February 2010 Bar Examination Sample Answers

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Question 1 - Sample Answer #1

MEMORANDUM

I. **Validity of First Defense: Contract was Invalid because Speedy Realty, Inc. did not exist, as the correct corporate name was Speedy Realty Investments, Inc.**

(a) There is little merit in this defense, as a party cannot assert a mistake of fact as a defense to the validity of a contract when the party asserting the defense caused the mistake. Speedy was in a position to discover this mistake before entering into the contract, and the mistake is immaterial so long as "Speedy Realty, Inc." allows both parties to identify Speedy as a party to the contract. As such, the mistake in name would not invalidate the contract.

(b) In addition to the above, the Johnsons should argue that they relied on the corporate status of Speedy in entering this transaction so that equity demands the imposition of a corporation by estoppel. Under this doctrine, when an entity does business as a corporation and uses corporate status to its benefit, the entity will be estopped from later denying its corporate status. Speedy Realty Investments cannot deny its corporate status by asserting that Speedy Realty, Inc. does not exist if it was doing business with the Johnsons as Speedy Realty, Inc.

II. Validity of Second Defense: Legal Insufficiency of the Land Description Invalidated the Contract

(a) While insufficiency of a land description may invalidate a deed, it will not invalidate this contract between Speedy and the Johnsons. Contracts for the sale of land must identify the land by a reasonably sufficient description. While this description containing only acreage and the street on which the land is located within a named county and city might not satisfy the reasonableness standard, it still would not invalidate this contract. Speedy clearly knows the identity of the land in question, and cannot use this alleged ambiguity to escape its obligations; the standard is meant to put third parties on notice of the land described, not parties to the contract itself.

(b) Further, in cases where the wording of a contract is vague, courts will allow parol evidence to cure the ambiguity. The Johnsons will be able to provide oral testimony as to their mutual understanding with Speedy as to the land that was the subject matter of the contract. Assuming the contract is signed by Speedy (as is required for all land sale contracts under the Statute of Frauds), Speedy cannot use the Statute of Frauds as a defense to bar admissibility of parol evidence to clear up the ambiguity regarding the land description. In this case, proof of a mutual understanding between the parties will control to the detriment of Speedy.

III. Validity of Third Defense: Johnsons' Failure to Pay the Purchase Price Precludes Recovery

(a) There is minimal technical merit merit to this defense, in that Speedy may argue that it will not technically be in breach until the Johnsons pay the purchase price. The delivery of the land and the payment of the purchase price are concurrent conditions, meaning that one party cannot breach a land sale contract until the other party delivers performance. When neither party has delivered performance, as in this case, neither party has technically breached.

(b) The Johnsons have two means of arguing against this defense. First, Speedy's notifying the Johnsons and the closing attorney that it was not going to close one week before the closing was to take place amounts to an anticipatory repudiation of the contract. Anticipatory repudiation occurs when, prior to the time performance is due, a party to a contract indicates that he will not perform. When a party to a contract anticpatorily repudiates, the other party has the right to sue for breach immediately, but nothing prohibits that party from waiting until performance is due to initiate a suit. Therefore, because of Speedy's anticipatory repudiation one week before closing, the Johnsons' payment of the purchase price is not a condition precedent to breach on the part of Speedy.

Second, they should also argue Johnsons' deposit of earnest money with Speedy coupled with Speedy's failure to perform currently results in Speedy's being unjustly enriched to the detriment of the Johnsons. Thus, quasi-contract remedy at a minimum is required for the value of the earnest money.

IV. Validity of the Fourth Defense: The Cause of Action Alleging a Right to Damages and to Specific Performance Is Not Sustainable

(a) This defense is a misstatement of the contract law principle prohibiting a party to recover both specific performance and damages for breach of contract. Speedy is correct in asserting that the Johnsons may not receive specific performance (via the delivery of the land) and damages for breach, as receipt of both would unjustly enrich the Johnsons. Nothing prohibits the demand of both damages and specific performance, however, as long as both are not awarded.

(b) The Johnsons should argue that the demand for both damages and specific performance is proper under these circumstances. Because all land is unique, the Johnsons are entitled to demand specific performance of this contract. However, these facts indicate that Speedy is refusing to perform because it received a higher offer than that from the Johnsons; as such, specific performance might be difficult to obtain, especially if the other offeror is a bona fide purchaser for value without notice of the Johnsons' claim. If that is the case, the subsequent purchaser's rights will be protected, and the Johnsons will be required to accept damages in lieu of specific performance. Without full knowledge of the facts, it is proper for the Johnsons to demand both at this stage of the proceeding.

Further, although time is not of the essence in land sale contracts, if Speedy's delay in performance is greater than 2 months, which is the accepted reasonable time for performance in these cases, the Johnsons will be entitled to damages associated with the delay.

Question 1 - Sample Answer #2

1. A. The issue is whether there is a corporation by estoppel and whether the unilateral mistake should be reformed by the court.

Generally, a corporation is registered in Georgia under a specific name, and the name specifically infers to one corporation. The corporation may contract under only its name and no other.

However, the Johnsons have a valid defense in the doctrine of corporation by estoppel. If an organization holds itself out as a valid corporation and third parties justifiably rely on that representation, the corporation is estopped from denying its existence.

B. Here, Speedy entered into a contract under a name it purported was valid by signing the contract. The Johnsons are permitted to rely on that representation.

Second, a unit mistake may be reason for voiding a contract if the mistake was mutual. However, if the mistake was unilateral, and one party had reason to know of the mistake, the contract's terms will be enforced against that party.

Here, the Johnsons had no reason to know of any unilateral mistake, while Speedy was in position to correct the mistake. Therefore, the Johnsons can seek reformation of the contract. A court may reform a contract when there is unilateral mistake. The reformation is an equitable remedy available when monetary damages would not adequately compensate the Johnsons. The court should reform the contract to read "Speedy Realty Investments, Inc."

2. A contract for land must describe the land in such detail that is sufficient to identify the land. The Johnsons can argue that the land is described in such detail and that Georgia law does not require the land to be identified with particularity. For example, a contract for land need not have latitude or longitude descriptions. The Johnsons will lose on this ground because the K (contract) does not describe the land. Rather, they should argue the description is a latent ambiguity in the contract, and parol evidence is admissible to cure the defect. The court could examine prior oral agreements and other extensive evidence to determine what parcel of land was contracted for. The Johnsons will likely be successful in arguing parol evidence is admissible in this instance to cure the latent ambiguity.

3. The issue is whether mutuality of recovery is necessary before a court will order specific performance, and whether anticipatory repudiation excuses performance.

Specific performance is an equitable remedy which is available only when monetary damages are insufficient and when the equitable remedy is feasible. In a breach of contract case, monetary damages are the usual remedy. However if the contract is for land, specific performance is available. This is because land may be unique and the purchaser may not be able to find another similar parcel.

However, in order to obtain specific performance, a plaintiff must herself perform her part of the contract. This rule is called "mutuality of recovery." Because the Johnsons did not perform their

obligation under the contract, which was full payment, they can not demand in equity that Speedy perform its obligations. If the Johnsons want an order for specific performance, they must pay in full first.

The Johnsons may argue that they were ready to perform. Indeed, they knew a week before closing that Speedy did not intend to attend the closing or to transfer the money. Yet the Johnsons still attended the closing and were ready to tender the full amount.

This may excuse the Johnsons' non-performance under the doctrine of anticipatory repudiation. Generally, contracts require full performance, unless there is anticipatory repudiation, an unforeseen event, or failure of a condition. This defense may be successful as the court could find they were excused from performing their half of the contract once Speedy repudiated it. (The contract remains valid).

4. The issue is what damages are appropriate in a cause of action for breach of contract.

Generally, compensatory and expectation damages are available to a plaintiff in a breach of contract case. If the contract was for a unique item, specific performance may be available. The court may consider the land to be unique.

An equitable remedy is only available when monetary damages are insufficient. If the court finds that monetary damages will not make the Johnsons whole (compensatory) or give them the benefit of their bargain (expectation), it may order specific performance. However, the Johnsons are not entitled to monetary damages and specific performance. If monetary damages are adequate the court will not order specific performance. The remedies are mutually exclusive.

Question 1 - Sample Answer #3

1. Company Name Error

This is unlikely to be a sustainable defense. Generally, sales contracts are drafted by the seller, and signed by both parties in presence of other party. Facts here do not indicate the precise circumstances of K formation, but some representative of Speedy must have signed it, and their link to Speedy Inc/Speedy Investments Inc. should be provable. Corporations are legal bodies, but cannot sign legal documents as corporations, but representative of the corp. can sign documents as the corp. agent. A K signed by both parties is presumed to be valid and complete on its face unless other facts indicate another conclusion. A transcription error in writing the company name would usually allow for correction of such a minor error. The K is enforceable against the seller if the seller signed it, and the signature is considered prima facie evidence of the seller's intent and that they had the right to sell the property. If Speedy wrote the K and intentionally mis-represented the company name, this is fraud, and would qualify the Johnsons for not only compensation damages, but also punitive damages from Speedy.

There should be further investigation done as to incorporation filings with the secretary of state

(SoS) for both Speedy names. If both are properly incorporated (filed proper paper with SoS, including name, agent/address in state, board of directors, shareholders, and meeting minutes, etc), the agents and shareholders and directors of each should be examined to see if there is sufficient nexus for considering each corporation to be an alter ego of the other. If each Speedy is indeed a separate legal entity (differing incorporators, directors, shareholders, agents, etc), then the error may cause the contract to fail, but the Johnsons should be entitled to return to their deposit from whomever took that earnest money, based on equitable remedy precepts. On simply this defense, the Johnsons appear to have high likelihood of prevailing over Speedy. Further evidence in favor of both Speedys being the same entity are the anticipatory repudiation communication to the Johnsons, discussed in #3 infra.

2. (In)sufficiency of Legal description

This defense is the strongest of the four Speedy has raised. There is no fixed legal standard for precisely how much information is required to adequately describe the property to be sold, but it must objectively describe it to such an extent that the property sold may be reasonably ascertained by a fact-finder. Here, the description on its face does not appear to be sufficient in the facts given. If the 25 acres" describe the only land along Burrell Road, and there are clear boundaries of the property not described here, it may be found that the description is reasonably ascertainable, but there generally is required a lot number, or a plat number, or property tax record number reference, boundaries, or some other way to describe the legal bounds of the property. Without sufficient description, a sale of land fails the statue of frauds. The Statue of frauds requires a writing for land sales Ks, and the writing must adequately describe the land in question, as well as having a determinable sale price and the signature of the party the K is being enforced against. Without more information, this description would fail. However, the judge would be permitted to use parol evidence (evidence outside the four corners of the document) to reform a K with inadequately-defined terms, particularly if there was mutual mistake in the writing of the deficient language, or if Speedy knew the Johnsons were mistaken in thinking this K was sufficient and was taking advantage of their lack of savvy for his own benefit.

3. Failure to pay purchase price

This defense fails on two issues: 1) anticipatory repudiation & 2) factual impossibility. Anticipatory repudiation occurs when one party to bilateral contract (where both parties are required to do or promise something to complete the K), prior to the time when a K is due of enforceable, notifies the other party that they do not intend to complete their end of the bargain. In normal circumstances, this in and of itself is not sufficient grounds for a breach of K claim, and the complaining party must show they sought adequate assurances from the potential breacher that they will or will not perform as promised. Here, though the Johnsons did not seek adequate assurances, they did appear at the scheduled closing and were prepared to pay for the promised property. The legally perfect way to protect their rights would have been to tender the purchase money to the closing agent, but in examining the totality of the circumstances, a judge would likely find that the combination of the anticipatory repudiation by Speedy, the failure of Speedy to show up at closing, and the Johnsons' being prepared to tender the purchase money at scheduled closing date are sufficient grounds for finding the Johnsons fulfilled their K commitments.

4. Damages and Specific Performance

This argument is adequate on its face, but fails because the remedies can be argued in the alternative and also because the Johnsons have dual causes of action against Speedy. Generally, a pleading must elect which remedy they are seeking, but cannot seek both. Here, however, the Johnsons can seek both with one in the alternative. Real estate is considered unique, and thus generally specific performance is the preferable remedy for a property dispute. But a subsequent sale to the higher bidder may foreclose that option to the Johnsons (not clear here). Further, they are entitled to their earnest $$ back (damages) because it wasn't their failure to perform that caused the breach.

Other concern:

Timing -- was this contract really violated nearly three years ago? Ga law does not permit contract disputed beyond two years. so absent settlement efforts or other dealings that may have tolled this time, the statue of limitations may defeat the entire proceeding.

Question 2 - Sample Answer #1

1.

In order to obtain a security interest in equipment, three elements must be met: (1) the creditor and debtor must enact an authenticated security agreement, (2) the creditor must give value, and (3) the debtor must have rights in the equipment. Once these elements are met, the security interest has attached. In order to perfect the security interest in equipment, the creditor must file an authorized financing statement with the clerk of the superior court of the county in which the debtor is located. The order of priority of security interests in equipment is determined by which creditor either (1) files or (2) perfects his or her security interest first.

Although Bank has properly perfected a security interest in Bob's inventory, it has not properly perfected (or even attached) a security interest in Bob's equipment. The security agreement signed by Bob does not specify that the security interest is meant to attach to Bob's equipment. The fact that the financing statement is more broad does not cure the defect; although Bank could enact a subsequent agreement that properly lists the equipment as attached, it has thus far no properly attached security interest in Bob's equipment. Bank met all the requirements for perfection except this requirement.

On the other hand, assuming that Bob now has possession of the diagnostic equipment manufactured by Tune-Up, Tune-Up has properly perfected its security interest in Bob's equipment. Tune-Up gave value, Bob has possession, there is a valid security agreement and it is properly filed in the proper office.

In a confict between secured creditors who both have security interests in the same collateral, perfected security interests have priority over nonperfected interests. Therefore, Tune-Up has priority in this case.

2.

Tire world may obtain a first priority lien (having priority over Bank's properly perfected security interest) if it takes certain steps.

A purchase money security interest results when either (1) a seller allows a debtor to purchase an item on credit and retains a security interest in the item purchased, or (2) a lender lends a debtor money to purchase a certain item and takes a security interest in the item, and the debtor actually uses the money to purchase that item. Purchase money security interests have superpriority, and generally take priority over other liens or security interests in the same collateral. In the case of purchase money security interests in inventory, the following steps must be taken to establish the superpriority: (1) all steps for perfection of the interest must be taken before the inventory is delivered to the debtor (i.e. the financing statement must already be filed), and (2) the secured party must notify all other creditors who have secured interests in the collateral of the establishment of the purchase money security interest, before the inventory is delivered to the debtor.

In this case, although Bank's interest was perfected on June 2, 2009, and Tire World did not enter the picture until July, Tire World will gain purchase money superpriority over Bank if it takes the above steps - if it files and notifies Bank before the inventory is delivered.

3.

Upon default, the unhappy creditor may take possession of the collateral and sell it, afterward holding Bob liable for any deficiency between the price of the collateral the price owed.

First, the creditor must take possession. A creditor may take possession by self-help, but may not breach the peace in doing so. A creditor breaches the peace when he takes collateral over any objection by the debtor. A creditor must not break and enter a dwelling to take possession, but simple trespass is alright. A creditor must not use overt or implicit force or threats.

Then, a creditor must notify Bob of an upcoming lien sale - the creditor must give reasonable notice, which is a question of fact, but in nonconsumer settings, 10 days is presumed reasonable notice. The creditor should, in its notice, include its name and address, Bob's name and address, the time and place of an upcoming sale, the manner of sale (public or private), and the fact that Bob has a right to an accounting of his debt, as well as the charge for such an accounting. Once this notice has taken place, the creditor may sell the item, and, if the item doesn't bring in sufficient funds to cover the costs of repossession, the sale, and the debt, the creditor can charge Bob for the difference - the deficiency.

If the creditor would like to keep the collateral instead of selling it, he may - but he must first notify Bob of his intention to keep the collateral in total or partial satisfaction of the lien. If Bob objects to keeping the collateral as partial satisfaction, the collateral must be sold.

Such a sale will discharge all security interests junior to the secured party affecting the sale.

Those interests senior will remain attached to the collateral, and the new owner will take subject to the lien. If the sale brings a surplus, the interests junior will receive funds in the order of their priority - otherwise, they'll be stuck suing Bob.

Question 2 - Sample Answer #2

1) In order to perfect a security interest in equipment, a the interest must first attach. The requirements for attachment are 1) an agreement authorized by the debtor, 2) value given for the interest, and 3) rights in the debtor to grant the creditor. As an initial matter, there seems to be an issue with Bank's security interest, since the clerk did not check the box to indicate that "equipment" was included. Thus the bank likely does not have any interest at all in anything other than Bob's inventory, since the authorized agreement does not grant any interest to Bank in anything other than inventory. Tune-Up, on the other hand, does seem to have a validly attached security interest, since an installment loan contract will be treated as a security agreement under Georgia law.

The next step is perfection of a security interest. There are many ways to perfect a security interest in goods under Georgia's version of the UCC, but only one is relevant here, since there has been no automatic perfection (not a purchase money security interest, or PMSI, in consumer goods), and neither control nor possession seem to be in issue, since Bob controls and possesses all the interests here. Thus, the filing of a proper financing statement properly perfects the interest in equipment.

The general rule, which applies to equipment, is that the first to perfect an interest has a superior claim to those who perfect later in time. In the present case, Tune-Up will have a superior interest in all equipment to that of Bank up to the amount financed for Bob. Even though Bank filed first, as noted above, Bank had no interest in equipment. It is also worth noting that equipment acquired after the June 15th might be included in Tune-Up's secured interest even though it is not noted on the filing statement or authorizing document, since the court may imply it, although this is much more common with pieces of collateral with high turnover such as inventory.

2) Yes, Tire World can obtain a priority lien on the tire inventory. At issue is how to make an after-acquired security interest become superior. Generally, this is not possible except by control or possession, but a PMSI in inventory (or livestock) is the exception to the rule. The creditor, here Tire World, must attach its interest (see 1 above) and file a financing statement with any Georgia Superior Court and give notice to the previous creditors before delivery of the inventory to the debtor. Here, it seems that Tire World would be giving a PMSI, since it a merchant of the goods (tires) being sold and is keeping security interest in them. Thus, for Tire World to get a superior interest, it must file a proper financing statement (which I will not further explore due to

the assumptions in the prompt) and then give notice to Bank and Tune-Up, as well as any other creditors) that specifies that it is taking a superior interest in the tire inventory. To properly protect itself, the agreement with Bob and the financing statement should include clauses that inventory acquired after the execution of the agreement will also be subject to the security interest. This notice will be good for five years, and may be renewed no sooner than six months before the five years passes.

3) Secured creditors may use self help to recover the secured collateral so long as there is no breach of the peace. A breach of the peace is essentially any action that is likely to lead to violence. Assuming that the relevant collateral items have been successfully repossessed without such breach (breach could lead to tort claims or criminal liability), there are very specific steps that must be followed in order for a creditor to recover its loan money.

The creditor may retain the collateral in satisfaction of the loan, but only if all other creditors with secured interests in the collateral agree. If there is no such agreement, there must be a sale of the collateral.

The overarching theme in selling off collateral in satisfaction of debt is commercial reasonableness. This begins with notice to the debtor and all other creditors that the sale will happen. The notice must be timely (i.e. give reasonable time, usually at least 10 days for non-perishable items such as those at issue here), must name the address and time of the sale, and must inform the debtor of his right to redeem by paying the full amount due and owing. If Bob was a deemed a to be a consumer (of the computers, for instance), there would need to be a phone number for him to get more information about how to redeem as well as other possible protections. There might be more specific requirements I have omitted, and it would be very important to follow them exactly, since failure to follow these requirements exactly will lead to the presumption that the sale price was equal to the amount owed on the security agreement, and there would be no way to hold Bob liable for any deficiencies.

The sale itself must be commercially reasonable as well. This probably means that it would need to be advertised, although it can be public or private. If there is a ready market for something, this advertisement requirement might be waived. This could be the case for the tires, but it would be foolish to loose the right to deficiency for the price of an ad in the newspaper. Further, the reasonableness requirement probably means that the sale must be held at a normal hour (not in the middle of the night) and a reasonable place, here probably at Bob's storefront or wherever the collateral was secured.

Question 3- Sample Answer #1

(1) Wrongful death actions may be brought by the survivors (which are parents if deceased is child) against a defendant who, through negligence and/or criminal activity, caused the wrongful

death of the deceased. Wrongful death is a type of negligence action, and thus requires (1) duty; (2) breach of duty; (3) actual cause; (4) proximate cause; and (5) damages. The issue is whether Mom (M) owed duty to Tom (T). T is a social guest (licensee) of M, since it is M's home and she allowed her son to have a party there. Thus, regarding conditions in the home, M had a duty to warn of all known concealed conditions. As to activities in the home (which a party would be an activity), M owed duty of reasonable care. M likely did not breach her duty. The issue is whether it is unreasonable to go to sleep while a few 17 year olds are at your house. When she went upstairs and went to sleep, there were no problems w/ drinking/drugs, and only a few friends remained. Thus, there was likely no breach. But there may be an argument that there was a duty and breach by having a firearm in an unlocked cabinet while guests are present, especially when not supervised. Based on the duty of reasonable care, there are arguments either way here. M will argue that you had to use a step stool to get to it, was not loaded, and was hidden behind canned goods. M will argue that T was no longer a licensee but rather a trespasser-party was only to be in basement-thus she did not owe a great duty. Tending to show breach is 17 year olds could reach w/ a step stool which was already there, and was in unlocked cabinet in kitchen w/ food. Assuming this was a breach, there must be causation. M's negligence would be the actual cause, since her negligently going to sleep and/or negligently having the gun in the home and not locked provided the gun which caused the death. However, a major issue is whether she was the proximate cause. A breach will not be the proximate cause where another intervening event happens that cuts off the liability. Where there is an unforeseeable event and unforeseeable result, there will not be p/c. Where there is an unforeseeable event and a foreseeable result, the law is not clear whether there is p/c. Where there is a foreseeable event and an foreseeable result, there is p/c, and when there is a foreseeable event and unforeseeable result, it is not clear. Here, if the breach was leaving the gun in the home unlocked and not supervising, it was likely a foreseeable event that someone would get the gun and it is thereby foreseeable that someone would be shot. There were damages--T was shot and died.

(2) The elements are listed above. The normal rule is that everyone owes duty to act as a reasonably prudent person (RPP) under the circumstances. This applies b/c L, like T, is a social guest of M and owes no greater duty to T. The issue is whether L's intoxication or other characteristics provide her a reason to have a different duty owed. GA does not recognize voluntary intoxication to a defense as a crime. Thus, GA also does not enable a voluntarily intoxicated person to escape the obligation to act as a RPP. L breached her duty by pulling the trigger. Despite that L and T were playing w/ the gun together, a RPP would not play w/ a gun and not pull trigger, regardless of whether he thought gun was unloaded and even if the person who is shot encouraged it. L's action is the actual cause (but for pulling the trigger, T would be alive) and proximate cause (as her pulling trigger was the direct cause of T's death). There were damages--T was shot and died.

(3) M and L can each assert affirmative defense of contributory negligence. GA follows modified comparative negligence scheme, rather than the old contributory negligence. Where a defendant is more than 49% negligent, he is barred from <u>any</u> recovery. This can be asserted against the plaintiff in a wrongful death action by arguing that the deceased was comparatively negligent. Here, M and L each have a strong argument b/c it was T who found the gun, loaded the gun, and encouraged L to shoot him after he had already pointed at L but it misfired. This will be more likely a good defense for M b/c she certainly had no knowledge of this going on downstairs. For L, it will be more difficult b/c she was playing along also, and even though she

claims she didn't know loaded, other guests testified that Lucy did know it was loaded.

Implied assumption of risk is also a defense (no express assumption b/c didn't expressly say anything). It will be available when a person knows of the risks but goes ahead despite such risks. Here, T loaded the gun, played w/ it, pulled trigger at L, and even said to L "pull it again." Based on the actions, and especially since T knew gun was loaded, he implied assumed the risk of the gun actually firing, thereby killing him. His intoxication will not mitigate this in any way.

T's parents may have a claim that b/c L had last clear chance (the last chance to avoid any negligence) that L was solely liable. The court may or may not find compelling.

(4) As indicated, voluntary intoxication is not a defense to a crime or to a tort in GA, unless it resulted in more than a temporary impairment of the person's ability to comprehend. Here, T's intoxication may be used as part of defense for M and L. T voluntarily became drunk, and no facts indicate that there was more than temporary impairment. Thus, T could not escape liability based on this defense. And, T can also not assert it to avoid being considered conparatively negligent or as not having assumed the risk of being shot. T's intoxication can be asserted as a defense against his parents for wrongful death in same manner as if it were being asserted against T if T were alive and suing for battery, attempted murder, etc.

If successful, parents will recover full value of T's life, as determined by a jury, which are general damages. Can also recover funeral and medical expenses, but must prove since they're special damages.

Question 3 - Sample Answer #2
To: Attorney for Tom
From: Applicant
Re: Civil Suit for Wrongful Death of Tom

Memorandum

1. Mom's Liability for Tom's Death

A. Duty of Care

The issue is whether mom can be held liable for Tom's death. This wrongful death suit would likely be asserted against Mom on a theory of negligence which would require mom to have a duty owed to Tom and a breach of that duty causing harm to Tom. There is evidence of harm to Tom in the fact that he died, thus the issue become what duty Mom had to Tom and whether she breached it and caused his death. In this case mom would owe Tom the duty owed by a landowner to a licensee which means she would owe him a standard of reasonable care and

would have to warn him of known dangers. A licensee is owed a duty in all areas where they have been invited on the land of the owner and if they exceed the scope of the license on the land they will not be considered a licensee, but rather a trespasser to which no duty is owed.

In this case, Tom was a licensee at the moment he entered the home to join the party in the specified grounds of mom's basement. Mom owed him a duty of reasonable care to warn him of known dangers in the basement, which was where the party was to be held. It is apparent that mom kept this duty and did not breach it because she made reasonable efforts to ensure the safety of the guests at her son's party. She set ground rules for the guests which included no drugs, alcohol or fighting was to occur. She specified that guests were to remain in the basement of the home and she checked on the small number of guests during the party to make sure everything was under control. During this check up, she saw that the party was in order and nothing dangerous was going on. Thus, mom did not breach a duty owed to Tom as a licensee and would not be held liable for his death.

B. Vicarious Liability Argument

The issue is whether mom could potentially face vicarious liability for the actions of her minor 17 year old son who provided liquor to the guests which resulted in their intoxication and game of russian roulette causing Tom's injuries. A parent is generally not liable for vicarious liability of the actions of their son unless they knowingly encourage tortious or illegal behavior of their children and have knowledge of their child's propensities for acting in illegal or tortious ways. In this case, mom was asleep when Jason went to get the whiskey which caused all the remaining guests to become intoxicated and led to Tom's death. She also had no reason to believe that her outstanding student son who was graduating with honors and had never been in any kind of trouble would engage in such behavior to encourage the demise of underage children by supplying them with an illegal substance for their age. Thus, given that mom had no reason to suspect Jason would do such a thing and that she did not encourage it herself she would likely avoid liability for Tom's death under vicarious liability standards as well.

2. Lucy's Liability for Tom's Death

A. Duty Owed

The issue is whether Lucy can be held liable for Tom's death. Georgia law provides that parties generally owe a reasonable standard of ordinary care when dealing with peers in that they must act prudently as a person of like circumstance would act. Georgia law provides that age of majority is 18 years old however if the child is at least 14 years old there is a rebuttable presumption that they had the requisite intent and knowledge to commit a tortious or criminal act. Furthermore if the child was engaging in an adult activity they would be held to a standard of care of an adult.

In this case, Lucy was a student presumably graduating with Jason since she was at the party and would likely be somewhere in the age of seventeen years old. This would mean she would be held to a standard of care of a reasonable person of 17 since she was still a minor yet above the minimum age to be held liable. Because she was close to the age of majority and was engaging in use of a gun (an adult activity) she would likely be held to an adult standard of care which would basically mean she had a duty to use reasonable care in her actions. Engaging in

acts of russian roulette would not be reasonable behavior for a reasonable ordinary person or an adult to use and thus she would likely face liability for the wrongful death of Tom.

B. Intoxication Defense

The issue is whether Lucy's intoxication would serve as a defense to any liability for the wrongful death of Tom. Intoxication may serve as a defense to a specific intent criminal activity but generally does not negate liability for acts of a reckless nature.

In this case, Lucy was engaged in Russian Roulette, which would be a reckless activity to engage in and expose her to negligence liability in this civil suit. The fact that she was intoxicated would thus not negate any mens rea necessary to find a party reckless and she would not be able to assert intoxication as a defense.

3. Defenses Raised

A. Assumption of Risk

The issue is whether mom and Lucy could raise assumption of risk as a defense to Tom's death. Assumption of risk is a defense in Georgia which follows a comparative negligence model. Thus if the party engages in an activity freely and knowingly and is harmed as a result, it may reduce the liability of the parties to the degree they were comparatively negligent.

In this case, Tom assumed the risk of playing with a loaded gun, an activity well known by most people, even young children to be dangerous and likely to cause death and thus he would likely have assumed the risk of his action.

B. Trespasser

The issue is whether mom could assert a trespasser defense against Tom sneaking upstairs to find the gun. As outlined above, a owner owes no duty to a trespasser who exceeds licensee status. Here, Tom did just that by going upstairs and mom could raise this defense.

4. Effect of Tom's Intoxication

Tom's intoxication would have no effect on the claim just as mentioned with Lucy above.

Question 4 - Sample Answer #1

I. This issue relates to a possible conflict of interest. In Georgia an attorney is not allowed to represent a client where a conflict of interest is present. In some instances an attorney may represent a client despite the conflict if the client is advised of the conflict, speaks to an independent attorney and signs a waiver. However, the rules heavily advise against this course of action. Many conflicts are not waivable. An attorney may not represent a client against another current client. Furthermore, even when considering representation of a new client against a former client, the attorney may not represent the new client if any of the information the attorney was privy to while representing the former client can be used in the representation of the new client.

Here, there is a conflict of interest in representing Mall Development (Mall) and Mary. Mall is still a current client, even though Partner is currently terminating representation. Mary asked associate for representation the day after the Partner requested termination of representation of Mall. While an attorney may terminate representation for failure to pay fees, there remain several steps after the decision is made to wrap up representation and get leave of the court in current cases. Therefore it is likely that Mall is still a current client. Even if Mall was not a current client, associate assisted in the drafting of the non-compete agreement, the same subject matter Mary has come to associate about. Therefore an unavoidable conflict has arisen.

II. My advice would not be different. As described above a conflict still arises where a matter for a new client relates directly that of a matter worked on for a previous client and information known to the attorney from the former client could influence representation of the new client. It is presumed that what other attorneys know in your office, all associates know as well. Here, Mall was still a former client of the associate. She worked on the several matters including eviction and also assisted in the non-compete and employment agreement as far as drafting and having Mary sign the agreement. Further, even if Partner negotiated the agreement, the code assumes that Mary was privy to the same information as Partner because she worked for him. It is impractical for the law to assume attorneys do not share information in the office and because of confidentiality cannot test the rule so to speak. Therefore, I would advise associate that the conflict still exists with respect to the employment and non-compete contracts. If Mary seeks representation about matters not relating to the work associate or Partner did on behalf of Mall, she may be able to take those cases.

III. There are several reasons a firm may seek to withdraw from representation. A firm must withdraw from representation if a client violates an ethics rule, like committing perjury, or a conflict arises that prohibits the firm from representing the client. However, there are other reasons a firm has discretion on the decision about whether to withdraw, among them are unresolvable disagreements with a client and failure of the client to pay fees. When a firm or attorney withdraws from representation, the firm must notify the court with respect to any pending actions, notify the client and notify opposing counsel in all currently pending cases. The firm must relinquish control of all of the client's files. The release of the files cannot be contingent upon filing unpaid fees. The firm's recourse is to sue the client for damages resulting from the unpaid legal fees.

Moreover, the release of files cannot be contingent upon signing a waiver releasing the firm from malpractice liability. Any agreement to relieve an attorney of malpractice liability will be void for public policy. Public policy in Georgia prohibits any agreement between a firm and another party releasing it from malpractice liability because of the need to hold professionals liable for their professional mistakes.

In this case, associate is required to notify Smith that Cain & Able is discontinuing representation and also must notify the court where actions are pending that the firm will be ceasing representation. Associate must also send notice to all opposing counsel. Cain & Able must give Smith reasonable time to find alternative counsel because a corporation may not represent itself. In some instances the court will not permit counsel to withdraw if the judge feels withdrawing from representation will unduly prejudice the client or delay the proceedings. Smith is entitled to the case files free of any restraint, like paying the legal fees. This would unduly prejudice the client in legal actions which is against public policy of allowing people to bring claims and move the cases along. The file is always the property of the client. The firm will be able to sue Mall for the unpaid legal fees as its recourse. Further, even in associate has Smith on behalf

of Mall Development sign the waiver of malpractice liability, it will be void for reasons of public policy as described above.

Question 4 - Sample Answer #2

1. Associate cannot represent Mary against Mall Development (Mall) in breaking the covenant not to compete and employment agreement. An attorney has numerous duties to its clients, some of them are: the duty to act with the care, skill and diligence of an ordinary attorney of like field; the duty to communicate to client; keep information confidential; keep scrupulous financial records (including keeping funds separate); and the duty of loyalty. The duty of loyalty requires that an attorney avoid any conflicts of interest with the client's interests. Although Associate's firm is about to terminate their representation of Mall, until they do so, she is still obligated to Mall. It would be a breach of their duty of loyalty to represent Mary at the same time in the same manner. Additionally, even after Associate and her firm terminate their attorney-client relationship with Mall, they will still owe Mall some lingering duties. Although in some situations, an attorney can represent multiple parties whose interests may conflict, she must fully inform each client of the potential conflicts and possible consequences of joint representation. Furthermore, the attorney must advise each client to consult with an independent attorney regarding the potential conflict of interest and then obtain written consent from all clients. Here it is highly unlikely that Mall would even consider consenting to Associate's representation of Mary. Regardless, it is impermissible for an attorney to accept representation of a party directly opposite to a former client in the exact matter in which the attorney previously worked. Here, even assuming Associate's firm no longer represents Mall, Associate personally assisted in the drafting of the contract and covenant between Mary and Mall that Mary is now seeking to break. In this situation, Associate would have been privy to confidential information of Mall relating to this contract, therefore, she is barred from accepting representation of Mary in breaking the contract.

2. The fact that Associate is a solo practitioner at the time Mary seeks her services does not affect the outcome arrived at above (see discussion ***supra***).

3. A firm or an attorney cannot simply drop a client at will (as opposed to a client; who is free to fire their attorney at any time). However, several permissible reasons for an attorney or firm to withdraw from representing a client are: the client used the attorney's work for some illegality or fraud; the attorney's physical or mental condition makes him unable to continue representation; the client persists in a course of conduct reprehensible to the attorney; and client fails to compensate attorney for his work. Here, Mall has stopped paying the law firm's bills for its legal service and they are now owed a substantial sum. The firm would be justified in withdrawing from any future legal work on behalf of Mall but they could not just drop cases that they were in the middle of because that would disadvantage Mall to a significant degree. Whether withdrawing from the lawsuits that Associate is involved in would be permissible would have to be decided on a case by case basis. If Associate was involved with a case that was complex, had been in litigation for a long period of time, and/or was in trial or about to go to trial, withdrawal would not be permitted absent strong showing of necessity. Here, no necessity exists. Cain & Able seems like a strong firm and won't go out of business because of Mall's unpaid legal fees (if they were on the verge of collapse, the scenario might be different). On the other hand, if Associate just began a routine eviction, she could seek leave of the court to withdraw. Partner's instruction that Associate withdraw from representing Mall in the various tenant lawsuits, without further qualification as discussed above, would be impermissible. Additionally, Partner would not be able to hold Mall's litigation files ransom. The work the firm did was for the benefit of Mall and is its

property. The firm will likely have to file suit against Mall to seek payment, just as Mary may have to do. Additionally, a firm cannot obtain a release from liability for any possible malpractice claims for the firm's legal services. Firms carry malpractice insurance in order to indemnify them for such claims by former clients. The firm could seek a release for continued representation whereby the firm wouldn't have to open itself up to malpractice claims arising out of its withdrawing from representation of Mall.

Question 4 - Sample Answer #3

1. Associate cannot represent Mary in her action against Mall Development because she has a conflict of interest. A conflict of interest arises when a lawyer's duties to one client would keep her from being able to make good on all her duties to another client, or otherwise impede her full, zealous representation. Sometimes such conflicts of interest can be waived by the clients. All clients whose interests are affected by the conflict would have to give informed, written consent to have the lawyer go forward with the representation. However, this kind of waiver is not permissible where the clients in question are adverse to each other in the same or a substantially related matter. Here, Mary and Mall Development would be adverse to each other in a matter on which associate has represented Mall Developers (the negotiation of the employment agreement and its covenant not to compete) and would be representing Mary and breaching the same. This is not a permissible representation for associate, even if the clients gave her informed, written consent.

2. If associate leaves and starts her own firm, she still has duties with respect to her old firm's former clients. She still could not represent Mary in this matter because of the duties she owes to Mall Development. She materially assisted in the representation of Mall Development in the employment contract and Mary could be directly adverse to them in the same, or a substantially related matter, as per question 1. Associate knows material confidential information about Mall Developers in the matter and she is not permitted to take on its representation, even though she no longer works for Cain and Abel.

3. A lawyer, or firm, is permitted to withdraw from representing a client under certain circumstances, assuming a judge does not order them not to withdraw. The firm can withdraw if client is trying to use their services to accomplish criminal or fraudulent conduct, or has in the past. They can withdraw if continuing the representation would be personally reprehensible to them because of their own principles or if client is failing to cooperate or is making the representation unreasonably difficult. They can withdraw if continuing would be unreasonably difficult, or if client is not paying their bills, as is the case here. The firm will have to send written notice of the withdrawal to the client, and allow her a reasonable time to find other representation. The firm is also required to give back the client's files. Associate is not going to be able to condition release of the litigation files upon client's payment of unpaid bills. Moreover, a lawyer is not permitted to contract away malpractice liability or otherwise have a client waive rights over laws thereto, so associate cannot do this either. It will do associate no good to say that she is just following orders. An associate or other subordinate in a law firm is required to abide by the rules of professional conduct, and is held accountable for all violations thereof. It is no defense that she was ordered to do the conduct constituting a breach. The exception is when the subordinate acted in reliance on the direction and advice of her superiors regarding an arguable question of professional duty or conduct, but that is

not the case here.

MPT 1 - Sample Answer #1

Because Officer Simon did not have reasonable suspicion to stop Brian McLain's vehicle, all evidence obtained from Mr. McClain's vehicle and the shed on 8th street should be suppressed because of the violation of Mr. McClain's 4th Amendment rights.

The Fourth Amendment protects individuals from unreasonable searches and seizures. Montel. Although the police may stop and question individuals, a Terry stop requires that policy have a "reasonable suspicion that criminal activity may be afoot". Montel, Terry. The reasonable suspicion must be based on "specific, articulable facts" that the person subject to being stopped is involved in criminal activity. Montel. Here, Officer Simon can not maintain that he had a reasonable suspicion that Mr. McClain was involved in criminal activity because the information received was from an anonymous tipster and Officer Simon failed to independently corroborate any assertions of illegal conduct prior to stopping Mr. McClain. See Montel.

In Sneed, the court ruled that all evidence obtained pursuant to a stop of the defendant was to be suppressed because the simple fact that the defendant visited a house which an "untested confidential informant" had asserted was the home to drug dealing was insufficient to warrant a stop. The home was not known for drug trafficiking and no independent indicia existed to indicate criminal activity. Likewise, here, the call placed to report the purportedly illegal activity of Mr. McClain was completely untested as it came from a caller who refused to give his name. Although the caller did state that Mr. McClain was in possession of two boxes of Sudafed and coffee filters, it should be noted the caller failed to state that coffee was also purchased by Mr. McClain. There is no law preventing a person from purchasing Sudafed and coffee filters at the same time. There is also no law precluding one from asking about engine starter fluid. It was only store policy that purchasers at Shop-Mart be limited to buying two boxes of Sudafed at a time. As such, simply buying the maximum available supply from a store of any item is hardly sufficient to establish a reasonable suspicion of criminal activity. Further, Officer Simon himself stated that the area in which Mr. McClain was arrested was not known for meth activity. Also, although there had been prior reports of criminal activity at Shop-Mart, Officer Simon admitted that none of these involved drugs and, further, that all prior calls involved individuals who gave their names.

In Montel, evidence uncovered in a stop subsequent to a second-hand tip was ruled to be suppressed due to a violation of the defendant's Fourth Amendment rights. There, a tipster conveyed information to the police second-hand, stating that another individual had seen the defendant speed away after shots were fired. Even though the tipster conveyed the defendant's license plate number, that in and of itself was insufficient to warrant a reasonable suspicion, as the tips did not involve a personal observation or firsthand account. As such, the court stated, there was no way of knowing the declarant's state of mind at the time she gave her information. Likewise, here, the anonymous tipster's call, because it was brief in nature and devoid in specifics, fails to demonstrate the callers state of mind. Because Officer Simon did not observe any illegal activity after first seeing Mr. McClain re-enter his vehicle (he obeyed all traffic laws and only stopped to talk with a neighbor) no independent investigation was sufficient to bolster the

tipster's claims. See Montel.

In Grayson, the court found that the police ***did*** have a reasonable suspicion to make a stop of the defendant's vehicle. That case involved totally different facts than those existing here. In Grayson, the tipster not only called with suspected criminal activity but predicted with particularity the defendant's actions, including that the defendant would be leaving a specific building at a set time, carrying a package, and would be traveling to a specific location. The police were able to independently verify these facts before pulling over the defendant. This, the court found, was sufficient to meet the "independent police corroboration requirement". Here, no predictions were made of Mr. McClain's movements. Although a general description was given of Mr. McClain, his purchases, and his car, any of these facts separately and, most importantly--taken together--fail to show anything remotely close to criminal design.

Therefore, because Officer Simon lacked reasonable suspicion at the time he pulled over Mr. McClain, any evidence obtained pursuant to the stop should be suppressed.

Count Two is a lesser-included offense of Count Three and, as such, should be dismissed because to maintain the charge would result in a violation of Mr. McClain's double jeopardy and Due Process rights, as guaranteed by the U.S. Constitution.

In Decker, the court found that when comparing the elements of two offenses, if the crimes are so similar that the commission of one offense will necessarily result in committing the other crime, the offenses are multiplicitous and violative of the double jeopardy clause. Count Two (43) outlaws knowing possession of equipment or chemicals or both for purposes of manufacturing methamphetamine. Count Three (51) outlaws knowing manufacture of methamphetamine. Further, Manufacture (under 51) ***includes*** producing, including packaging either "directly or indirectly ***by extraction . . . or by chemical synthesis"***. This clause indicates, therefore, that one ***must*** possess equipment or supplies in order to conduct the extraction or chemical synthesis.

Therefore, both Code 43 and 51 involve knowingly possessing equipment or chemicals for the purposes of methamphetamine manufacturing. Should the State maintain both of these provisions, Mr. McClain's constitutional protections afforded by both the double jeopardy clause and the Due Process clause would be violated. Therefore, we respectfully request the court to dismiss Count Two.

MPT 1 - Sample Answer #2

1. Defendant's Motion to Suppress Evidence Should be Granted.

Defendant's Motion to Suppress should be granted because Officer Simon acted on an anonymous tip that was not corroborated by independent investigation. The issue is whether the investigating officer lacked reasonable suspicion to stop Defendant's vehicle on the night in question. The 4th Amendment protects individuals from unreasonable searches and seizures. Accordingly, police officers may only make an investigatory stop if they have a "reasonable suspicion" that criminal activity is "afoot." ***State v. Montel***. The seminal case on investigatory stops by police, ***Terry v. Ohio***, held that an officer must have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity" at the time. Finally, courts look at the "totality of the circumstances" in each case. ***Montel***.

In the case at bar, the Defendant was stopped by Officer Simon after an anonymous tipster called the CrimeStoppers Hotline to report "criminal activity" at the Shop-Mart. Officer Simon, however, did not find Defendant at the Shop-Mart, but instead found him across the street at Cullen's Food Emporium. Officer Simon did not have a "reasonable suspicion" to stop Defendant because his suspicion was not "grounded in specific and articulable facts," as required by ***Terry v. Ohio***. Instead, Officer Simon based his report on an anonymous tip that Defendant was buying cold medicine, coffee filters and inquiring about engine-starter fluid. The present facts are similar to ***Montel***, where the Franklin Court of Appeal affirmed the granting of the defendant's motion to suppress evidence on the grounds that the anonymous tip was not corroborated and the officers had not verified the information received through an independent investigation. The ***Montel*** court specifically stated that anonymous tips should be "corroborated, such as by investigation or independent police observation of unusually suspicious conduct, and must be 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'" In both the instant case and the facts of ***Montel***, the tip was anonymous and was not corroborated. In the instant case, Officer Simon merely found the Defendant, without seeing any suspicious activity, and did not even find him in the same location as described by the tipster (but instead found him at another store). The tip was not verified for "illegality" because Simon did not witness any illegal activity. The State will likely argue that the area in which Defendant was found is a high-crime area, but as the ***Montel*** court noted, "a person's mere presence in a high-crime area . . . does not, by itself, justify a stop." The State will also likely discuss ***State v. Grayson***, where the Franklin Court of Appeal affirmed the trial court's denial of defendant's motion to suppress, which was also based on an anonymous tip. The court's decision in ***Grayson***, which the court admitted was a "close question," is distinguishable. The facts of ***Grayson*** involved an anonymous tip, but the tip was "sufficiently corroborated" when police observed a chain of events precisely as they were described by the tipster; on the contrary, in the present case, Officer Simon did not find Defendant at the Shop-Mart and did not witness anything suspicious. The facts in ***Grayson***, unlike here, exhibit "sufficient indicia of reliability to provide reasonable suspicion." Defendant's Motion to Suppress Evidence should be granted because Officer Simon lacked a reasonable suspicion to stop Defendant.

2. Count Two Should be Dismissed as Multiplicitous.

Count Two should be dismissed because methamphetamine (hereafter, "meth") cannot be manufactured without first possessing supplies to manufacture it. The issue is whether Count Two, possession of supplies with intent to manufacture meth, is a lesser-included offense of Count Three, the manufacture of meth. The controlling case law on the issue comes from a decision of the State of Franklin's highest court, the Franklin Supreme Court. In ***State v. Decker***, the Supreme Court adopted the ***Blockburger*** test, which states that "[i]f the elements of the 'greater' crime necessarily include the elements of the 'lesser' crime, then the latter offense is a lesser-included offense and prosecution of both crimes violates double jeopardy."

Here, the Defendant could not have manufactured meth (Count Three), without first possessing equipment or supplies with intent to manufacture meth (Count Two), and therefore, Count Two is a lesser-included offense. Although the elements of Count Two do not fit neatly into the elements of Count Three, the ***Decker*** court held that "Franklin case law does not require a strict textual comparison such that only where all the elements of the compared offenses coincide exactly will one offense be deemed a lesser-included offense of the greater." In ***Decker***, the Supreme Court dismissed the charge of second-degree assault as a lesser-included offense of first-degree burglary because "[a] lesser-included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the

lesser offense." Tellingly, Defendant could not have manufactured meth, which is defined as producing meth (Section 51 of the FCC), without possessing meth for the purpose of manufacturing meth (Section 43 of the FCC). The State will likely argue that the elements of Count Two do not match up in identical form to the elements of Count Three, but the ***Decker*** court clearly stated that "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are multiplicitous." In the case at bar, Count Two is multiplicitous of Count Three because one cannot argue that you can manufacture meth without first possessing the supplies to manufacture meth. Count Two, therefore, is multiplicitous.

MPT 1 - Sample Answer #3

1. Without reasonable suspicion to justify the stop of McLain's vehicle, all evidence obtained as a result should be suppressed.

The Fourth Amendment protects individuals from unreasonable searches and seizures. The police do have a right to stop and interrogate persons based on "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity" at the time. ***Terry v. Ohio***. The stop must be appropriate under the totality of the circumstances. McLain's stop was not corroborated by independent police work, and thus, did not exhibit a sufficient indicia of reliability to provide reasonable suspicion for Officer Simpson to make the stop.

While a tip from a source unknown to the police may be sufficient in and of itself to warrant a stop, such an anonymous tip must be corroborated by independent police investigation and must be "reliable in its assertion of illegality not just in its tendency to identify a determinate person." ***Florida v. JL***. Here, as was the case in ***State v. Sneed***, there is no evidence that the tip was more than an indication of a determinate person. In ***State v. Sneed***, the stop was not grounded in reasonable suspicion when the information was not independently verified. The tip was from an untested informant and was done in an area that was not known for drug trafficking. As is the case here, McLain was stopped based on an untested informant's information in an area not known for methamphetamine sales, but rather for shoplifting and marijuana. Since the fact that the area where the car was stopped was only known for general drug activity, McLain's stop was not grounded in reasonable suspicion of illegal methamphetamine sales. Furthermore, as was the case in ***State v. Montel***, there was no way to know if the informant's tip was reliable because the tip was from an unknown informant who could not be tested for reliability. The tip, standing alone and not coupled with any other evidence, was not enough to provide reasonable suspicion. The informant in the present case refused to disclose his identity and was not the manager or other employees of the ShopMart who had proved to be reliable in the past. The informant's tip alone should not be considered enough to provide reasonable suspicion.

It is true that it is not necessary for every detail of an anonymous tipster's story to be verified, the information must be sufficiently corroborated to provide the reasonable suspicion necessary to make a valid investigative stop. ***State v. Grayson***. In ***State v. Grayson***, the court denied a motion to suppress evidence due to the reliability of an anonymous informant's tip had been sufficiently verified by independent police investigation. After the police observed a man leaving the building described by the tipster, carrying a briefcase as described by the tipster, entering a vehicle matching the description of the tipster, and following a route consistent to lead to the final destination that the tipster described, the police had done enough independent

investigation to verify that the suspected person was the person that the tipster described. Under the totality of the circumstances, the independent investigation lined up with the information given by the anonymous tipster to corroborate the story, thus providing reasonable suspicion. Here, Officer Simpson was acting on an anonymous tipster's call providing merely a general description of the current location of a man. There was nothing predictive about the call, nothing verifiable. Everything described by the informant could be based on current observation, including the fact that the man entered into a red Jeep Cherokee. The informant's reliability could not be verified. When Officer Simpson arrived, he found a man fitting the description entering a similar vehicle, but the location was a across the street at Cullen's Food Emporium, and not at the location of the Shop-Mart parking lot identified by the tipster. With only a general description of a man with dark hair entering a particular vehicle, that alone is not enough for reasonable suspicion based on the totality of the circumstance. The motion to suppress the evidence should be granted.

2. Count 2 of possession of equipment to manufacture methamphetamine should be dismissed as multiplicitous.

Prosecuting McLain for Count 2 and Count 3 is violative of double jeopardy. When the same event or transaction gives rise to two statutory offenses and the elements of the greater crime include the strict elements of the lesser crime, then the prosecution of both crimes violates double jeopardy. ***Blockburger v. US***; Franklin Criminal Code 5(2). Defining the elements of Count 2 possession of equipment to manufacture methamphetamine as follows: (1) knowingly (2) possessing equipment or chemicals, or both (3) for the purpose of manufacturing methamphetamine, the elements of Count 3 manufacture of methamphetamine, (1) knowingly (2) manufacturing methamphetamine (3) by extraction or by chemical synthesis, include the same strict elements from Count 2. Franklin case law does not require a strict comparison where all elements coincide exactly, just that the offenses be so similar that commission of one will necessarily result in the commission of the other. ***State v. Decker.*** Since manufacturing requires knowingly manufacturing through the direct or indirect extraction or chemical synthesis and since possession of equipment to manufacture is knowingly possessing the equipment or chemicals to do this manufacture, the greater offense of Count 3 includes the strict elements of the lesser crime, so to prosecute for both crimes would be violative of double jeopardy. Unlike ***State v. Jackson***, where one offense contained another element that the other did not, here, every strict element of the lesser crime is included in the greater crime. While it was possible to possess drugs but not paraphernalia, One may not manufacture methamphetamine without possessing the equipment to do so. ***Id***. Count 2 should be dismissed.

MPT 2 - Sample Answer #1

NEGLIGENCE CLAIM

To recover damages under negligence claim, Karen Logan ("Plaintiff") has the burden of proving the elements that follow by a preponderance of the credible evidence. In other words, that negligence is more probable than not given the evidence.

1. Condition on defendant's property presenting an unreasonable risk of harm to people on the property.

Generally, it is agreed that water on a tile floor presents, without more, an unreasonable

risk of harm to people on property. Additionally, there were no warning signs around the puddle to warn of its presence and make it less unreasonable. The presence of the small, thin puddle is a weakness in our case.

2. Defendant knew or in the exercise of ordinary care should have known of both the condition and risk.

However, the facts show that Defendant did not know about the water puddle because it had been an hour or so before the puddle since any employees were on the aisle and no customers informed Defendant about the condition before the fall. Therefore, it becomes a question of whether Defendant should have known with ordinary care about the puddle. The facts show that Defendant (a) had a set policy of mopping and cleaning every night, (2) that employees had been on the aisle a number of times that morning, (3) that employees never saw the puddle, (4) that, at most, the puddle had only existed from 10am (the last "check-in") to 12pm, (5) puddles/spills should be rare at the store given they do not sell water products, and have no known roof or plumbing problems, (6) no other customers saw the puddle or had a reason to report it, and (7) the mild weather would not have put the Defendant on the alert for wet conditions in the store. Therefore, similar to the Camera case, where the owner was not liable for a rare, recent spill, these facts show that Defendant had a routine, relatively frequent policy of searching out and curing dangerous conditions like small puddles, particularly for a store where spills should be quite uncommon and easy to detect and, thus, could not have discovered it without extraordinary care. However, the employee missing a single aisle "check-up" is a weakness and a jury will need to consider it.

3. Defendant could reasonably expect that people on the property would not discover the danger.

The facts show that Defendant could not reasonably expect people not to discover the condition because they show that (a) there was nothing obstructing her view on the aisle and (b) the store, by Plaintiff's own admission was "brightly" lit, suggesting that the puddle might be easy to see, especially if the bright lights caught the reflection. However, the facts also show that there were no warning signs that would allow an even easier discover. The jury will have to weigh these facts to determine whether the puddle was an "open and obvious" danger to an objective reasonable person. Note: even if it was open and obvious, the "distraction" exception might apply in Plaintiff's favor to the extent that the Wii display created a distraction that made it impossible to discover the puddle. Given that Plaintiff had time to leave the display, make a call, and start walking, the time in between suggests that the distraction should not apply. Additionally, the games on the shelves were not an unreasonable distraction because they were displayed on shelves like usual merchandise.

4. Defendant failed to warn of the unreasonable risk of harm to people on the property.

The facts show that Defendant did not warn of the puddle because it was unaware of the puddle. This is a weakness. However, given the relatively short amount of time between the spill and the fall, it is arguably unreasonable to expect that Defendant could have warned in time. As in the Camera "just spilled" spills weigh against a plaintiff on this element. Additionally, the facts suggest that the baby, not the Defendant, might have created the condition by spilling the water from his cup before Defendant ever had a reasonable chance to warn about the condition.

Conclusion

In all, our primary strength is that we could have not have known about the spill soon enough to warn based on the fact that our clean-up/observation policy was reasonably calculated to discover rare puddles in the store. Our primary weakness, is that there is an unexplained puddle that we did not warn about. The jury must weigh the totality of these facts to determine if negligence is more probable than not given the testimony of the employee and the Plaintiff.

CONTRIBUTORY NEGLIGENCE DEFENSE

To defeat Plaintiff's negligence claim, Trina's Toys ("Defendant") may make a case for contributory negligence on the part of Plaintiff by, as it has the burden of doing, proving that, by a preponderance of the credible evidence, Plaintiff was guilty of negligence that was a direct and proximate cause of the occurrence and the resulting injuries and damages sustained by Plaintiff.

The Plaintiff was potentially negligent because she was (a) walking towards the shelf without looking, (b) wearing awkward backless sandals that she was not used to walking in, (c)wearing a bulky backpack, (d) possibly talking on her cell after playing the Wii, and at the time of the fall, (e) she was carrying a bottle with enough water to create the puddle, she said she had barely consumed any of it, and an employee saw it on the floor empty after the fall, and (f) seen with her shoes off next to her at the scene. However, to the extent that these facts suggest negligence by Plaintiff, they also suggest that she was the proximate cause because they either suggest that she tripped on her own shoes and caused the puddle by spilling her bottle or she was so unreasonably oblivious to her surroundings to no fault but her own, that she could have avoided the fall with basic reasonable care. In other words, despite our own negligence, she intervened with her own inattentive negligence and was the substantial factor in causing the fall.

MPT 2 - Sample Answer #2

To: Norman Brown, Supervising Attorney

From: Applicant

Re: Logan v. Rios

Form 12, EDR Statement: ITEM 6

To be discussed at EDR is the assessment of Plaintiff Logan's claim of negligence against our client, Defendant Rios as well as our client's defense of contributory negligence. Unfortunately for our client, based on Franklin Supreme Court's Jury Instructions, Logan makes a fairly good argument that her negligence claim should stand. However, there are holes in her prima facie case as evidenced by the Chad v. Bill's Camera Shop and Brown v. City of De Forest cases. Additionally, because Franklin adheres to the strict rule of contributory negligence and Logan's own acts were a substantial factor in her injuries, our client's defense is a strong one.

Logan will need to show there was a condition at Trina's Toys which presented an unreasonable risk of harm, Trina's Toys knew or should have known of the condition and risk, and Trina's Toys could expect those on the property to not discover the danger and Trina's Toys failed to warn of such risk. It's likely a puddle of water is an unreasonable risk of harm seeing as spilled coffee and spilled soda were considered so in Owens v. Coffee Corner and Chads v. Bill's Camera

Shop, respectively. Additionally, both Logan and employee, Patel, agree that, although not deep, the water was at least a foot to a couple of feet long, Patel even attested the tile floor, when wet, could be slippery. There is however case that supports Defendant's argument that there was not an unreasonable risk of harm. The Chad court explained that soda spills were not reasonably foreseeable in a camera shop, and similarly, water spills are unlikely events in a toy store where no food or beverage shop is available. Moreover, the Owens case explained that a business owner might be liable for "just spilled" beverages when the beverage is sold, like there with coffee at a coffee shop, in the store. However, here the toy store did not sell water or even water guns.

Next is Logan's need to demonstrate that Trina's Toys knew or in the exercise of ordinary case should have known of the puddle of water and the risk it posed. Although neither Trina's employee nor Trina herself had any actual knowledge of the water and its risk before Logan fell, their argument that the defendant should have known is a strong one. Store policy typically requires an employee to monitor Aisle 3, where Logan fell, every hour; however, Patel failed to do so at the 11 o'clock hour, with Logan falling around noon. With Trina in the back storeroom all day and Naomi at the front counter, it appears the defendant should have known by exercising care during the day but did not.

However, Franklin case law provides for a limitation on liability on this prong of the negligence elements. A business owner will not be liable nor have an obligation to warn when the condition is open and obvious. The test is "whether an average user with ordinary intelligence would have been able to discover the risk presented upon casual inspection" (Roth v. Fiedler). This test is easily met in our circumstances. Logan is a smart, 20-year old college student who could have discovered the water (assuming she was not the one who spilled it) had she been looking where she was going when walking down Aisle 3. She and Patel explained there was nothing blocking her view of the floor, and Logan further admitted she was not looking at the floor but rather at the games in the aisle. Plaintiff's counsel will have a fairly strong argument under the exception to this limitation, which is the limitation does not apply "when the owner has reason to suspect that guests may not appreciate the danger or obvious nature of the condition because they are distracted or preoccupied" (Ward v. Shop Mart Corp. Two helpful cases for Logan are Gardner v. Wendt, where the court explained that blinking lights and a suspended mobile constituted distractions, as well as Ward, where a concrete post stuck out from a doorway where passengers generally left with packages in hand. Here, Trina's Toy store was brightly lit and there were many games in the aisle as well as a fancy Wii display inviting guests to use the display, which Logan might contend was a distraction. However, this is a weak argument, as there were no flashing lights and no obstructions to Logan's view. Defendant has an valid exception however, because the court in Brown explained that when the plaintiff created the distraction, she cannot use the distraction exception, just as the P in Brown who chased after her child and tripped on the sidewalk, acting inattentively. Logan acted just as the P in Brown did, inattentive to her surroundings. Assuming Logan did not spill the water herself, she was still not looking where she was going, talking on her cell phone right before she fell, and wearing high heel shoes with a heavy backpack. Even assuming Trina's Toys expected guests to discover the danger of water puddles in a toy store and failed to warn by not placing signs (that it admittedly did not own) out on the floor, the last element is unmet because Logan caused the distraction herself.

Defendant's contributory negligence defense is a strong one. Contributory negligence provides that P was a proximate cause of her injury, a substantial factor in its result, and is a complete bar. As mentioned, P admits to wearing high heels no less than 3 inches high while also carrying an extremely heavy backpack. Additionally, she was not looking where she was headed as she walked down the aisle. Regardless of whether P spilled the water or the water was on the

floor from a different cause, P's other acts appear enough for D's defense to prevail. Logan admitted she not only failed to look where she was going, but she hung up her cell phone immediately beforehand, contributing to her distraction. Her high heels coupled with her heavy backpack and failure to look where she was going collectively were substantial factors in her injuries to her ankle.

MPT 2 - Sample Answer #3

Draft Item 6

The plaintiff, Ms. Logan, has the burden of proving by a preponderance of the credible evidence three separate elements. Each element and defenses will be evaluated on the strenths and weaknesses of each. First, Ms. Logan must prove that there was a condition on the defendant's property which presented an unreasonable risk of harm to people on the property. To support this element, Ms. Logan has offered her testimony that there was a puddle of water, a couple of feet long and several inches deep, on the floor in aisle 3 of Ms. Rios' store. Ms. Rios' employee, Mr. Patel has confirmed that there was water on the floor in aisle 3 when he arrived a few minutes after Ms. Logan fell. The origin of the water is unknown. Ms. Logan states that it was there before she fell and the water caused her fall. Mr. Patel, however, stated that he saw an empty water bottle next to Ms. Logan as she sat on the ground holding her right foot. Regardless of whose testimony is believed, it seems that there was an unsafe condition on the floor of Ms. Rios' store at or near the time of Ms. Logan's fall.

The second element Ms. Logan must prove is that the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk. Based on the testimony of Mr. Patel and the fact that Ms. Rios gained nothing by leaving a dangerous condition in her store, it is unlikely that the defendant knew of the risk. Additionally, it is not disputed that water on a tile floor poses a risk of harm to those in the store. This leads us to whether Ms. Rios (as owner of the store), should have known of the condition in the exercise of ordinary care. In determining what constitutes reasonable care, one issue is the length of time an unsafe condition has existed. (*Commentary)*. Depending on the type of business, the length of time an unsafe condition exists will be different (*see Owens*, in which it was determined that the owner of a coffee shop was liable for coffee that had "just spilled" because it was reasonably foreseeable that a customer would spill coffee; *distinguish with Chad*, in which an owner of a camera shop was not liable under similar facts as *Owens*, because it was not reasonably foreseeable that a customer would spill a drink where no refreshments were served). Ms. Rios' store does not sell refreshments; nor does the main part of the store have any sourses of water. The bathroom is in the back; squirt guns for sale are not filled with water nor stocked during the winter; and there were no leaks in the store's celing. Furthermore, Ms. Rios' policy is to have the store swept and mopped every night and she uses a cleaner that does not make the floor slippery. These facts favor Ms. Rios argument that she exercised reasonable care to maintain the premises. However, Mr. Patel did admit that although he was supposed to patrol all the aisles every hour, he had not done so for nearly two hours. Additionally, the fact that children frequent the store with drinks makes it more foreseeable that some liquid might spill creating a dangerous situation (*see Rollins*, in which an owner of a mini golf park that sold refreshments was liable for failing to clean up a ketchup spill for an hour where it was

known that kids frequently spilled food items). What distinguishes the present situation from *Rollins*, is the fact that Ms. Rios' store does not sell refreshments even if kids do frequent it.

The third element is that defendant could reasonably expect people would not discover such danger and she failed to warn of it. It is true Ms. Rios did not warn. However, there is nothing to suggest that Ms. Rios herself was on notice of the dangerous condition (again the facts stated above about no refreshments, bathroom in back, well lit aisle, v. Mr. Patel's failure to patrol, children frequet etc. are relevant here). Ms. Logan might have been on notice because she saw a toddler drinking out of a sippy cup. Ms. Rios may claim that she is not liable because the condition was open and obvious. *Townsend*. Water several feet in length in the middle of an aisle is open and obvious. However,Ms. Logan may cite the "distraction exception" to this rule. *Ward*. This exception applies when the owner has reason to suspect that guests may not appreciate the obvious nature of the danger because they are distracted or preoccupied. Ms. Logan has stated that she was, in fact, distracted by the displays of games on the shelves. Although there were no overhead displays causing a person to look up, there was a Wii bowling game inviting guests to "test your Wii bowling skills" as well as regular displays of games. These are distractions. On the other hand, the exception does not apply where the person claiming injury created the distraction. *Brown*. Arguably, Ms. Logan created the distraction by choosing to play the Wii (although this isn't a strong argument), but she might have by not watching where she was walking as she walked down the aisle. Also, there is a question of fact as to whether she was talking on the phone when she fell (Ms. Logan claims to have hung up right before falling but Mr. Patel stated that Ms. Logan's phone was on the floor next to her after she fell raising a doubt as to the timing of her call).

Regarding Ms. Logan's contributory negligence: there is the testimony of Mr. Patel that Ms. Logan's own water bottle was empty when he picked it up(indicating she may have spilled the water). Also, Ms. Logan was wearing shoes that were, by her own admission, new and had leather soles, not rubber ones. Mr. Patel described them as "sandals, with high heels," that "looked pretty hard to walk on-not too steady." He also stated that Ms. Logan's backpack "weighed a ton." These factors, in conjunction with Ms. Logan's statements that she had just played Wii, wasn't looking at the floor, spoke on the phone and saw a toddler drinking out a sippy cup might make her contributorily negligent. Ms. Logan's negligence may have proximately caused the alleged injury. The jury should decide.