not for a court to determine.

The father, or the state child welfare agency may be able to obtain a court order requiring the mother to cooperate in giving her child the required asthma medication. A parent may decide matters such as a child's diet, but a parent is not permitted to harm their child by refusing life saving medication. A state child welfare agency may begin child endangerment proceedings against the mother if the

child's health is in danger because of the lack of medicine. While the father and the mother are married, a court may issue an order when the life of a child is at stake.

2. A court could award custody of the daughter to the father based on the mother's decision to follow the religious group's rules if the award of custody would be in the best interest of the child.

The issue is whether a court can award custody to the father based on the mother's decision to follow the religious group's rules.

A court determines custody based on the best interest of the child. Many factors are taken into account when determining the best interest of the child including

adherence to medical advice, lifestyle, safety, drug use, stable home life, and after a certain age the child's wants. The court is not permitted to take religion into account unless some aspect of adherence to that religion would affect the child's best interest.

The court could consider the mother to be a danger to her child because the mother is refusing to give the child her required asthma medicine. If the court feels that the mother's adherence to her religious beliefs will place the child in danger, then the court can award custody to the father.

========= End of Answer #3 ========
END OF EXAM

MEE Question 4

The city police department received a 911 call regarding a domestic violence incident. The caller said that she was staying with her sister and her sister's boyfriend. The caller said that she had called the police because her sister's boyfriend was becoming violent. The police department records all 911 calls. The relevant portions of the 911 recording are as follows:

> Caller: My sister's boyfriend is out of control right now. He just threw a broken beer bottle at my sister. It hit her on the arm. Now he's holding a chair like he's going to throw that at her, too.
> Police Dispatcher: Where is your sister?
> Caller: She's running toward the bathroom.
> Police Dispatcher: Is she injured?
> Caller: I see some blood on her arm.
> Police Dispatcher: Does he have a gun?
> Caller: I don't see a gun.

A nearby police officer arrived on the scene five minutes after the caller telephoned 911. The police officer found the boyfriend pacing in the front yard and ordered him to sit in the rear seat of the patrol car. The boyfriend sat in the patrol car, and the officer locked the door from the outside so that the boyfriend would stay in the car while the officer spoke to the sister.

When the sister saw that her boyfriend was locked in the patrol car, she came out on the porch to speak with the officer. The sister was in a highly agitated and emotional state, and she had several fresh cuts on her right arm. The officer asked her how she got the cuts. The sister replied, "My boyfriend threw a bottle at me which cut my arm." The sister declined the officer's offer of medical assistance but said that she wanted to press charges against her boyfriend. The sister was in tears throughout her conversation with the officer.

The boyfriend was charged in state court with battery and disorderly conduct. The prosecutor made every effort to secure the appearance of both the sister and the caller at trial, but when the trial began, the sister and the caller did not appear.

The prosecutor is attempting to convict the boyfriend without trial testimony from the sister or the caller. The prosecutor plans to introduce the caller's statements to the police dispatcher and to call the officer to testify and to repeat the statements the sister made to him at her house to prove that the boyfriend attacked the sister.

The 911 recording containing the caller's statements to the police dispatcher has been properly authenticated. Defense counsel has objected to the admission of (1) the caller's statements to the police dispatcher on the 911 recording and (2) the officer's testimony repeating the sister's statements to the officer (at her house). Defense counsel asserts the following:

a) The caller's statements to the police dispatcher are inadmissible hearsay.
b) Admission of the caller's statements to the police dispatcher would violate the boyfriend's constitutional rights.

c) The officer's testimony repeating the sister's statements is inadmissible hearsay.
d) Admission of the officer's testimony repeating the sister's statements would violate the boyfriend's constitutional rights.

This jurisdiction has adopted rules of evidence identical to the Federal Rules of Evidence and interprets the provisions of the Bill of Rights in accordance with relevant United States Supreme Court precedent.

How should the trial court rule on each defense objection? Explain.

4) Please type your answer to MEE 4 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #4 (973 words) ========

a. The trial court should overrule defense's first objection. The issue is whether the statements made in the 911 call fall into an exception to the hearsay rule.

The Federal Rules of Evidence prohibit the admission of hearsay as evidence in a trial. Hearsay is generally defined as statements made by a witness other than those at trial that are offered to prove the truth of the matter asserted. Although hearsay is generally excluded, several examples of nonhearsay and several exceptions to the hearsay rule are provided in the Federal Rules of Evidence. One particular exception that is relevant here is the present-sense impression exception to the hearsay rule, which applies regardless of whether the declarant is unavailable as a witness. A present sense impression is a statement describing or relating an event or condition as it is happening or immediately thereafter.

The statements made to the 911 operator qualify for the present sense impression exception to the hearsay rule. Each statement described an event that was currently transpiring, especially those made that say, "My sister's boyfriend is out of control right now," "Now he's holding a chair like he's going to throw that at her, too," "she's running toward the bathroom," "I see some blood on her arm," and "I don't see a gun." These statements describe an ongoing event, and under the rules, should be

admitted. Furthermore, the statement, "He just threw a broken beer bottle at my sister. It hit her on the arm," should also be admitted under this exception because it likely happened so closely in time that it falls within the "immediately after" portion of this exception. Additionally, these statements could qualify for the excited utterance exception if she made the statements while in an excited state (see below). Of course, the facts do not indicate this, but the statements nonetheless qualify as a present sense impression regardless.

b. The admission of the 911 call does not violate the caller's constitutional rights. The issue is whether the criminal defendant's constitutional right of confrontation has been violated.

A criminal defendant has a 5th Amendment/14th Amendment constitutional right to confront the witnesses who speak against him and get him convicted. This helps to ensure the accuracy of witness testimony and allows defendant to cross examine witnesses. Although a statement may qualify for admission under the Federal Rules of Evidence, the statement may nonetheless violate one's Confrontation Clause rights if the statement is made by someone who did not testify at trial. In fact, the Supreme Court of the United States recently so held in the landmark case of *Crawford v. Washington*. The Court noted that a defendant's confrontation rights are violated when a statement is admitted under a hearsay exception, the witness does not testify at trial or another proceeding where meaingful cross examination could occur, and the statements are testimonial. Statements are testimonial generally when they are garnered by police personnel or stated by the police for trial purposes. In colloquial

terms, if the statements are made in order to convict the defendant, then the statements are testimonial and violate the Confrontation Clause.

Here, the statements were clearly not testimonial. The woman called the police in order to obtain police assistance with a safety concern. She told the 911 operator the information needed for a police officer to safely diffuse the situation. Her statements were not made with the purpose of convicting the defendant but only to receive help. Thus, the defendant's confrontation rights were not violated by admission of these statements.

c. No. The issue is whether the statements by the sister fall into another hearsay exception.

As noted above, hearsay is generally precluded from a trial unless it fits within an exception. One relevant exception here is the excited utterance exception. An excited utterance is a statement relating or describing a startling event made while the declarant was still excited or under the rush of the event. It is slightly different than the present sense impression in that it can be made later in time so long as the declarant is still under the pressure of the exciting event. Additionally, the statement of current physical or mental condition is also an exception, and this exception encompasses one's plans or intent. Finally, there is also a statement made for medical diagnosis or treatment exception, but these statements must be made to medical personnel.

In this case, the sister's statement about the boyfriend throwing a bottle at her qualifies as an excited utterance. She was just a victim of domestic abuse, so it is understandable that she is excited. Additionally, she was in tears while making the

statement. Thus, it fits the exception. Also, the statement that it cut her arm is admissible as an excited utterance and as a statement of physical condition. Finally, the statement that she wanted to press charges is also admissible under both exceptions. The medical diagnosis exception would not apply because the statement was not made to medical personnel.

d. Probably so. The issue is whether the statements to the police officer are testimonial and thus violate the confrontation clause.

As noted in part 2 of this essay, criminal defendants have a right to confront witnesses and their statements even if a statement qualifies for a hearsay exception. These rights are violated under *Crawford* if the statement was made by one not testifying at trial and testimonial.

The statements here are most likely testimonial. They were made to a police officer not for safety or protection but for conviction purposes. This is clear considering that the boyfriend was constrained in the police car at the time the statements were given. Thus, the defendant should have a right to confront the sister/his girlfriend at trial and have a adequate opportunity for meaningful cross examination. Because he does not, his confrontation rights were violated.

======== End of Answer #4 ========
END OF EXAM

MEE Question 5

A man asked a friend for a loan. The friend was willing to make the loan so long as the man paid interest at a rate that would enable the friend to make a profit on the transaction. After some discussion, they agreed that the friend would lend the man $4,000, to be repaid one month later together with interest at a rate two percentage points higher than the "prime interest rate" charged by First Bank. (First Bank's prime interest rate is reported daily in the financial press.)

At dinner that evening, the friend handed the man a check for $4,000, payable to his order, that was drawn on the friend's account at First Bank. In exchange, the man handed the friend a document signed by him and dated that day. The document read, in its entirety, as follows: "The undersigned hereby agrees to pay to bearer the sum of $4,000, plus interest at a rate two percentage points higher than the prime interest rate charged by First Bank on the date hereof, no later than one month from the date hereof."

After dinner, as the two waited for a bus together, they were robbed. The robber took the check from the man and the document described above from the friend.

The next day, the robber forged the man's signature on the back of the check and then sold the check to a check-cashing business, handing the check to the manager of the business in exchange for $3,500 in cash. The business and its employees acted in good faith and had no reason to believe that the check did not belong to the robber or that the man's signature had been forged. The following day, the robber sold the document that he had stolen from the friend to a local investor, handing the investor the document in exchange for $2,500 in cash. The investor acted in good faith and had no reason to believe that the document did not belong to the robber.

A few days later, the manager of the check-cashing business took the check to First Bank, handed the check to the teller, and asked that the amount of the check be paid. But the teller refused to pay because the friend had contacted First Bank and stopped payment on the check. Accordingly, the teller handed the check back to the manager.

On the date on which the document signed by the man called for him to pay, the investor contacted the man and demanded payment. The man responded that he would not pay because his promise had been made to his friend, not to the investor, and, moreover, he should not have to pay because the friend's check had been stolen from him with the result that he never received the money that his friend was supposed to loan him.

1. Does the check-cashing business have a right to recover the amount of the check from the friend? Explain.

2. Is the document signed by the man a negotiable instrument? Explain.

3. Assuming that the document is a negotiable instrument, does the investor have a right to recover from the man the amount that the man promised to pay in the document he gave to the friend? Explain.

5) Please type your answer to MEE 5 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #5 (1019 words) ========

MEE QUESTION 5

1) The check-cashing business does not have a right to recover the amount of the check from the friend

At issue is whether a payee is liable on a check that was stolen and has a forged indorsement.

Under general principels of commercial paper, a payee is secondarily liable on a check which the payee indorses. The check must be presented to the drawee bank and dishonored, triggering liability. However, where a payee never indorsed the check, the payee does not incur liability for the dishonor because she has not signed the instrument. A payee is the person the check is made payable to. A drawee is the bank the check is drawn on. A holder is a person who is in possession of bearer paper, or is in possession of order paper made payable to them. A holder is entitled to enforce a check, but a non-holder is not entitled to enforce a check. Anybody who takes after a forged indorsement is not a holder of a check, but is actually a converter of the check.

Here, the man is the Payee, because the check was made payable to him. First Bank is the drawee, because that is the bank the check was drawn on. The check was stole by thief prior to the man endorsing the check, and therefore the thief was not a holder because he was not in possession of bearer paper or order paper payable to him. When he transfered the check to the check-cashing business, although the check-cashing business took in good faith and had no reason to believe the document did not belogn to the robber, they still are not holders because the check was not negotiated to them. Because the check-cashing business is not a holder, they are not entitled to enforce the instrument. Thus they can not sue up the chain of endorsers, because the check was never properly endorsed to begin with. The check is still order paper made payable to man, and the only person entitled to enforce the instrument is man. Therefore, check-cashing business cannot hold man liable for payment on the check. Man never signed/indorsed the check and therefore cannot be held liable for its dishonor.

Therefore, check-cashing business cannot recover for man for liability on the dishonored check.

2) The document signed by the man is a negotiable instrument

At issue is whether the note that the man made to friend is a negotiable instrument.

A negotiable instrument is a writing, made by a maker or a drawer, which is a promise

or order to pay a fixed amount of money on demand, or at a definite time, which is unconditional, with no additional undertakings, and with order or bearer language. Fixed amount may include interest. A maker is the person who made the note, and who is promising to pay. The currency used must be recognized by the United States government.

Here, the note that man made to friend was a writing, because it was a document that the man handed to the friend. It was made by the man, who is now the maker of the note. It was a promise by the man to pay the friend. It was a fixed amount, the $4,000 with a fixed amount of interest. It was in a currency recognized by the United States Government (dollars). It is payable on demand, or at a definite time because it is due no later than one month from the date of the note. There is no other undertaking on the note, and the note has no other conditions. And finally it is bearer paper, because it stated "pay to bearer."

Therefore, the note that the man made to the friend is a negotiable instrument because it meets all the requirements of negotiability.

3) The investor has a right to recover from the mant he amount that the man promised to pay in the document he gave to the friend.

At issue is whether a holder in due course, who was transferred the note, may enforce bearer paper which he took from a thief.

Under general principles of commercial law, bearer paper is payable to whomever is a holder in possession of the instrument. A holder is a person whom may enforce the instrument. A holder in due course is a holder who takes a note for value, in good faith, and without notice of any claims or defenses against the note. In good faith means subjective honesty-in-fact, and the objective acting under the commercial standards of fair trade. A holder in due course may prevail against the maker of a note even though the maker of the note has a personal defense against him. A personal defense is any general contract defense. A real defense is fraud-in-the-inducement, or forgery of the instrument.

Here, the investor has a negotiable instrument which is in bearer-paper form. The investor is a holder, because he is in possession of bearer paper. The investor is a holder in due course because he is a holder, who took in good faith (because there are no facts which suggest he did not take with honesty-in-fact, or violating the commercial standards of fair dealing), for value (because he gave $2,500 to the thief), and without knowledge of any defenses or claims against the note (because there are no facts which suggest he had any knowledge of any defenses against the note). Because he is a holder-in-due-course, he is able to enforce the instrument against the maker of the note even if the maker of the note has a personal defense. Here, Man will attempt to claim that the note was stolen from him and thus he should not be liable on the note. However, theft of a piece of bearer paper is a personal defense. Thus, because Investor is a holder-in-due-course, he takes free of personal defenses and will be able to hold the man liable on the note he made.

Therefore, the investory (HDC) is able to enforce the note against the man for the amount the note was originally made for.

======== End of Answer #5 ========
END OF EXAM

MEE Question 6

Twenty years ago, John and Mary were married. One month before their wedding, John and Mary signed a valid prenuptial agreement in which each of them waived "any property rights in the estate or property of the other to which he or she might otherwise be legally entitled upon the termination of their marriage by death or divorce."

Seventeen years ago, John executed a valid will, which provided as follows:

> I, John, leave my entire estate to my wife, Mary. However, if I should hereafter have children, then I leave three-fourths of my estate to my wife, Mary, and one-fourth of my estate to my children who survive me, in equal shares.

Fifteen years ago, John had an extramarital affair with Beth, who gave birth to their child, Son. Both Beth and John consented to Son's adoption by Aunt. At the time of the adoption, Beth, John, and Aunt agreed that Son would not be told that he was the biological child of Beth and John.

Three years ago, Aunt died, and Son moved into John and Mary's home. At that time, John admitted to Mary that he had had an extramarital affair with Beth which had resulted in Son's birth.

Three months ago, Mary filed for divorce. Nonetheless, she and John continued to live together.

One month ago, before John and Mary's divorce decree was entered, John was killed in a car accident. John's will, executed 17 years ago, has been offered for probate. John's will did not designate anyone to act as the personal representative of his estate.

John was survived by Mary, Son, and John's mother.

1. To whom should John's estate be distributed? Explain.

2. Who should be appointed as the personal representative of John's estate? Explain.

6) Please type your answer to MEE 6 below
(Essay)

======== Start of Answer #6 (661 words) ========

1. John's entire estate should be distributed to Mary. At issue is the effects a prenuptial agreement, pending divorce, and adopted children have on a validly executed will.

Under the Uniform Probate Code, a divorce subsequent to a validly executed will is treated as if the spouse predeceased the testator. However, the divorce must be a final decree from the court. If the divorce is pending and a final decree has not be issued, then the couple are still considered married for probate purposes. Additionally, an adoption of a child is the termination of the existing parental relationship and the creation of a new relationship with new parents. Typically, adopted children have no rights to inherit from the biological parents unless the child is adopted by the spouse of one of the natural parents. Furthermore, although prenuptial agreements are generally enforceable in the court, a prenuptial agreement has no effect on a validly executed will provision since it is assumed the testator had full testamentary capacity and understood the effects of his will.

Here, even though Mary and John filed for divorce, the divorce decree has not been entered and so their divorce was not final and effective at John's death. Thus, making the provisions in John's will to his wife Mary still valid. Even though John and Mary executed a valid prenuptial agreement, it has no effect on the provision in John's will since the prenuptial agreement would only affect the rights of Mary to property had John died without a will or had disinherited her

through his will.

In regards to the son born out of John's extramarital affair, the child was adopted by his Aunt. As a result, the rights to son to inherit from his parents was terminated thereby making the provision in John's will for his children not applicable. Although it could be argued that John's description of children is broad enough that he intended to encompass any offspring he may have fathered or that son is actually pretermitted (afterborn) child, by plain reading of the will, the provision was meant for any children that John may have. Under the UPC, son is technically no longer a child of John's and so the provision in John's will for any children fails due to the fact that the adoption terminated any rights and thus making John childless. Additionally, it could be aruged that had John intended to provide for son out of any guilt that he may have felt over the extramarital affair or the adoption, he had ample time to amend his will to provide for son in any way he chose.

Therefore, John's entire estate should be distributed to his wife Mary in accordance with his will.

2. Mary should be appointed as the personal representative of John's estate. At issue is who should be appointed as a personal representative of the estate when a will does not designate one.

Under the UPC, a personal representative is responsible for administering the probate of the estate. When a personal representative is not designated, one can be appointed by the court or a person can petition the court for designation as the personal representative.

Here, John's will did not designate a personal representative, thus the court will need to appoint one. Mary would be the natural choice for personal representative of John's estate since she is still is wife, but because she is the sole devisee of John's will. Although John and Mary have a valid prenuptial agreement in which Mary waived her rights to any property in the estate or in the other which she would be entitled to uupon termination of their marriage by divorce, the prenputial has no effect on the appointment of personal representative. A personal representative can be any person. Mary would be most familiar with the claims against the estate and the person best equipped to administer the claims.

Therefore, Mary should be appointed as the personal representative of John's estate.

======== End of Answer #6 ========
END OF EXAM