NEW YORK STATE BAR EXAMINATION
FEBRUARY 2009 QUESTIONS AND ANSWERS

QUESTION 1

Husband and Wife were married in 1990. In 1995, using funds received as a gift from her mother, Wife started a consulting business. Wife is the sole owner of the business, and Husband has never participated in the business in any manner.

In 1997, Husband decided to build a store on Whiteacre, property he had inherited prior to the marriage. Because he did not want Wife to find out about his store, Husband asked his brother, Brother, if Husband could transfer title to Whiteacre to Brother. Brother agreed on the condition that Husband would pay the taxes and all other expenses related to Whiteacre. Brother orally promised that he would reconvey Whiteacre to Husband upon Husband's request. Title to Whiteacre was thereafter transferred to Brother. Husband has paid all taxes and expenses for Whiteacre. He built a store on the property and has rented it continuously to the present time.

In 2000, Grantor sold Husband and Wife a building lot in a large subdivision he was developing called Blackacres. The deed for every lot Grantor sold in Blackacres, including Husband's and Wife's, contained a restrictive covenant stating that only one single family residence could be built on each lot, and that this covenant ran with the land and would be binding on all successors in interest. The deeds for all of the lots were recorded with the County Clerk. Husband and Wife built a single family house on their lot and lived there together until 2006, when Wife moved out.

In 2007, Husband and Wife sold the house to Perry. The deed from Husband and Wife to Perry did not contain the restrictive covenant.

In 2008, Husband duly commenced an action for divorce against Wife and sought equitable distribution of the marital assets.

After Wife answered the complaint in the divorce action, Husband served upon her a demand for discovery and inspection of all financial records of Wife's consulting business. Wife refused to comply with Husband's discovery request, claiming that her business was separate property. Husband duly moved to compel Wife to comply with his discovery demand. The court granted Husband's motion. The divorce action was thereafter settled.

Perry decided to convert the house that he purchased from Husband and Wife into a two family residence and rent out the second apartment. Perry obtained a building permit and was about to begin construction when he received a letter from the owner of one of the other lots sold by Grantor in Blackacres. The letter threatened legal action to prevent him from converting the house into a two family residence in violation of the restrictive covenant contained in the deed from Grantor to Husband and Wife. Perry had no actual knowledge of the restrictive covenant prior to receiving the letter and does not believe that it is enforceable against him.

Last month, Husband asked Brother to reconvey Whiteacre to him. Brother refused, claiming that his oral promise was unenforceable.

(1) Was the court correct in granting Husband's motion?

(2) Is the restrictive covenant enforceable against Perry?

(3) Under what legal theory can Husband seek to regain title in Whiteacre and is any defense available to Brother?

ANSWER TO QUESTION 1

1. The issue is whether the court properly granted the husband's motion to compel his wife to comply with the discovery request for her business financial records, which was funded with separate property when she initially started it

The courts will apply equitable distribution when there is a divorce proceeding. When determining equitable distribution the court will look at factors such as the spouse's duration of the marriage, age of the spouses, earning capacity, lifestyle, income of the spouses, and property which was separate. Separate property is property that is purchased with money that belongs to the spouse before the marriage. Such property will not be distributed because it belongs to the spouse before the marriage. The courts will distribute marital property which is property that belongs to the marriage from the date of the marriage until the date of the divorce decree being granted. Property purchased before the marriage, assets that the spouse had before the marriage, inheritance, gifts from people other than the spouse are separate property which will not be distributed. If a property was purchased with "separate property" but is purchased during the marriage then the spouse who purchased it will be given the dollar to dollar equivalent value of what he had initially put in, and the rest will be equitably distributed. If "separate property" appreciates during the course of the marriage, if the appreciation was passive, then such appreciation will not be distributed. However, if the appreciation is "active", meaning there was some minimal activity contributed by the spouse to its appreciation, then the value of active appreciation will be equitably distributed. In an action for divorce, when there is discovery and there must be full disclosure made in good faith by both parties. The spouses are not allowed to hide assets or refrain from submitting any assets owned. They must make full disclosures.

Here, the wife has started her business with funds which she has received as a gift from her mother. Those funds were received after she was married. Those funds received as a gift would not be entitled to be equitably distributed. However, the funds were used to start a business. That business has now appreciated in value due to the work of the wife. Even if the husband has not directly contributed to that appreciation, even if he was a stay at home dad, that would give him the right to be entitled to the distribution of the appreciated value of the business. The husband and wife had a long duration marriage, one of 18 years and the courts will likely distribute it equally in half. Therefore, even though the wife's business was started with "separate property" because it was a gift from her mother, the appreciation of the business, will be equitably distributed to the husband even though he has not participated in the business.
Therefore the court properly granted the husband his motion to compel his wife to financial records of the consulting business, because it’s appreciated value is now marital property.

2. The issue is whether the restrictive covenant running with the land is enforceable on a purchaser who had constructive notice of the covenant:

A covenant that runs with the land is binding on all successive parties. The covenant runs with the land with each successive person purchasing the land. For a covenant to be enforceable, it needs to have privity of estate with the original grantor, the original grantor had the intent to enforce the covenant, there is constructive, inquiry, or actual notice of the covenant, it touches and concerns the land, and it did not violate the statute of frauds requirement to be in writing. The statue of fraud requirement is satisfied so long as the original covenant was in writing. Notice is given by constructive notice which is notice recorded in the chain of title. It can also be given by inquiry, which when a buyer has notice by something that alerts him to inquire, or by actual notice which is given expressly, orally or in writing. Covenants running with the land can be issued by the owner for the benefit of the land or by mutual owners for benefit of neighboring lands, or by a builder as a common scheme for development When a covenant for a general scheme or development is issued, then any of the owners can bring suit to enforce that covenant because they have an interest in maintaining that general scheme/development.

Here, the covenant restriction limiting the use to a one family dwelling satisfies the entire requirement listed above. The covenant was granted by the grantor to each house in the subdivision as a general scheme, the covenant traces back to the same grantor who intended to maintain one family houses in Blackacre, the covenant had to do with the land that was sold when the original grantor sold the land to Husband and Wife, the covenant was in writing on their deed which satisfied the statute of fraud requirement, and the Husband and Wife filed and recorded the deed which satisfies the notice requirement.

Therefore, Perry had constructive notice that there was a covenant running with the land because the deed was properly filed with the county clerk, and he would have known about the covenant because it was in the chain of title.

3. The issue is whether the Husband can reclaim title to Whiteacre through the theory of constructive trust.

A constructive trust occurs when there is a special confidential relationship between the parties, title is transferred, the party receiving the transfer is unjustly enriched and had promised to return the property to the original owner when they ask for it. A constructive trust is an equitable remedy that the court may apply in order to avoid the unjust enrichment to the person whom the property was transferred to. A confidential relationship such as family members must exist in order to show that the intent of the party transferring was that she receive the property back if she requested it. The intent was to have the person holding the property only temporarily. When a constructive trust is established, the court will give the property back to the original owner.

Here the Husband transferred title to his brother, who satisfies the "relationship requirement", his brother promised to reconvey title, the husband kept paying the taxes and expenses showing his intent to gain title back, and the brother would be unjustly enriched if he kept the property. Note that the husband has essentially tried to hide assets through this transaction from his wife in case they divorce. Therefore courts may be reluctant to apply the constructive trust theory to help the husband. However, the husband conveyed this property in 1997 which is 11 years before any divorce proceeding was even started. Further, the property was inherited which would of been separate property and was Husband's property before the marriage which means it would have

been separate property anyway. Therefore, the court may apply the constructive trust theory to award the husband the property, which will not be part of equitable distribution (except for its appreciation of the hardware store). The brother will argue that his oral promise is unenforceable under the statute of frauds requirement because reconveyance of property orally would violate the statute of fraud requirement, but a constructive trust is an equitable remedy which the courts will apply even if it's when reconveyance was made orally.

ANSWER TO QUESTION 1

1. The issue is whether Wife's business which was started with her own money and separate from Husband is subject to discovery in an equitable distribution claim.

A marriage imposes a contractual relationship on two individuals regarding ownership of property. Once a marriage is commenced and valid, property that is acquired by the two parties is considered a part of the marital pool. The contractual relationship between husband and wife can be dissolved through a divorce. Once the marriage is dissolved through divorce, the Court then surveys the assets that belong to both the husband and wife to determine which will be divided equally through equitable distribution. In order to impose equitable distribution the Court looks at all the assets acquired by each spouse prior to and during the marriage. Additionally, the Court looks at assets that are acquired through inheritance, personal injury settlements, gifts, and other individual means.

Generally, gifts received separate and apart from the other spouse are considered separate property for purposes of equitable distribution. Also, property acquired through inheritance and money from personal injury settlements are not subject to equitable distribution because they are separate property. Property that is inherited is not subject to equitable distribution. However, if the property is not "passively" owned and improvements are made to the property, then this income is subject to equitable distribution. In addition, if money is inherited and then used for a business after the marriage has commenced, it is subject to equitable distribution.

Here, Wife received a gift from her mother after her marriage to Husband. With the gift, she started a consulting business separate and apart from Husband. In this case, the gift from her mother is not subject to equitable distribution. However, Wife used the funds from the gift to start a business. Although Husband did not own the business and was not a participant in the business, the business asset is subject to equitable distribution.

In order to get an efficient and impartial suit, parties are entitled to pre-trial discovery. In pre-trial discovery, the parties are required to release enough information so that the opposing party will have access to relevant information and evidence to put together a fair case. Physical examinations (when the P puts health at issue), written interrogatories, request for admissions, depositions, mental examinations, request for addresses, and inspection & discovery are all part of pre-trial discovery materials that should be made available to the opposing party after a request for these materials. In a divorce action that seeks equitable distribution, at the request of opposing party, there must be a disclosure of all assets that are owned by a husband and wife in

order to get a proper accounting of the total assets, and to then be able to determine whether the property is subject to equitable distribution.

In this case, although the consulting business was purchased separately from Husband, Wife is still required to complete the demand for discovery and inspection because it is necessary to do a complete accounting of Wife's assets before equitable distribution can be determined. If however, the court finds that the business should be considered part of the marital res, then Wife will not be required to contribute to equitable distribution with assets from the business.

Therefore, the demand for discovery and inspection of all financial records of Wife's consulting business should be granted.

2. The issue is whether a covenant running with the land is enforceable against Perry, a purchaser, when the covenant was not contained in the deed.

A covenant is a restriction on the use of land. A covenant runs with the land if: 1) at one point, the land was held by a common owner, 2) it was the intent of the parties that made the covenant that it run with the land, 3) there was notice (actual, inquiry, or constructive) that the covenant exists, 4) the covenant touches the land, that is, it is of and concerning the property, and 5) the covenant satisfies the writing requirement of the Statute of Frauds. In order for there to be proper notice, the buyer must have been exposed to either actual (being told there is a covenant), inquiry (it was obvious that a covenant may exist), or constructive notice. A bona fide purchaser takes the land free from covenants if there is no notice. In order to be a bona fide purchaser, a person must have purchased the land in good faith, paid valid consideration, and must not have notice of the defect. If it is found that a covenant runs with the land then the remedy is to seek an injunction (which prevents the wrongdoer from continuing the wrong) or to seek money damages.

In this case, the covenant restricting the use of the land to single family homes runs with the land because 1) the Grantor was the common owner of Blackacre before he split the land up into a development, 2) his intent was to build a community of single family homes, 3) there was proper notice because the covenant was properly recorded and a simple search of the record would have revealed the covenant. Additionally, by looking at the adjoining properties, it was obvious that Perry bought a property in a development that consisted of a residential community of single family homes, 4) the covenant was of and concerning the property, and 5) the Statute of Frauds was satisfied because all of the written deeds were recorded with the County Clerk.

Therefore, the covenant running with the land is enforceable against Perry and Perry is not a bona fide purchaser because he had notice. Legal action can be enforced by the owner of one of the other lots because the covenant exists for the benefit of the residential area. Here, if legal action is sought the proper remedies will be either an injunction or damages.

3. The issue is whether the theory of constructive trust is applicable and if the theory of clean hands negates the claim.

The statute of frauds requires that all contracts pertaining to the transfer of real property be in writing. The statute of frauds seeks to prevent fraud within the legal system and requiring a writing serves as an efficient way to determine the terms of an agreement and its enforceability. Generally, if an oral contract for the transfer of land is executed, this contract is held to violate the statute of frauds and is unenforceable.
When property is held in constructive trust, the property is transferred to a person of usually a confidential relationship to be held for the other party with the intent that the property be transferred back. In addition, when there is a breach of constructive trust, the aggrieved party may seek Constructive Fraud. During a constructive fraud: 1) there is a transfer of property, 2) the transfer is done to someone who has a confidential relationship with the transferor (such as a close friend or family member), 3) there is unjust enrichment, and 4) there was a promise to return the property which has been breached. Defenses to constructive trust are unclean hands and fraud. This occurs when the intent to transfer the property was to defraud another person of their interest in the property.

In this case, Husband transferred the property to Brother with the intent that Brother deed back ownership after the divorce. There was a valid transfer because a deed was signed and acknowledged. When the time came to transfer the property back to Husband, the Brother refused. Husband may claim that he has an ownership interest in the property as Constructive Trust and that he made various improvements to the land that demonstrate this ownership intent However, although he made various improvements, these improvements are sufficient to prove the existence of a Landlord-Tenant relationship as well. Therefore, Husband cannot seek to prove the oral agreement (which is unenforceable because of the violation of the statute of frauds) through the improvements. Additionally, even though Husband may claim that he deserves the property because of constructive trust, he does not have clean hands because the sole reason for the transfer was to defraud Wife out of her interest in the property. Therefore, Husband cannot successfully claim that the property was held in Constructive trust because he cannot disprove, Brother's clean hands defense.

QUESTION 2

In 2000, Landlord leased a five story commercial office building in New York to Tenant for a term of ten years. The lease provided that all exterior maintenance was to be performed by Landlord and that Tenant would make no changes, alterations or improvements to the exterior without Landlord's consent.

In 2007, Tenant decided that the exterior of the building needed repainting. Without Landlord's knowledge or consent, Tenant hired Contractor, a painting contractor, to paint the exterior of the building.

Painter, an employee of Contractor, was painting the building while standing on scaffolding erected by Contractor when the scaffolding slipped and tipped forward. Painter fell 20 feet to the ground, sustaining serious injuries. The scaffolding was manufactured with a safety railing around it, but Contractor had removed the front part of the railing to make it easier to use spray painting equipment.

Contractor had purchased the scaffolding from its manufacturer, Seller Inc., in 2006. At the time of the sale, Seller Inc. was aware that painting contractors frequently removed the front portion of the safety railing. In 2008, Seller Inc. sold all of the assets of its scaffolding business to Scaffold Corp. pursuant to an agreement that was silent as to assumption of liabilities. Scaffold Corp. has continued to manufacture scaffolding, using the same manufacturing plant, the same employees and the same trade names for its products as Seller Inc. had used.

Assuming proof of the foregoing facts, is Painter likely to be successful on each of the following causes of action:

(1) Against (a) Seller Inc. and (b) Scaffold Corp., as successor to Seller Inc., for strict product liability?

(2) Against Landlord, for failure to provide safe scaffolding?

(3) Against Contractor, for negligence?

ANSWER TO QUESTION 2

1. a. The issue is whether Painter has a cause of action for strict liability against the manufacturer of the ladder, which caused his injury even when the product has been altered since it left the manufacturer's control.

A plaintiff proving strict liability of a manufacturer must show four things. First, that the manufacturer made the product in question. Second, that the product was defective and was therefore unreasonably dangerous. Third, that the product was defective when it left the manufacturer's control. And fourth, that the plaintiff was using it in a way reasonably foreseeable to the manufacturer. To recover for strict liability, the product must not have been altered since it left the manufacturer's possession. It is important to note that a plaintiff may also recover for strict liability against a retailer even though the retailer did not manufacture the product - simply on the basis that the retailer is putting unreasonably dangerous products into the stream of commerce. The same test articulated above applies. This is inapplicable here since Contractor purchased the ladder directly from Seller Inc., the manufacturer.

In the present case, Contractor purchased the ladder from Seller, Inc. and subsequently modified the product to meet his needs. Applying that fact to the requirements for strict liability, it is clear that not all the requirements have been met. There is no indication that the product was defective when it left Seller Inc.'s control. Painter will likely be unable to show that the ladder was unreasonably dangerous when Seller Inc. had put a safety railing on it that was removed by Contractor. Therefore, this subsequent modification may cut off Seller Inc.'s liability to Plaintiff in strict liability. It made the product, but the product was not unreasonably dangerous when it left Seller Inc.'s control, and was modified thereafter. However, there may be a question of whether Contractor's removal of the front part of the safety railing was a sufficient modification to show that the product was not defective when it left Seller Inc.'s control. The facts show that

the scaffolding slipped before Painter fell to the ground. If Painter can show that this slippage was caused by a defect that was unreasonably dangerous and existed when it left Seller Inc.'s control, then he may be able to recover from Painter Inc. There will still be a question of whether the subsequent modification rids Seller Inc. of liability.

The next question that arises is whether Seller Inc should be liable to Painter because Contractor and Painter's use of the product was reasonably foreseeable by Seller Inc. Seller Inc. will be liable for foreseeable uses even if they are not uses the product was intended for. However, this coverage should not extend as far as foreseeable uses that require subsequent modifications of the product. Seller Inc. will still be able to show that while they knew people removed the front part of the safety railing, the product was not defective when it left Seller Inc.'s control. Painter would have a better chance of recovering from Seller Inc. on a theory of negligence - that Seller Inc. owed a duty to Painter and that it breached that duty by not manufacturing a product that would be safe and useful. Painter could then show that because Seller Inc. knew the product was not being used appropriately, it owed a duty to determine a better way of manufacturing the product in keeping with the way the product was being used. Seller's failure to do so would be a breach, and seller would then need to show that it was the actual and proximate/legal cause of his damages. In a negligence claim, Painter could also bring up the statutory liability Seller Inc. has to construction workers. If he could then show that he was in the class of persons protected under the statute and that the activity was in the class of activities protected, then he would have established negligence per se against Seller Inc. and would only have to show causation and damages.

Under a theory of strict liability, Painter will likely not recover against Seller Inc. because he cannot show that the product was defective when it left Seller Inc.'s control.

b. The issue is whether Scaffold Corp. has assumed Seller Inc.'s liabilities by the purchase of all Seller Inc.'s assets.

The general rule is that when a company sells all or substantially all of its assets to another company and the agreement is silent as to assumption of liabilities, no liabilities are assumed by the purchasing corp. This rule, however, has an exception for when the purchasing company operates as "merely an extension" of the selling company. When the purchasing company operates as an extension of the company it purchased, the purchasing company is treated as having assumed the purchased company's liabilities.

In this case, Scaffold Corp. purchased all of Seller Inc.'s assets pursuant to an agreement that was silent as to assumption of liabilities. Normally this transaction would not make Scaffold Corp liable for Seller's liabilities. In this case, however, Scaffold Corp "continued to manufacture scaffolding, using the same manufacturing plant, the same employees and the same trade names for it s products as Seller Inc. had used." This shows that Scaffold Corp. was really acting as a mere continuation of Seller Inc. and can therefore be held liable to the same extent as Seller Inc. would have been (as described above).

Therefore, Painter can assert a claim against Scaffold Corp, but will probably not prevail on a claim of strict liability due to the alteration of the product. Painter may, however prevail on a claim of negligence.

2. The issue is whether Painter can prevail on a cause of action against Landlord for failure to provide safe scaffolding when Painter was injured on Landlord's premises but not with Landlord's consent

To prevail on such a claim, Painter would have to show that the Landlord was negligent. He would have to prove that the landlord owed Painter a duty of care, and that he breached that duty and the breach of it was the actual and proximate/legal cause of Painter's injury. He would also have to show damages, which in this case would be the injury sustained. The rule is that a party injured on the landlord's property may hold the landlord liable if the landlord was using an independent contractor to perform work on areas of the premises under his control and the person was injured in performing that work.

Painter cannot prevail on a claim of negligence against Landlord because the Landlord's maintenance of the common areas was not the cause of Painter's injuries, and Contractor, for whom Painter worked was not an agent of Landlord. A landlord has the duty to make the common areas of his property reasonably safe for those who come to the premises. Here, the Landlord did not breach that duty. The accident occurred, not because of a defect in the land, but because of a defect in the scaffolding provided by Contractor. Contractor was not an agent of Landlord because Landlord did not consent to Contractor's use and had not given Tenant authority (either actual or implied) to enter into a contract with Contractor for improvement of the premises. In fact, Tenant was strictly forbidden from entering into a contract with anyone for this purpose as well as from making any improvements on his own. The question may arise whether the Painter and Contractor reasonably believed that the Tenant had authority to hire them for the purpose of painting the exterior of the premises - this however does not appear to be an issue here. The Landlord owed Painter and Contractor no more duty of care than to keep the common areas of the premises safe. He did not owe a duty to provide safe scaffolding since Contractor was an independent contractor who provided his own scaffolding and was not under Landlord's control. Landlord met his duty of care to reasonably maintain the common areas and therefore has not been negligent.

3. The issue is whether Painter can recover from Contractor under a theory of negligence for Contactor's removal of the protective railing on the scaffolding

To establish negligence, Painter must show that Contractor owed him a duty of care, that he breached that duty, and that the breach was the proximate and legal cause of Plaintiffs injuries.

Plaintiff can prevail on a claim of negligence against Painter. Contractor owed a duty to painter. Contractor has a statutory duty specifically for construction workers working with scaffolding, ladders, etc. and Plaintiff is in the class of people designed to be protected under that statute. Also, the activity of painting the exterior of a commercial office building would fall under the class of risks intended to be protected. Contractor breached this duty when he modified a safety feature on the scaffolding that was designed to protect Painter and others like him from injury.

Contractor's breach resulted in Painter falling 20 feet to the ground and sustaining serious injuries. Thus Contractor has committed negligence per se, so Painter only needs to show that this was the actual and proximate/legal cause of his injuries. Painter can show this because but for contractor removing the safety railing, Painter would not have fallen even if the scaffolding tipped. The railing would have protected him. Therefore, Contractor's breach is the actual cause of his injuries. Contractor's breach is also the legal/proximate cause of his injuries because it was reasonably foreseeable that if the scaffolding slipped or tipped, or anything happened to disrupt it, then with the railing removed, the painter on the scaffolding could be injured. Contractor should have reasonably foreseen this when thinking as a reasonable person under the circumstances, therefore, his actions were the proximate cause of Painter's injuries. Painters injuries are sufficient to show damages.

It should be noted, however, that Painters first remedy should be a worker's compensation claim. Painter is a worker employed by someone profiting from business. Therefore, Painter is covered under worker's compensation. Painter can recover for his medical bills and cannot file a claim against the employer if he can recover under worker's comp. Because painter is an employee of Contractor, he should recover under worker's compensation rather than suing in negligence. He would then be able to sue the other parties under a theory of third party liability and would be compensated for anything above the first party claims paid out by workers comp (the insurance company would recover up to the first party benefits paid).

ANSWER TO QUESTION 2

1. a. PAINTER v. SELLER INC

The issue is whether Seller Inc. is strictly liable to Painter under the products liability doctrine.

A manufacturer may be strictly liable to a plaintiff who suffered personal injuries under either a theory of design defect or a manufacturing defect or warning defect. Design defect (with failure to warn as partial proof of the design defect) is the theory more applicable to this case. In order to prevail in a design defect strict liability suit, the plaintiff bears the burden of showing that: 1) the defendant owed a strict duty of care because they sold or manufactured the faulty product, 2) that the defendant breached it's duty of care because product was unreasonably dangerous for it's ordinary use because a) a safer design was available and feasible, or b) the plaintiff was not warned of the risks not obvious to the ordinary user but known to the designer, and 3) that the faulty design was the cause of the injury because the plaintiff did not alter the product from the form it was in when it left the defendants custody. The statute of limitations for a strict products liability action is three years from the date of injury and each seller in the chain of custody may be held strictly liable.

In this case, Painter has filed a timely claim that falls within the three year statute of limitations.

Regarding element one: Seller Inc. owed a duty of care to manufacture and sell scaffolding that was reasonably safe for its intended use (i.e. supporting people who were doing construction without collapsing). Thus, Seller Inc. owed a strict duty of care to design, manufacture, and sell

a product that is reasonably safe for its intended use, and Painter easily satisfies element one by virtue of the fact that Seller Inc. manufactured and sold the scaffolding.

Regarding element two: Painter also may likely show that there was a breach because product was unreasonably dangerous for its intended use because the facts state that "seller was aware that people frequently removed the front portion of the safety railing." Seller Inc.'s awareness that people were habitually removing their safety precautions means that if Painter showed that a safer model was available and feasible, they had a duty to manufacture this safer model. Under element two, Seller Inc. also had a duty to include a clear warning about the risks and potential consequences of the non-obvious risks of removing the safety railing. On these facts, it appears that Seller Inc. failed to include a clear warning about the risks of removing the safety railing but that they are probably not liable for failing to warn because the risk of removing a safety railing is fairly obvious — i.e. that someone would be more likely to fall off the scaffolding. Thus, If the risks of removing the safety railing are simply obvious (i.e. it will increase the risk that someone will fall), the Seller Inc. is likely not liable for failing to warn of this obvious risk. On the other hand, if the removal of the safety railing made is more likely that the entire scaffolding would tip over — as it did in this case — then Seller Inc. likely did have a duty to warn about this use and might be held liable for design defect via a failure to warn. In either case however, Painter will have to show that there was a safer option available and feasible. Painter can likely show that a safer design was available and feasible because Painter can probably show that at minimal cost Seller Inc. could have manufactured a scaffolding with a front safety railing that was more difficult to remove or perhaps more amenable to being convenient for spray can usage (thus minimizing the alterations that buyers might make).

Regarding element three: Painter will not be able to prevail on the third element of strict products liability. To satisfy element three, Painter will have to show that the product was the cause of the injury by showing that the product was not altered since its sale. The scaffolding here was altered— purposefully — by Contractor, and thus Painter will likely not be able to satisfy the causation element because he will be unable to show that the faulty design was the actual cause of the injury to Painter.

Thus, because Painter cannot show that the scaffolding was unaltered from Seller Inc.'s design, he will not be able to prevail in strict products liability against Seller Inc.

b. PAINTER v. SCAFFOLD CORP.

The issue is whether successor liability exists when the original manufacturing company has all of its assets acquired by another company in the same line of business.

The general rule is that transfer or sale of all or substantially all of a company's assets does not carry successor liability for tort claims against the subsumed company. [This is in contrast to a merger of two companies where successor liability does attach for the subsumed company.] One exception to this rule however is that when a company transfers all or substantially all of its assets to another company who essentially continues the same business as the original company, successor liability may nonetheless attach to the purchasing company for the subsumed

companies tort liabilities. The rational for this exception is that transfer of a company's assets should not be used as an end run around a companies' tort liability.

In this case, Seller Inc. transferred all of its assets to Scaffold in an agreement that was silent as to the assumption of liabilities. Normally, this transfer of assets would cut off Scaffold from successor liability however here, Scaffold is involved in substantially the same — nearly identical in fact -- business as SI previously had been. The transfer of assets in fact appears to have had little effect on the business of these companies because the facts state that Scaffold "continued to manufacture scaffolding, using the same manufacturing plant, the same employees, and the same trade names for its products as [Seller Inc.] had used." Because the second company appears to simply be a continuation of the first company, and because Painters injuries and claims against Scaffold would arise out of this continued business of manufacturing scaffolding, Painter may maintain a cause of action against Scaffold under successor liability, to the extent that he would be able to maintain a cause of action against Seller Inc.

2. PAINTER v. LANDLORD

The general issue is whether Landlord is liable to Painter in agency theory by assuming control of the exterior of the building in the lease agreement.

The doctrine of caveat lessee says that a tenant "takes the premises as he finds them" and is liable for personal injuries suffered on his property. In a commercial building, a landlord is responsible for repairs and maintenance to common areas like the exterior of buildings. However, a landlord is still not responsible for personal injuries suffered in the common areas of buildings when the danger was created by his tenant and not by his failure to repair.

Agency liability will exist when a principal has Assent, benefit, and control over their agent's actions. In order to have given assent, the principal must have given the agent explicit written or oral authority to do something, or the agent simply assumes that they have the authority due to it being part of the nature of their fulfilling an assigned task. A principal must also benefit from an agent's actions, or be intended to benefit, and a principal must exercise some control over the nature in which the agent performs the actions.

In this case, even though Landlord assumed responsibility for the exterior of the building, Landlord did not grant Tenant any authority to contract with Contractor (or Painter). Nor did Landlord exercise any control over the Tenant's contracting with Contractor (and Painter). Thus, even though Landlord is the principal owner and assumed duties to repair the exterior, he cannot be held liable for the actions of his lessee Tenant, because Tenant was acting well outside of any principal/agent relationship between Landlord and Tenant. Moreover, Landlord cannot be held liable because any implicit authority that Tenant might have had to paint the exterior of the building was expressly revoked in writing by the terms of the lease.

More specifically, Landlord expressly assumed responsibility for the repairs of the outside of the building. Notwithstanding this, Tenant breached the lease agreement and hired Contractor and Painter to paint the outside of the building. The lease agreement required that Tenant give Landlord notice before altering the outside of the building. Landlord was entitled to notice here.

Landlord had no agency relationship with Painter or with Contractor or with Tenant in this case. Agency relationship only exists where a principal has given assent to the subcontractor's authority, benefits from it, and has control over the work done. When an agent acts outside of their express authority and moreover acts expressly against the written word of the principal, the principal is not liable for their actions. Tenant here acted against the express instructions of Landlord and against the express words of their lease agreement. As such, Landlord revoked any assent (implicit or explicit) for Tenant to make repairs to the outside of the building. Even though Tenant may have been acting to benefit Landlord by painting the outside of the building, in the face of the parties express agreement that Landlord would get notice and assume responsibility for repairs to the outside of the building, Tenant cannot bring liability to Landlord for personal injuries to Painter.

Painter will not be able to prevail against Landlord.

3. PAINTER v. CONTRACTOR

The issue is whether the workers compensation statutes bar an employer from being liable to his employee for negligence in New York.

The rule in New York is that employers cannot be sued for negligence by their employees. The New York Workers Compensation Statute prevents employer liability to their employees unless the employee was truly gravely injured. The case law in New York holds that grave injury is an extraordinarily high bar and in order for a worker to be able to recover from their employers they must be permanently disfigured or in pain or disabled as a result of their employers negligence. Notably, workers compensation laws do not bar an injured employee from suing a third party for products liability or negligence.

In this case, Painter is an employee of Contractor. They work in New York. As such, Contractor is statutorily required to maintain workers compensation insurance. Painter will be able to recover from Contractor so long as his injuries were incurred while carrying out his work assignments.

In sum, Painter was injured while painting the office building which was the task he was specifically employed for, thus Painter will be able to recover workers compensation from Contractor, but not sue him.

However, if this is not a New York company, Painter will be able to maintain a cause of action for negligence against Contractor if he shows that 1) Contractor owed a duty of care 2) he breached that duty 3) the breach was the actual and proximate cause of 4) Painter's injuries. In this case, Contractor owed Painter a duty of care as a reasonably prudent person. The reasonably prudent person duty of care requires people to act as a reasonable person would in similar circumstances. Contractor owed Painter a duty of care to not put him on scaffolding that he had made dangerous. Contractor breached his duty of care by removing the safety guard rail and assigning Painter, his agent, to climb on the scaffolding. By removing the guard rail, Contractor may have also created the danger to Painter --presuming that Painter fell off the scaffolding as a result of the lack of guard rail. Contractor also was the proximate cause of Painter's injuries

because the kind of injury one would foresee from removal of a guard rail would be that the person standing on the scaffold would fall and be injured. Proximate causation exists when the person injured is foreseeable — here Painter the person who Contractor assigned to climb the scaffolding without the guard rail. Painter was indeed injured by the fall. Thus, if this case were not in New York, Painter would be able to prevail against Contractor for negligence.

QUESTION 3

In 2000, Dad, a widower, duly executed a trust instrument with Best Bank as Trustee. The trust instrument named Dad as the income beneficiary of the trust for his life, with the principal to be paid to his son, Brent, on his death. The trust instrument provided that the trust could be freely amended or revoked. Dad funded the trust with $300,000.

In 2002, Dad duly executed a will which contained the following substantive dispositions:

FIRST: I leave $100,000 to my son Brent.
SECOND: I leave $500,000 to Best Bank, as Trustee, under the trust I established in 2000, to be added to the trust estate and to be held, administered and distributed pursuant to the terms thereof.
THIRD: I leave the residuary of my estate in equal parts to my Uncle Ed and to Hope Hospital.

Dad married Sue in 2005. Sue waived her right of election in Dad's estate pursuant to a validly executed pre-nuptial agreement. Dad and Sue had one child, a daughter, Gina, born in 2006.

In 2007, Dad amended the trust instrument creating his trust at Best Bank. The amendment, which was properly executed and acknowledged, provided that, upon Dad's death, the trust would continue to be held by Best Bank as Trustee, with the income to be paid to Sue for her life and the principal to be paid to Gina, upon Sue's death.

Dad died in 2008 survived by Brent, Sue and Gina. Uncle Ed predeceased Dad, survived by his son, Ned. Dad's will has been admitted to probate. Dad's net probate estate is $1,000,000.

Brent claims that in addition to his $100,000 specific bequest under the will, the trust principal should be distributed to him, in accordance with the terms of the trust on the date the will was executed, and that Uncle Ed's death created an intestacy as to one-half of the residuary, which he alone is entitled to receive.

Hope Hospital claims that the gift to the trust in Dad's will is invalid, and that the bequest falls into the residuary, which it alone is entitled to receive.

Ned claims that he is entitled to one-half of the residuary estate.

Sue claims that the income and principal of the trust should be paid respectively to her and to Gina, in accordance with the terms of the trust as they existed on the date of Dad's death. Sue

also claims that Gina, although not named in the will, having been born after the will was executed, is entitled to an intestate share in Dad's estate.

(1) Was the gift to the trust in Dad's will valid?

(2) What are the rights, if any, of Brent, Sue and Gina in the trust assets?

(3) Is Gina entitled to an intestate share of Dad's estate?

(4) How should the residuary estate be distributed?

ANSWER TO QUESTION 3

1. The issue is whether Dad's provision in his will referencing the trust constituted a valid "pour over" will provision.

Generally, New York wills are governed by EPTL. Unlike in certain other states, EPTL does not provide for the doctrine of incorporation by reference whereby a will provisions may incorporate an extrinsic document and be considered valid. However, an exception to EPTL/s rejection of this doctrine of incorporation by reference is a so-called "pour over" will provision.

A pour over will provision occurs where a bequest in a will is made to lifetime (inter vivos) trust instrument. Generally, such a provision is valid provided it expressly references the trust and the trust was created prior to or concurrently with the will itself. Dad duly executed the trust instrument in 2000 thereby creating a lifetime private express trust. Dad duly executed his will in 2002. In addition, Dad included in his will a bequest to the trustee of the trust with reference to the already-created trust. As a result, the bequest in the will would be deemed a valid gift to the trust and Best Bank, as trustee, would owe a fiduciary obligation to the beneficiaries of the trust to administer the gift from the will according to the terms of the already-existing trust.

2. The first issue is whether Dad had the right or power to amend the trust and the second issue is whether the fact that Dad's amendment occurred on a date after the valid execution of the will affects the validity of such amendment.

Turning to the first issue, New York statutorily provides that, absent express reservation of such rights, a lifetime trust is irrevocable and unamendable. As the prior sentence suggests, a settlor may in fact reserve the right to revoke and/or amend provided such reservation is expressly included in the instrument. On the facts, Dad did reserve the power to freely amend and revoke and, thus, he was entitled to make the 2007 amendment to the trust instrument.

It should be noted that, if Dad was not entitled to amend or revoke the trust, such amendment or revocation could only be accomplished with the consent of the beneficiaries - in this case, Brent. Furthermore, if Brent was a minor, Brent could not consent to such amendment or revocation (and nor could any guardian on his behalf).

Moving to the second issue, the probate court will generally give effect to valid amendments to a lifetime trust even where such amendments occur after valid execution of the will which incorporates them. Although an exception exists where the receptacle trust is amended by a third party rather than the settlor/testator, the facts indicate that Dad is both settlor and testator and, therefore, the court would give effect to Dad's amendments to the trust after execution of his will.

Giving effect to the amendment:

Brent is no longer a beneficiary under the terms of the trust As a result, Brent would have no interest in the trust res (principal or income).

Sue is a lifetime income beneficiary under the terms of the trust. Under EPTL, absent contrary agreement or provision, income trusts are spendthrift-protected. However, Dad is the income beneficiary until his death and Sue does not become income beneficiary until Dad's death. As a result, Dad would have to include express spendthrift language in order to preserve such protections for Sue. It is worth noting that, Dad, a settlor and income beneficiary would not be entitled to spendthrift protection himself either. In sum, Sue is a lifetime income beneficiary of the trust with no spendthrift protection.

Gina is the beneficiary of the principal of the trust. Upon Sue's death, Best Bank must distribute the entire balance of the trust to Gina. Note that no Rule Against Perpetuities issue arises as both Sue and Gina are lives in being.

3. The issue is whether the court would consider Gina a pretermitted child under the applicable New York pretermitted child statute.

Generally, the law statutorily will provide a share of inheritance for a child of a testator who is: (1) born after the execution of testator's will, (2) not mentioned in testator's will and (3) unprovoked for by other settlement.

On the facts, Gina was born in 2006 after Dad executed his will in 2002. In addition, Gina is not mentioned in the will (probably because she was not yet born). However, Dad did provide for Gina in the pour over will provision and via the avenue of the trust.

The statute protecting pretermitted children does not extend so far as to ensure equal shares for all children, but rather assumes an oversight where no settlement or mention of the child was made in a prior will. In such circumstances, a court will allow such a child to share equally in the gifts to the other children. However, as here, Dad provided for Gina through the trust and the court will respect Dad's intent that such provision was the extent to which Dad desired (or thought necessary) to provide for Gina. As a result, Gina will not be entitled to an intestate share of Dad's estate.

4. The first issue is whether the surviving residuary beneficiaries rule applies to Dad's residuary estate and the second issue is whether the anti-lapse statute saves Dad's gift to Uncle Ed.

Addressing the first issue, the surviving residuary beneficiaries rule states that, where there are two or more residuary beneficiaries and one predeceases the testator, the surviving residuary beneficiaries take the share of deceased residuary beneficiary. Applying this rule to the facts, Dad left his residuary estate to Uncle Ed and Hope Hospital. When Uncle Ed died, Hope Hospital became the beneficiary of Dad's entire residuary estate.

Moving to the second issue, an anti-lapse statute, where it applies, trumps the surviving residuary beneficiaries rule and saves the gift to the predeceasing residuary beneficiary in favor of his issue. The NY anti-lapse statute saves a gift (to the extent if fails due to the beneficiary predeceasing the testator) if such gift was made to: (1) the issue or sibling of the testator; and (2) the predeceasing person left behind surviving issue.

Assuming that Uncle Ed referred to Dad's actual uncle (rather than a nickname for Brent's uncle which would make Uncle Ed Dad's brother), the anti-lapse statute would not save Dad's gift because Uncle Ed was not Dad's issue or sibling. As a result, the surviving residuary beneficiaries rule would apply and Hope Hospital would be entitled to the entire residuary estate.

It should be noted that if Uncle Ed did in fact refer to Dad's sibling (an admittedly unlikely theory just above), then the anti-lapse statute would save the gift to Uncle Ed in favor of his surviving issue Ned. Continuing a bit further down this path, Ned and Hope Hospital would then each be entitled to a one-half share of the residuary estate.

ANSWER TO QUESTION 3

1. The issue is whether reference to another document or agreement in a will be incorporated by reference or invalid.

Under New York law, incorporation by reference into the terms of a will is not allowed. All terms must be set forth in a will that is in writing, signed or acknowledged by the testator at the end of the will in the presence of two attesting witnesses. However, there is an exception for pour-over wills. A pour-over will exist when a testamentary instrument leaves part or all of the estate to a trust. The trust must have (1) been in existence at the time the will was executed or (2) executed contemporaneously.

Here, the trust was in existence when the will was executed. The trust was created (and duly executed) in 2000 and the will was executed in 2002, The issue is that the trust was subsequently amended in 2007. However, since the trust had been duly created prior to the will's execution, the amendment will not prevent the pour-over will from becoming part of the will.

2. The issue is whether the trust amendment is valid and therefore worked to prevent Brent from having an interest in the trust.

The trust that Dad created in 2000 was a lifetime revocable trust since it was created during the settlor's lifetime and specifically included a right to freely amend or revoke the trust. Therefore, Dad was free to execute the amendment in 2007. The amended trust does not provide any interest for Brett. Therefore, he has no interest in the trust. Brent might argue that sue waived her

right to the trust when she executed the prenuptial agreement that included a waiver to her right of election. However, this only waived Sue's right to her elective share under the elective share statute. She did not waive her right to take under the will. Since the trust was validly amended, Sue has a right to income for life and Gina has a right to the principal upon Sue's death, or $800,000.

3. The issue is whether an after-born child will be allowed to take under intestacy.

Under New York law, a pretermitted child, one that is born after a will is executed, will nevertheless be allowed to take under the will if (1) the child is a firstborn child or after born child (born after the will executed), (2) is not mentioned in the will and (3) is not otherwise provided for. Where there is another child, the object is to treat all children the same. Therefore, the child would share in the portion of the will devised to the other children. Where there is a limited provision for the other child, the pretermitted child would be allowed to take his or her intestate share in order to prevent disinheritance. Where the other child or children is/are not provided for, the pretermitted child would take nothing.

Here, Gina is a pretermitted child since she was born after Dad's will was executed. She is also not mentioned in the will. However, she is otherwise provided for and therefore does not meet the requirements that would allow her to take an intestate share (even though it could be argued that Brent is, in the end, receiving a limited provision of $100K given that the entire estate is worth $1M. If she was not provided for by the trust, or if the trust is found to be invalid, Gina could take an intestate share since she then meets the requirements for a pretermitted child to take an intestate share.

4. The issue is whether the death of Uncle Ed caused Uncle Ed's one-half interest in the residuary estate to fail and vest in Hope Hospital or whether the one-half interest vests in Ned.

Under New York's Estates, Powers and Trusts Act, generally, when a beneficiary under a will dies, the bequest to that beneficiary fails. When a gift to a class is involved, whether the interest of the predeceased member will go into the residuary estate or be divided amongst the other class members depends on whether a group of persons is named (e.g.,, "my children") or whether individual members of the class are specifically named. Where they are specifically named, the gift will lapse and fall into the residuary estate unless New York's1 anti-lapse statute applies. The anti-lapse statute provides that, where a beneficiary under a will predeceases the testator, the gift will vest in the issue of such predeceased beneficiary if (1) the predeceased beneficiary is the issue or sibling of the testator and (2) such beneficiary leaves issue who survive the testator. Where the class members are named as a group, the predeceased member's share will be divided amongst the other members.

Here, the will provides that the residuary estate will go in equal parts to "my Uncle Ed and to Hope Hospital." Thus, the beneficiaries are specifically named. Uncle Ed has predeceased Dad. Since the beneficiaries are specifically named, New York's anti-lapse statute can be looked to save the gift. However, though Uncle Ed left issue, Ned, who survived Dad, Uncle Ed is not the issue or sibling of Dad - he is his uncle. Therefore, the anti-lapse statute does not apply and the gift goes 100% to Hope Hospital, the other residuary beneficiary.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2009 QUESTIONS AND ANSWERS

QUESTION 4

GasCo contracts with landowners to obtain leasehold rights for it to enter landowners' property and drill for gas reserves. Widow, an 80 year old woman who owns a parcel of vacant land in Cortland County, is in dire need of monies for medical expenses. In November 2007, GasCo discussed a potential lease with Widow that would allow GasCo to drill upon her land for the next 25 years. In return, GasCo would pay an up-front lump sum payment to Widow of $5 per acre for drilling rights as soon as a lease was signed and 3% royalties each year, if marketable natural gas was produced from Widow's land.

Widow contracted with Surveyor to provide a legal description for the property to be leased. Surveyor prepared a report that included an accurate legal description of the parcel. In addition, although not asked to do so and without charge, Surveyor included in the report that he calculated the size of the parcel to be 1,000 acres. Widow provided Surveyor's full report to GasCo. Relying upon Surveyor's report, GasCo included Surveyor's legal description of the parcel in its draft of the proposed lease. Based on Surveyor's calculation, the lease recited the up-front amount to be paid as $5,000, expressly stating it was based on $5 per acre for 1,000 acres.

GasCo presented the proposed lease to Widow who said she would discuss it with her attorney and get back to GasCo. GasCo said they needed her to sign the lease immediately, and they would not have time for her attorney to review the lease. Not wanting to lose her opportunity to obtain the monies she desperately needed, Widow signed the lease presented to her by GasCo. GasCo then signed the lease and paid $5,000 to Widow.

GasCo had signed leases with other landowners in the Cortland County area for identical drilling rights, but GasCo had paid the other property owners $100 per acre for a five year lease term and agreed to pay 10% royalties each, for gas produced from those leased properties.

Widow soon became aware of what other landowners in Cortland County were receiving for their leases. In January 2008, Widow spoke to her attorney, Lawyer, about the difference between what she had received and what her neighbors were receiving.

Lawyer orally agreed to try to renegotiate Widow's lease with GasCo, in return for which he would receive a contingent fee of one-third of any additional revenues she received from GasCo over and above the amount she had already obtained. Widow agreed to this arrangement.

When Lawyer contacted GasCo to obtain compensation for the lease comparable to terms of the leases with other landowners in Cortland County, he was advised that GasCo would not pay anything more than the amounts provided in Widow's lease.

Lawyer also informed GasCo that, in fact, Widow had been underpaid because Surveyor erred and the parcel in question was not 1,000 acres, as calculated by Surveyor, but 2,000 acres. GasCo, after confirming that Lawyer was correct, nonetheless refused to make any adjustment to the price.

Widow instructed Lawyer to commence suit against GasCo. Because of his own health issues, Lawyer advised Widow he could no longer handle Widow's matter. Widow has come to you asking your advice:

(1) Discuss the legal theories and evidence upon which Widow may seek to:

(a) Obtain the difference between the up-front lump sum paid to Widow and the amount she should have received at that time for the actual acreage leased.

(b) Set aside the lease agreement in its entirety.

(2) What are Widow's rights, if any, against Surveyor for his erroneous calculation?

(3) What is Lawyer entitled to be paid, if anything, for the work which he performed prior to withdrawing, if Widow obtains a monetary recovery from GasCo?

ANSWER TO QUESTION 4

1. The first issue is whether mutual mistake will allow for reformation of a lease with drilling rights.

This is a contract for the lease of land, therefore common law applies, and not Article 2 of the UCC. In order for there to be a valid contract there must be an offer, a manifestation to be bound, an acceptance, consideration, and the terms must be definite. When the contract involves an interest in land, it must be in writing to satisfy the statute of frauds. In this case there was a valid contract because GasCo. made an offer which the widow signed. It stated consideration, it was in writing and it had definite terms.

Contracts may be rescinded or reformed when there is a mutual mistake made by the parties that is material to the contract The equitable remedies of rescission or reformation will not be allowed when the only mistake was as to value or price. Reformation is available when the parties relied on a mistaken fact, and equity states that fairness requires the contract be re-written. If one party knew the other party was operating under another assumption, then the innocent party's terms would govern.

In this case there was a mutual mistake that was material. Both the widow and GasCo were operating under the assumption that there were only 1000 acres, because the widow after seeing the report gave it to GasCo. and GasCo relied on it in making the lease, and as such the widow was only paid for 1000 acres. Furthermore, the amount of the land leased is material because it is a drilling contract, and whether GasCo can drill 1000 or the full 2000 is material. And, the

mistake did not merely go as to value or price, but went to the amount of land GasCo was entitled to drill on.

GasCo may attempt to argue the parol evidence rule, that the contract was a full and integrated writing and the contract can not be re-written, but the parol evidence rule does not apply to a party seeking to establish a mutual mistake and a problem in the forming of the contract.

Therefore, because the lease of the land involved a material mutual mistake made by the parties, Widow may seek to have the contract reformed and not be barred by the parol evidence rule.

2. The second issue is whether GasCo acted unconscionable toward the Widow.

Unconscionability has two components. Procedural unconscionability involves unfair bargaining positions or experience, such that the superior party is taking advantage of the less experience party. Substantive unconscionability involves an unconscionable result, one that is said to shock the conscience of the court.

In this case there appears to have been both. The widow was 80 years old and in need of medical treatment. When she asked to have her attorney read over the lease GasCo rushed her and told her she had to sign the lease immediately. This constituted procedural unconscionability. Additionally, there was substantive unconscionability because it would shock the conscience of the court that this 80 year old widow who needed medication and was rushed to sign the lease, leased her property for 20 more years than any of the surrounding land owners, at $95 less per acre, and at only 3% royalties when other land owners were getting 10% royalties.

Because GasCo's actions in dealing amount to procedural and substantive unconscionability, Widow may seek to have the entire contract set aside.

Additionally, Widow may try to argue she was under economic duress to lease the land because she needed medicine. However, because GasCo was not the party applying the economic duress that argument would most likely not be successful.

3. The third issue is whether a party may sue another party for negligence when they voluntarily undertook a duty.

Negligence is a tortious claim that states a duty was owed to a foreseeable person and that duty and breached by someone not acting reasonably prudent and the breach caused damages.

In this case Widow would be able to sue the surveyor for his negligent representation that the land was only 1000 acres when it was in fact 2000 acres. Surveyor initially had no duty to state the amount of acres, but upon undertaking such duty voluntarily, he obligated himself to act as a reasonable prudent surveyor. Widow was a foreseeable victim because she was the person for whom the survey was being prepared. Surveyor breached the duty to prepare an accurate description of acres by riot accounting for half of the land. A reasonable prudent surveyor would not have stated the land was only 1000 acres when it was in fact 2000 acres. The breach of the duty by the surveyor caused the widow to be paid substantially less than she was otherwise due,

because but for the error by the surveyor the widow would have been paid twice as much, and because the widow was the client, it was foreseeable that such an error would result in such loss of profit. Lastly Widow suffered damages in that she was only paid half of what she was due under the contract.

Coincidentally, If surveyor knew GasCo would rely on the survey as well, GasCo may be able to sue as a foreseeable plaintiff under third party beneficiary law.

4. The fourth issue is whether a lawyer who takes a case on an oral contingency fee is entitled to payment.

New York Professional Code of Conduct states that an attorney may take a case on a contingency basis if the case does not involve a criminal matter or a collection of alimony or child support. The agreement must be in writing and must state the contingency rate, as well as what cost and litigation expenses the client would be responsible for paying.
New York Professional Code of Conduct also states that an attorney may not take a case unless they are competent to do so. Competency means several things. It means substantively knowledgeable in the law at issue. It means physically and mentally capable to take on the representation. And, it means the attorney has enough time to donate to the matter. If any of these things are missing the attorney may seek assistance from qualified counsel, but the client must consent, the overall fee must be fair and the amounts paid must be accurately representative of the work actually done.

In this case the attorney orally agreed to renegotiate the lease with GasCo for one-third of anything widow received from renegotiations. This was wrong, and the attorney is subject to discipline for such actions because the agreement should have been in writing.

The attorney however did not agree to represent the widow in litigation. This was good because he was not physically able to, had he attempted to and not been able to complete the task, he would be subject to discipline. But rather he directed her to seek other counsel for the litigation. If Widow recovered anything from the litigation the first attorney would be entitled to nothing, not only because the contingency fee was oral, but also because even if enforceable, the amount paid would not be a result of any renegotiating he did with GasCo.

ANSWER TO QUESTION 4

1. a. The issue is how Widow can attempt to recover the difference between her lump-sum payment and the amount she should have received based on the actual acreage.

A contract is a legally enforceable agreement. To be valid, there must be an offer, acceptance, and consideration. Here, GasCo offered Widow a lump-sum payment of $5/acre plus 3% royalties/year in exchange for a 25 year lease on Widow's property in Cortland County. Widow accepted this offer. Based on a report prepared by Surveyor, who was hired by Widow, the parties erroneously believed the Widow's land was comprised of 1000 acres. As a result, GasCo paid Widow $5000. However, after the lease was signed it was discovered that Widow's property

was actually comprised of 2000 acres. Widow seeks to recover payment for the additional acreage.

Widow has two options. First, she may bring a suit to construe the terms of the contract. The plain meaning of contract language will not be disturbed. However, when a patent or latent ambiguity exists in the contract, parties may offer extrinsic evidence to establish the true meaning of the contract terms. Here, the contract stated that GasCo would pay Widow $5000, based on a payment structure of $5/acre. It appears that while the lease included Surveyors legal description of the land, it did not include a number of acres. Widow can argue that the terms of the contract do not state that GasCo will pay $5000 for her land, but rather that GasCo agreed to pay $5/acre, and because there are actually 2000, not 1000 acres, GasCo owes her another $5000 to fulfill the contract terms. Widow may be able to win a suit based on ambiguity.

Widow can also bring a claim based upon mutual mistake. Here, both parties believed, albeit incorrectly, that they were contracting a lease for 1000 acres. When both parties make a mutual mistake, a court may set aside or reform the contract on that basis. However, if one party knows or has reason to know of the other parties' mistake, the contract will be interpreted based on the understanding of the unaware party. Here, GasCo can argue that, as owner of the land, Widow should have been aware of the amount of acreage at issue. It is true that she relied in good faith on a report provided by a professional, however the amount of acreage here is double what Widow initially thought and it seems that a reasonable landowner would be aware, at least approximately, of the size of their estate, and this large of a mistake should not have occurred. Widow is unlikely to win an argument based on mutual mistake.

b. The issue is upon what grounds Widow can attempt to set aside the entire lease agreement.

Widow has two grounds upon which to challenge the validity of the lease agreement: economic duress and unconscionability.

Economic duress occurs when there is a pending agreement between two parties, one party pressures the other to agree to certain terms, to modify terms, or to agree immediately; the pressured party agrees simply to ensure the contract will be completed; and there is no reasonable alternative.

Here, there was a proposed lease agreement, where GasCo would pay Widow $5000 and 3% royalties for a 25 year lease on her land. Widow wished to discuss the lease with her attorney before making a decision, and told GasCo of her intent. GasCo insisted that Widow sign the lease immediately, without consultation with her attorney, or the opportunity would be lost. Because of overwhelming medical expenses and a desperate financial situation, Widow forwent the opportunity to discuss the lease with her attorney and signed the agreement.

There was a proposed agreement, and GasCo pressured Widow to decide immediately. Widow agreed for fear of losing the payment that would come as a result of the deal. The real question here is whether there were other reasonable alternatives. Widow is 80 years old and in poor health. Presumably, she cannot simply get a job to cover her medical expenses. However, while this leasing opportunity may have been lost, Widow likely had the option to sell a portion of her

acreage or lease it to another gas company. It is unlikely that a court would find economic duress in Widow's situation.

Widow may next try to cancel the lease agreement on the basis of unconscionability. Unconscionability is a drastic remedy, which is rarely used by the courts. An agreement is unconscionable when it is so unfair as to shock the conscience.

Procedural unconscionability refers to unfairness in the making of the deal; that is, the negotiation period, and not necessarily the terms of the deal itself. Here, Widow was 80 years old, in poor health, and in desperate need of money. It is unclear whether GasCo was aware of her situation, but it seems likely they were. Pressuring Widow to make the deal immediately, without allowing consultation with her attorney, turned the agreement into something similar to an adhesion contract—a take it or leave it type deal. GasCo had superior knowledge of similar contracts and the value of the gas and, as a large corporation with substantial resources, was in a significantly better bargaining position,

Substantive unconscionability refers to the fairness of the terms of the agreement. Here, GasCo offered to pay Widow only $5/acre and 3% royalties in exchange for a 25 year lease. In the same county, GasCo was contracting with other owners who were paid $100/acre and 10% royalties for a 5 year lease. These terms are drastically different and GasCo, the makers of the contracts, was obviously aware of the difference. When looking at the pressure exerted on Widow, especially in light of her dire financial situation and vulnerability due to age and health problems, combined with the unfairness of the terms Widow was offered in comparison to similar contracts, a court is likely to find that GasCo's agreement with Widow was unconscionable.

2. The issue is what rights Widow has against Surveyor for his erroneous calculation of acreage.

Widow can bring a breach of contract suit or a malpractice suit against Surveyor.

A contract requires offer, acceptance, and consideration. Widow is unlikely to prevail in a breach of contract suit because while she entered into a contract with Surveyor to provide a legal description of the property, there was no contract regarding the establishment of the acreage. Widow never extended an offer including a provision regarding the amount of acreage. Further, Surveyor provided this calculation free of charge; therefore there is also no consideration.

Widow can bring a malpractice action against Surveyor. Assuming a real estate surveyor is a sufficiently professional occupation, Widow has three years in which to bring a claim against Surveyor for his erroneous calculation. To establish malpractice, Widow must show that Surveyor owed her a duty, breached the professional standard of care, and that breach was the actual and proximate causation of damages. Here, Surveyor owed a duty to act as a reasonable professional within the community, a level of care that needs to be established through expert testimony. Surveyor breached his duty when he failed to make an accurate calculation as to the amount of acreage encompassed in Widow's property. This breach was not minor—Surveyor miscalculated the amount of acreage by half. This report was used to calculate the amount of acres and therefore payment GasCo should make to Widow. But for this erroneous calculation,

the parties would have engaged a professional to determine the acreage or determined pricing on another basis. It was foreseeable that Widow, an 80 year old woman in poor health, would rely on the report conducted by a trained professional. Finally, Widow was damaged by the breach because she was paid by GasCo for only half of her total acreage.

3. The issue is the amount Lawyer is entitled to recover.

Lawyer and Widow entered into a contingent fee agreement in which Lawyer was going to renegotiate Widow's lease with GasCo, and in exchange, he would receive one-third of any additional revenue Widow received from GasCo. Generally, a contingent fee agreement, or any representation agreement in New York where the fee is expected to be over $3000, must be in writing. The writing must disclose the basis of the fee calculation, any expenses the client is responsible for, the scope of the representation, and the right of the client to settle disputes through arbitration. However, an agreement does not have to be put in writing where the agreement is between the lawyer and a current client for whom the lawyer has performed similar services in the past. Here, while is appears Lawyer has represented Widow in the past, there is no indication that Lawyer has ever performed similar work as is at issue here, relating to the lease of Widow's land. Therefore, the contingent fee agreement was required to be in writing. Because it is not, the oral agreement is not enforceable.

However, Lawyer will be permitted to recover from Widow on the basis of quasi contract. Quasi contract allows a party to recover the reasonable value of a benefit conferred to avoid unjust enrichment. Here, Lawyer will be able to recover, on a quantum meruit basis for the work he has engaged in prior to his withdrawal. This includes the attempted negotiations with GasCo to modify the contract based on the amount other landowners were receiving and based on the inaccurate acreage payment. The amount Lawyer is entitled to will be determined by the court based on the number of hours worked, the expertise of Lawyer, the rate commonly charged in the community for similar work, any time constraints imposed by Widow, the nature and quality of the work, and the novelty of the question presented.

QUESTION 5

Don was a maintenance worker at Doctor's office and had a key to the office. Don, who was addicted to prescription pain-killers, decided to go to Doctor's office to steal drugs. At 2:00 a.m., when he thought that the office was empty, Don used his key to enter Doctor's office. As he approached the room where drugs were stored, he noticed through a window in a closed door that Nurse was asleep on the couch in the staff room. Don placed a heavy piece of equipment against the door to prevent Nurse from exiting the room.

Nurse awoke and through the window observed Don moving the equipment. Nurse then saw Don breaking into the cabinet where drugs were ordinarily kept, but it was empty, and he left without taking anything. Nurse attempted to exit the room but was unable to move the heavy equipment blocking the door. Nurse then called the police. The police soon arrived and freed Nurse, who told them that Don had tried to burglarize the office.

The next day, Don was arrested. At the time of his arrest, Don was given the Miranda warnings and questioned about his involvement in the incident. He refused to answer any questions, and he did not request an attorney. Thereafter, Don was indicted for the crimes of burglary and unlawful imprisonment.

Prior to Don's trial, his attorney properly notified the prosecution that Don's defense was based on an alibi that placed him elsewhere during the incident in question.

At trial, in its direct case, the prosecution presented evidence of the above facts. In her testimony, Nurse identified Don as present at the scene at the time that the alleged crimes were committed. During the defense's case, Don's wife testified that she was with Don in their home at the time of the alleged crimes. Don did not take the witness stand in his own defense.

After the defense rested and at the conclusion of all the evidence, Don moved for a trial order of dismissal on the grounds that: (a) as he had a key to enter Doctor's office and nothing was stolen, the evidence did not establish the crime of burglary; (b) the evidence did not establish the crime of unlawful imprisonment; and (c) his alibi had been established. The judge reserved decision on Don's motion.

Overruling Don's objection, the court allowed the prosecution to argue in its closing argument that Don's failure to mention the alibi at the time of his arrest was an indication that the alibi was fabricated.

(1) How should the court rule with regard to grounds (a), (b) and (c) of Don's motion for a trial order of dismissal?

(2) Did the court rule correctly in overruling Don's objection to the prosecution's closing argument?

ANSWER TO QUESTION 5

1. A court should dismiss a case if there the prosecution does not present a prima facie of wrongdoing. On a dismissal motion the court looks to the evidence in the light most favorable to the non-moving party and decides if a prima facia case of the crime or crimes charged has occurred

a. The issue presented is whether a burglary is committed if the accused party entered by using keys and nothing was in fact stolen?

Under common law burglary was the breaking and entering of a dwelling at night with intent to commit a felony. New York has since modified this crime. In New York, under the Penal Law, burglary occurs when one enters a building or dwelling to commit a crime. The entering into a building or dwelling does not need to be actual breaking and entering, but rather an unlawful entry or an unconsented entry. For instance, it will be unlawful entering even if a window or

door was open and there was not in fact a "breaking" or when one stays in a building with intent to commit a crime.

Here, Don was a maintenance worker at a Doctors office. He had keys to the office. One night he entered the Doctor's office to steal drugs. He entered in the early morning as he thought no one would be around to commit this crime. Don thus entered the premises clearly to commit the crime of larceny - stealing drugs. Even though he did so with a key he had, the Doctor's office did not approve Don to use the key to enter the building at night. He clearly went beyond the scope of the permission he had just to enter during the day to fix things or clean up as a maintenance worker. The intent is to enter the building unlawfully, not to enter it in the most convenient manner

Furthermore, it is irrelevant that nothing in the building was stolen. Burglary occurs when the accused enters with intent to commit a crime, regardless of whether one in fact took place.

As a result, the case should not be dismissed, since the facts, if viewed most favorable to the prosecution, make out a prima facia case that a burglary occurred.

b. The issue presented is whether a person accused of false imprisonment need to intend to unlawfully imprison someone?

Under New York's Penal Law, a person is guilty of unlawful imprisonment when he restrains another person against there will. Intent is not the specific intent to imprison someone but a general intent to do the acts to constitute the imprisonment. To be committed of the crime, the person must have the intent to restrain another, even if that belief is in good faith. Intent may be imputed based on the circumstances.

Here, Don entered the Doctor’s office at 2:00 am. He had the intent to steal drugs from the Doctor's office. Before entering the room he noticed the Nurse asleep on the couch. To prevent her from exiting the room he placed a heavy piece of equipment against the door. Don failed to remove the equipment and was needed to be let out by the police.

It is clear that Don knew that the Nurse was in the room. He blocked the door to prevent her from leaving if she had awoken and to prevent her from discovering him. The nurse was restrained since she was unable to reasonably exit the room (who knows what floor she was on? if she could have gone out the window - but this does not seem material). Don intentionally restrained her in this room in an effort to steal drugs.

As a result, when the evidence is viewed most favorably to the prosecution, a prima facie case of unlawful imprisonment was set forth and the court should not dismiss the action.

c. The issue presented is the burden on the defendant to prove an alibi and its effect on a prosecution's case?

An alibi can be presented by a defendant with proper notice before trial to the prosecution. An alibi is a tool used by defendants to prove that they are not guilty of a crime because they were

somewhere else. An alibi is not an affirmative defense, since the defendant is not admitting to guilt of the crime, rather the defendant is denying the crime all together. Rather, it is up to the trier of fact to decide if they believe the defendant's testimony. If they do then this clearly would not prove the defendant's guilty beyond a reasonable doubt on all elements of the crime charged. An alibi charge may be included in jury instructions if the judge believes it was adequately established. Nevertheless, it will be up to the trier of fact to decide the weight of the evidence and alibi.

Here, Don gave notice to the prosecution that his defense was based on an alibi, placing him someone else during the incident in question. If the trier of fact believes Don then they will subsequently acquit him of the crime. Don does not have a burden per se as in an affirmative defense, rather the alibi will be weighed with other factors at trial for the trier of fact to determine if Don was at the place he was at, and even if not, whether the prosecution made out that Don committed the crime charged beyond a reasonable doubt.

As a result, the alibi may be considered and included in the jury instructions. Nevertheless, this does not acquit Don of the crime, as it will be up to the jury to decide if it is in fact true based on the facts.

2. The issue presented is whether the prosecution may mention in a closing argument the lack of an alibi at the time of a defendant's arrest?

Under the 5th amendment citizens are protected against self-incrimination. This is embedded in Miranda rights as a suspect's "right to remain silent." A suspect has this right to remain silent to protect his interests. The lack of denial may be admitted against a witness or defendant when a reasonable person in that witness's or defendant's situation would have said something. This is to impute knowledge of guilt. However, generally, people have no obligation to say anything and there refusal or silence should not be held against them.

Here the prosecution mentions in his closing argument that Don's failure to mention his alibi at the time of arrest was an indication the alibi was fabricated. At the time of arrest Don had a constitutional right to remain silent if he so chose. Don chose to remain silent - exercising his constitutional right. Don did not have an obligation to state an alibi at this time or later - at least until the trial to give notice to the prosecution. It is another story if Don changed his alibi. This however is not the case. The prosecution is attempting to use Don's silence as a sword and as a tactic for incrimination.

As a result the court did not rule correctly. The prosecution's statement should be stricken from the court. This should be appealed by Don to decide whether this was a harmless error or whether it was such a gross error as to constitute anew trial

ANSWER TO QUESTION 5

1. a. The issue is whether a defendant may be guilty of burglary if he has a key and does not steal any property from within the building.

In New York, the crime of burglary requires entering and remaining unlawfully in a building with intent to commit a crime inside. Unlike the common law definition of burglary, there is no requirement of breaking. Unlawful entry or remaining unlawfully in a building is sufficient. The fact that a crime is not in fact committed is not a defense. If the defendant enters the building with intent to commit a crime, that is sufficient. Moreover, New York's definition of burglary includes the "remaining unlawfully" inside language so as to address the potential problems of concurrence of the requisite mens rea and act.

Don was a maintenance worker at the Doctor's office, and therefore had a key. However, when he went to the office at 2:00 am to commit a crime, he was in fact entering the building unlawfully. The fact that there was no physical breaking does not absolve him of guilt for the crime of burglary. Also, Don entered and remained in the building with intent to commit larceny. Larceny is the trespassory taking of personal property of another without their consent with intent to permanently deprive them of their interest in the property, Don entered the office with the intent to wrongfully take the pain-killers with the intent to permanently deprive Doctor of his interest in him. The intent to commit larceny is the requisite mens rea here. The fact that such crime was not achieved does not preclude a guilty verdict for the crime of burglary. Moreover, Don remained unlawfully in the building, in which time he formed the intent to unlawfully imprison the nurse. Therefore, the court should not dismiss the burglary charge.

b. The issue is whether the prosecution has established the facts supporting a guilty verdict for unlawful imprisonment.

Under New York Penal Law, unlawful imprisonment involves the unlawful confinement of a person against their will providing no means of exit.

Here, Don believed the nurse was asleep when he began moving the heavy equipment to block the door. However, he was blocking the door to prevent her exit, thereby evidencing his belief that she might awaken. Blocking the door prevented the nurse from exiting, and left her with no means of escape. The fact that she could call the police was not a sufficient means of exit. Therefore, the court should not dismiss the unlawful imprisonment charge.

c. The issue is whether the defendants wife's testimony is sufficient to establish the alibi defense.

An alibi defense is a regular rather than an affirmative defense. A defendant is entitled to a jury instruction on such defense if he has proffered evidence tending to support such defense. There is no requisite number of witnesses that must testify in order to establish an alibi defense. The prosecution is free to impeach a potentially biased witness on cross-examination and present evidence contradicting such defense. Ultimately, it is the prosecution that must establish beyond a reasonable doubt that the defendant was the one who committed the charged crime.

Here, Don's wife testified that Don was at home with her at the time of the alleged crimes. Although she is a biased witness whose credibility should have been impeached by the prosecution on cross-examination, the jury must determine whether the prosecution has proved every element of their case beyond a reasonable doubt, and may consider evidence proffered by

Don which would tend to raise doubt. It is therefore up to the jury, not the judge, to determine whether the prosecution was unable to prove beyond a reasonable doubt that Don was the perpetrator.

2. The issue is whether the prosecution may comment on a defendant's valid invocation of his Miranda rights — specifically, the right to remain silent.

The fifth amendment provides that a person is not compelled to provide testimony that may tend to establish a link in a chain of evidence that could lead to prosecution. In furtherance of this right, pursuant to Miranda, a party who has been arrested must be read Miranda warnings. The warnings include, inter cilia, the right to remain silent and the right to an attorney. The invocation of the right to remain silent must be scrupulously honored (though the police may, after some time has passed, may attempt to initiate discussions). The right to remain silent is a fifth amendment constitutional right that cannot be commented on by the prosecution. Just as a defendant may not be compelled to incriminate himself, his silence itself may also not be used to incriminate him. However, if the prosecution does improperly comment on the defendant's invocation of his fifth amendment rights, such comment will not provide a grounds for reversal, should the defendant ultimately be convicted, if the prosecution can prove that such error was harmless error. A showing of harmless error requires the prosecution to prove beyond a reasonable doubt that there was sufficient evidence for a finding of guilt beyond a reasonable doubt even absent the constitutional violation.

Here, the prosecution should not have commented on Don's invocation of his fifth amendment right to silence. The prosecution was in essence using Don's silence as evidence against his alibi defense. Such comment was improper and violated Don's fifth amendment right. However, if the prosecutor would likely be able to prove that this comment was harmless error, as Don's guilt with respect to the burglary and unlawful imprisonment charges were harmless error.

MPT

Ronald v. DMV

In this performance test, applicants work for a sole practitioner who represents Barbara Ronald in an administrative proceeding before the Franklin Department of Motor Vehicles (DMV). The DMV suspended Ronald's driver's license for allegedly operating a motor vehicle with a blood-alcohol level of 0.08 percent, the legal limit. Ronald requested an administrative hearing to challenge the suspension. Because this is an administrative proceeding, and not a criminal prosecution, the DMV must prove by a preponderance of the evidence that Ronald drove a motor vehicle with a prohibited blood-alcohol content. The administrative hearing officer has heard the evidence and has directed the parties to submit written briefs. Applicants' task is to draft a persuasive memorandum arguing that the police officer did not have a reasonable suspicion warranting the stop of Ronald's car, that the hearing officer cannot rely solely on the blood test to find that Ronald was driving with a blood-alcohol content of 0.08 percent or more, and finally, that in light of all the evidence, the DMV has not proved that Ronald was operating a motor

vehicle while intoxicated. The File contains the memorandum from the supervising attorney, the administrative hearing transcript the police report, and the blood-alcohol test results. The Library contains a selection of Franklin statutes and three cases.

ANSWER TO MPT

LAW OFFICES OF MARVIN ANDERS
1100 Larchmont Avenue
Hawkins Falls, Franklin 33311

MEMORANDUM

To: Marvin Anders
From: Applicant
Date: February 24,2009
Subject: Ronald v. Department of Motor Vehicles

1. The police officer did not have reasonable suspicion to stop Barbara Ronald.

According to the written report of Officer Barry Thompson, he began following Ms. Barbara Ronald at 1:00 AM as she pulled out of the Lexington Club parking lot. He thereafter followed her, and stated that he saw her vehicle weaving. (Exhibit 1) However, under examination, he admitted that he did not see Ms. Ronald weaving until after he had begun following her car. (Transcript at 4) In fact, her weaving did not begin until after he had been following her car closely for approximately a mile with his high-beam headlights on. (Transcript at 3) This fact renders the instant case readily distinct from Pratt v. Department of Motor Vehicles (FT. Ct. App. 2006), where the officer first observed that the defendant's vehicle was "canted" and only thereafter followed it. Pratt at 9.

More importantly, the Court in Pratt explicitly rejected the notion that there could be "a bright line rule that weaving within a single lane alone gives rise to reasonable suspicion." Id at 10. The Court in Pratt further stated that the notion of weaving alone within a lane would further conflict with its earlier holding in State v. Kessler (Dr. Ct. App. 1999), and that the DMV's proposed standard would not only potentially subject many members of the public to unconstitutional invasions of privacy, but would be "in effect no standard at all." Pratt at 10.

While it should be noted that the Court in Pratt did find reasonable suspicion, that finding may be readily distinguished by the fact that the defendant in that case weaved, canted into the parking lane" and "wasn't in the designated traffic lane." Id at 11. In marked contrast here, Ms. Ronald is said in the police report merely to have been "weaving back and forth in her lane." (Exhibit 1)

For the foregoing reasons, the Court must find that Officer Thompson's observation of Ms. Ronald's "weaving" is not sufficient to constitute reasonable suspicion under binding precedent set forth by the Court of Appeal in Pratt and Kessler, and would therefore constitute a violation of Ms. Ronald's constitutional rights under the Fourth Amendment to the United States

Constitution, since absent the DMV's already-rejected bright line weaving rule, stopping someone in Ms. Ronald's position must be based on more titan the officer's "inchoate and unparticularized suspicion or “hunch." Pratt dX 11,. citing Terry v. Ohio (U.S. 1968). It is further demonstrable that Officer Thompson began trailing Ms. Ronald on nothing more than a 'hunch,' since he began his actions based merely on the fact that she exited the Lexington Club parking lot, which serves to underscore the merely "inchoate and unparticularized suspicion or “hunch" utilized by Officer Thompson.

2. The Administrative Law Judge cannot solely rely on the blood test report to find that Ms. Ronald was driving with a prohibited blood-alcohol concentration

While it is generally true that section 353 of the Franklin Vehicle Code provides generally that the Department of Motor Vehicles ("DMV") may immediately suspend a license on receipt of a blood-alcohol test result of .08 or greater, subsection b) of the statute in question explicitly notes that the DMV "shall bear the burden" of proving that matter. Moreover, while Franklin Code of Regulations s. 121 states that a forensic blood alcohol test performed by a forensic alcohol analyst may be admitted in any administrative suspension hearing, without the requirement of a further foundation, s. 115 of the Franklin Administrative Procedure Act states that hearsay evidence shall be admissible in an administrative hearing if either, it would be admissible in a judicial hearing as a generally recognized hearsay exception or, if not falling into such a category, "it may nonetheless be used for the purpose of supplementing or explaining other evidence." S. 115

Hearsay, as defined by Franklin Evidence Code s. 1278, "is a statement, other than one made by the declarant while testifying at a judicial proceeding, offered in evidence to prove the truth of the matter asserted." S. 1279 further states that hearsay is not admissible "except provided by this Code." Turning to the specific evidentiary statute most germane to this matter, section 1280 defines the public-records exception to hearsay, when the writing in question a) "was made by and within the scope of duty of a public employee, (b) the writing was made at or near the time of the act, condition, or event, and (c) the sources of information and method and time of preparation were such as to indicate its trustworthiness." Emphasis added.

As written in the Blood Alcohol Test Results admitted into evidence as Exhibit 2, there are two factors that prevent it from being relied upon under FEC s. 115. First, in order for the Test to constitute a public record for hearsay exception purposes under FEC s. 1280, as indicated above, the writing had to be made "at or near the time of the act, condition or event." As the Test itself indicates, however, the sample was analyzed on December 21,2008 (two days after the sample was taken, see Exhibit 1), but the certified copy, was not signed by the Records Custodian until December 29,2008, eight days later. In a case before the Court of Appeal, the Court held that where an official report did not come out until over a month after the defendant's arrest and blood draw, that it did not satisfy the public-records hearsay exception. Schwartz v. Department of Motor Vehicles (Fr. Ct. App. 1994) In that case, the Court stated that the blood test report could be used in an administrative procedure only "for the purpose of supplementing or explaining other evidence." Schwartz at 13, citing Franklin APA s. 115. Accordingly, while the Administrative Law Judge could properly refer to the Test "together with the police officer's observations" it may not do so merely on the basis of inadmissible hearsay. Schwartz at 13.

Furthermore, there is a second factor that lessens the utility of the Test under FCR s. 121, which states that a "forensic blood analysis signed by such a forensic alcohol analyst and certified as authentic by a records custodian...may be admitted... without further foundation." As Exhibit 2 demonstrates, while the name Daniel Gans, a duly certified Forensic Alcohol Analyst appears, the signature on the Test report is "Daniel Gans signed by Charlotte Swain." Charlotte Swain, who also signed her own name, is stated as being a Senior Laboratory Technician, and not a Forensic Alcohol Analyst, as required by statute.

For the foregoing reason, this case bears a striking resemblance to the binding precedent of Rodriguez v. Department of Motor Vehicles (Fr. Ct. App. 2004), in which the blood-alcohol test was performed by an unauthorized individual, a "criminalist." As the Court stated, "Section 121 authorizes only "forensic alcohol analysts" to perform forensic alcohol analysis - and none others, including "criminalists."" Rodriguez at 15.

Based on the two inescapable facts that the Test was not properly recorded pursuant to applicable statutory requirements, as further elucidated by the Court of Appeal in two separate cases, the Administrative Law Judge cannot solely rely on the blood test report to find that Ms. Ronald was driving with a prohibited concentration, and indeed, should place extremely little reliance on said Test.

3. The DMV has not met its burden of proving, by the preponderance of the evidence that Ms. Ronald was driving with a prohibited blood-alcohol concentration

As more fully stated in sections 1 and 2 of this memorandum, the DMV has failed to demonstrate either viable evidence of Officer Thompson's 'reasonable suspicion' in stopping Ms. Ronald or that the blood-alcohol test administered comported with applicable statutes so as to qualify as a public-records exception to the hearsay rule. This particular combination of failures on the DMV's part renders the instant case analogous to Rodriguez, cited above. In that case, the blood-alcohol test was conducted and signed by a non-forensic alcohol analyst. Additionally, the DMV failed to provide more than "cursory proof of the officers observations." Id at 15, distinguishing that case from Schwartz, supra.

As the Rodriguez Court stated unequivocally, "A police report void of detail and a blood test report that lacks proper foundation, even in combination, to not add up to the necessary quantum of evidence. Consequently, the DMV failed to prove by a preponderance of the evidence that Rodriguez had an excessive blood-alcohol concentration." Rodriguez at 16. As point I of this memorandum previously demonstrated, Officer Thompson failed to have a reasonable suspicion upon which to stop Ms. Ronald. Examination of Officer Thompson further demonstrated that he did not recall if she was speeding, but "probably would have" included that fact in his report, couldn't recall if the night was busy, and could not recall even if she had alcohol on her breath. The combination of a lack of detail in Officer Thompson's testimony coupled with the lack of adequate basis for 'reasonable suspicion' is clearly analogous to the "police report void of detail" cited in Rodriguez.

Accordingly, with the fact that the blood test report similarly lacked proper foundation, having been signed by anyone other than a duly certified forensic alcohol analysis, the DMV has clearly not met its burden of proving by the preponderance of the evidence, that Ms. Ronald was driving with a prohibited blood-alcohol concentration, under the binding and clearly applicable precedent set forth by the Franklin Court of Appeal in Rodriguez v. Department of Motor Vehicles.

ANSWER TO MPT

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MEMORANDUM

To: Marvin Anders
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More importantly, the Court in Pratt explicitly rejected the notion that there could be "a bright line rule that weaving within a single lane alone gives rise to reasonable suspicion." Id at 10. The Court in Pratt further stated that the notion of weaving alone within a lane would further conflict with its earlier holding in State v. Kessler (Dr. Ct. App. 1999), and that the DMV's proposed standard would not only potentially subject many members of the public to unconstitutional invasions of privacy, but would be "in effect no standard at all." Pratt at 10.

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For the foregoing reasons, the Court must find that Officer Thompson's observation of Ms. Ronald's "weaving" is not sufficient to constitute reasonable suspicion under binding precedent set forth by the Court of Appeal in Pratt and Kessler, and would therefore constitute a violation of Ms. Ronald's constitutional rights under the Fourth Amendment to the United States Constitution, since absent the DMV's already-rejected bright line weaving rule, stopping someone in Ms. Ronald's position must be based on more than the officer's "inchoate and unparticularized suspicion or 'hunch.'" Pratt at 11, citing Terry v. Ohio (U.S. 1968). It is further demonstrable that Officer Thompson began trailing Ms. Ronald on nothing more than a hunch,' since he began his actions based merely on the fact that she exited the Lexington Club parking lot, which serves to underscore the merely "inchoate and unparticularized suspicion or hunch'" utilized by Officer Thompson.

2. The Administrative Law Judge cannot solely rely on the blood test report to find that Ms. Ronald was driving with a prohibited blood-alcohol concentration

While it is generally true that section 353 of the Franklin Vehicle Code provides generally that the Department of Motor Vehicles ("DMV") may immediately suspend a license on receipt of a blood-alcohol test result of .08 or greater, subsection b) of the statute in question explicitly notes that the DMV "shall bear the burden" of proving that matter. Moreover, while Franklin Code of Regulations s. 121 states that a forensic blood alcohol test performed by a forensic alcohol analyst may be admitted in any administrative suspension hearing, without the requirement of a further foundation, s. 115 of the Franklin Administrative Procedure Act states that hearsay evidence shall be admissible in an administrative hearing if either, it would be admissible in a judicial hearing as a generally recognized hearsay exception or, if not falling into such a category, "it may nonetheless be used for the purpose of supplementing or explaining other evidence." S. 115

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could be used in an administrative procedure only "for the purpose of supplementing or explaining other evidence." Schwartz at 13, citing Franklin APA s. 115. Accordingly, while the Administrative Law Judge could properly refer to the Test "together with the police officer's observations" it may not do so merely on the basis of inadmissible hearsay. Schwartz at 13.

Furthermore, there is a second factor that lessens the utility of the Test under FCR s. 121, which states that a "forensic blood analysis signed by such a forensic alcohol analyst and certified as authentic by a records custodian...may be admitted... without further foundation." As Exhibit 2 demonstrates, while the name Daniel Gans, a duly certified Forensic Alcohol Analyst appears, the signature on the Test report is "Daniel Gans signed by Charlotte Swain." Charlotte Swain, who also signed her own name, is stated as being a Senior Laboratory Technician, and not a Forensic Alcohol Analyst, as required by statute.

For the foregoing reason, this case bears a striking resemblance to the binding precedent of Rodriguez v. Department of Motor Vehicles (Fr. Ct. App. 2004), in which the blood-alcohol test was performed by an unauthorized individual, a "criminalist." As the Court stated, "Section 121 authorizes only "forensic alcohol analysts" to perform forensic alcohol analysis - and none others, including "criminalists."" Rodriguez at 15.

Based on the two inescapable facts that the Test was not properly recorded pursuant to applicable statutory requirements, as further elucidated by the Court of Appeal in two separate cases, the Administrative Law Judge cannot solely rely on the blood test report to find that Ms. Ronald was driving with a prohibited concentration, and indeed, should place extremely little reliance on said Test.

3. The DMV has not met its burden of proving, by the preponderance of the evidence that Ms. Ronald was driving with a prohibited blood-alcohol concentration.

As more fully stated in sections 1 and 2 of this memorandum, the DMV has failed to demonstrate either viable evidence of Officer Thompson's 'reasonable suspicion' in stopping Ms. Ronald or that the blood-alcohol test administered comported with applicable statutes so as to qualify as a public-records exception to the hearsay rule. This particular combination of failures on the DMV's part renders the instant case analogous to Rodriguez, cited above. In that case, the blood-alcohol test was conducted and signed by a non-forensic alcohol analyst. Additionally, the DMV failed to provide more than "cursory proof of the officer's observations." Id at 15, distinguishing that case from Schwartz, supra.

As the Rodriguez Court stated unequivocally, "A police report void of detail and a blood test report that lacks proper foundation, even in combination, to not add up to the necessary quantum of evidence. Consequently, the DMV failed to prove by a preponderance of the evidence that Rodriguez had an excessive blood-alcohol concentration." Rodriguez at 16. As point I of this memorandum previously demonstrated, Officer Thompson failed to have a reasonable suspicion upon which to stop Ms. Ronald. Examination of Officer Thompson further demonstrated that he did not recall if she was speeding, but "probably would have" included that fact in his report, couldn't recall if the night was busy, and could not recall even if she had alcohol on her breath. The combination of a lack of detail in Officer Thompson's testimony coupled with the lack of

adequate basis for 'reasonable suspicion' is clearly analogous to the "police report void of detail" cited in Rodriguez.

Accordingly, with the fact that the blood test report similarly lacked proper foundation, having been signed by anyone other than a duly certified forensic alcohol analysis, the DMV has clearly not met its burden of proving by the preponderance of the evidence, that Ms. Ronald was driving with a prohibited blood-alcohol concentration, under the binding and clearly applicable precedent set forth by the Franklin Court of Appeal in Rodriguez v. Department of Motor Vehicles.