

July 2008

New York State  
Bar Examination

Essay Questions  
and Sample Answers

## QUESTION 1

Owen, the owner of a shopping plaza, leased a store in the plaza to Art, for the operation of an art gallery. The lease described only the interior of the store as the demised premises. It gave Art the right to use the common areas in the plaza, including the sidewalks and parking lot, for himself, his employees, vendors and customers, jointly with other tenants in the plaza. The lease was silent regarding the obligation to maintain or repair common areas.

On October 29, 2006, Payne visited the art gallery and purchased a large sculpture. After exiting the gallery carrying the sculpture that partially obstructed his view, Payne tripped and fell on the sidewalk outside the gallery. The accident occurred in daylight hours on a clear day. Payne was a regular customer of the gallery and had walked across the same sidewalk many times before. Payne suffered a broken hip in the accident, and thereafter commenced an action against both Owen and Art to recover damages for his injuries.

Last week, Payne's action against Owen and Art proceeded to trial. At trial, due proof of the above relevant facts was presented. In addition, Owen testified that he lives out of state, had not visited the plaza in several years, and was unaware of any defect in the sidewalk. Art testified that a portion of the sidewalk outside the gallery had uplifted with the freezing and thawing cycle the winter prior to Payne's fall, so that one slab of the sidewalk was three inches higher than the adjoining slab. Art admitted that he was aware of the condition but never reported the condition to Owen and did not warn Payne of it.

At the close of all the proof, both Owen and Art moved for judgment as a matter of law. Owen contended that the proof established that the defect in the sidewalk was open and obvious, and, in any event, he could not be held liable because he did not cause the condition and was not aware of it. Art contended that he owed no duty to Payne as a matter of law to repair the condition or warn Payne of its existence.

- (1) How should the motions of (a) Owen and (b) Art be decided?
- (2) If Payne is successful in the action, what impact, if any, may Payne's conduct have on any verdict he may recover?

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## QUESTION 2

Bookkeeper had been embezzling money for several years from Company. When Bookkeeper found out that an audit was scheduled, Bookkeeper decided to destroy the books so that her crime would not be discovered. One night after closing, Bookkeeper went to Company's office building, spread gasoline around the office, threw a match on the gasoline, and ran out.

Watchman, who was on duty at the office building, saw Bookkeeper start the fire and called the police. Detective was the first person to arrive on the scene. Detective immediately asked Watchman, "Is anyone in the building?" Watchman exclaimed, "No, only Bookkeeper was in the building. I saw her spread gasoline, light it, and take off in a new silver convertible, license number 123."

Detective put out a bulletin over the police radio to apprehend Bookkeeper, wanted for arson, who was last seen driving a late model silver convertible, license number 123. Officer heard the bulletin, saw the car and stopped it. When Officer approached the car, he saw an empty gas can on the front seat next to the driver. Officer placed the driver, who was later identified as Bookkeeper, under arrest and seized the gas can.

Bookkeeper was indicted for arson. Prior to trial, Bookkeeper's attorney timely moved to suppress the gas can on the ground that Officer did not have personal knowledge of the events that had occurred at the office building and therefore did not have probable cause to arrest Bookkeeper or to seize the gas can. After a hearing at which Detective and Officer testified to the above pertinent facts, the court (1) denied the motion.

After jury selection, Prosecutor informed the court that Watchman had died, but that Prosecutor would introduce Watchman's statement through Detective's testimony. Bookkeeper's attorney objected on the ground that this would violate Bookkeeper's right to confront a witness against her. The court (2) allowed Detective to testify as to what Watchman had told him.

After the prosecution rested, Bookkeeper took the stand. Upon completion of her direct examination late Friday afternoon, over Bookkeeper's attorney's objection, the court granted Prosecutor's application to adjourn the trial until Monday to commence the cross-examination of Bookkeeper, and (3) directed Bookkeeper not to discuss her testimony with her attorney over the weekend because she was still under oath.

Were the numbered rulings correct?

### **QUESTION 3**

Art and Beth have been operating a seasonal landscaping business under the name AB Landscaping (“ABL”) as partners without a written partnership agreement. Art lives in Florida in the winter from November to March, when ABL does not operate.

In December 2007, one of ABL’s customers, Carl, asked Beth if she knew anyone who could construct a new home on vacant land owned by Carl. Without contacting Art, Beth responded that ABL could act as general contractor and hire subcontractors for the job. ABL had never previously acted as a general contractor.

One week later, Beth, on behalf of ABL, and Carl signed a building contract to construct a new home at the price of \$300,000 with a down payment of \$100,000, a payment of \$125,000 on February 1, 2008 and the balance of \$75,000 on completion and issuance of a certificate of occupancy (“C/O”).

In March 2008, after Carl made payments of \$225,000 to ABL, Beth discovered that, due to increases in the cost of materials, ABL was losing money on the job. She advised Carl that ABL would not complete construction unless Carl agreed to pay an additional \$25,000 for the increase in the cost of materials. Therefore, Carl gave Beth a signed note which read: “I agree to pay ABL an additional \$25,000 upon the issuance of a C/O.”

Although the building contract specified the installation of Wonder Windows, Beth, on behalf of ABL, mistakenly ordered windows from Clear Windows. In April 2008, after ABL obtained a C/O, Carl inspected the new home and discovered that Clear Windows were installed instead of Wonder Windows. Clear Windows are identical in appearance, quality and price to Wonder Windows.

In May 2008, Art first learned about the building contract between Carl and ABL and that, even if it received payment of the additional \$25,000 and the \$75,000 final installment, ABL would lose money on the job. Art asserts that Beth lacked the authority to enter into the contract.

Despite a demand from ABL, Carl refused to pay (a) the additional \$25,000 and (b) because the wrong windows were installed, the \$75,000 final installment due under the building contract. ABL did not pay the invoice from Clear Windows for its windows.

- (1) What are the remedies, if any, available to Art against Beth to recover the loss on the building contract?
- (2) What are the issues raised by, and likely outcome of, an action by ABL against Carl to recover (a) the additional \$25,000 that Carl agreed to pay and (b) the \$75,000 final installment due under the building contract?
- (3) What are the issues raised by, and likely outcome of, an action by Clear Windows to recover on its invoice (a) against ABL and (b) against Beth individually?

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#### **QUESTION 4**

On January 2, 2007, Testator borrowed \$100,000 from Bank A. As collateral, Testator gave Bank A a security interest in a valuable original Van Gogh painting which she owned.

One month later, Testator borrowed \$50,000 from Bank B. At that time, Testator gave Bank B a security interest in the same Van Gogh painting. The same day, Bank B filed its financing statement. A week later Bank A filed its financing statement.

Three months later, Testator contacted Attorney about drafting a will. Attorney drafted a will on June 15, 2007, based on Testator's instructions. On the following day, after declaring the instrument to be her will, Testator signed it in the presence of Witness One. Witness One also signed the will at that time. Ten days later, Testator acknowledged to Witness Two that the instrument was her will and that it was her signature which appeared therein. Witness Two thereupon signed the will. Witness One was not present when Witness Two signed.

Testator's will contained the following bequests: (1) \$25,000 to "the issue" of her daughter, Ann; (2) the original Van Gogh painting which was the subject of the security interests held by Bank A and Bank B to her son, Bob; (3) \$100,000 to her son, Charles, whom she gave up for adoption in 1955; (4) and the residuary estate to her son, Bob. All of the beneficiaries were identified by name, except the issue of Ann.

On September 1, 2007, Testator defaulted on both her Bank A and Bank B loans. On October 1, 2007, Testator made a permanent gift of the original Van Gogh painting to Museum.

Thereafter on November 10, 2007, Testator's son Charles died. He was survived by a son, Fred. One month later on December 10, 2007 Testator died. She was survived by Ann; Ann's adopted daughter, Jill; Bob; her estranged daughter, Doris; and Fred.

Testator's will was offered for probate on March 1, 2008. The following day Doris filed an objection to the probate of Testator's will claiming it was not properly executed. Fred claims he is entitled to Charles's bequest under the will. Bob claims the bequest lapsed and should be part of the residuary estate.

- 1) Should Testator's will be admitted to probate?
- (2) Assuming the will is properly admitted to probate, what are the rights, if any, of Jill, Bob, Doris and Fred?
- (3) (a) Do the security interests of Bank A and Bank B survive Testator's gift of the original Van Gogh painting to Museum?  
  
(b) Assuming that the security interests of both banks survive, which bank's security interest has priority?

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## **QUESTION 5**

In 1990, Grantor acquired title to Greenacre, 15 acres of land on the northerly side of Highway.

In 1995, Grantor conveyed Backland, the rear ten acres of Greenacre, to Dom. Backland does not include any frontage on Highway and is landlocked. The deed from Grantor to Dom contained no grant of an easement over Roadland, the remaining portion of Greenacre.

During 1996, Dom cut some trees on Backland for firewood, accessing Backland by using a road located on Roadland along its westerly boundary line. Since then, Dom has not been to Backland.

In 2002, Grantor conveyed Roadland to Husband and Wife, as tenants by the entirety. The deed did not except or reserve any easement in favor of

Backland. In 2003, Wife executed and delivered to Husband a durable power of attorney which expressly included authority for real estate transactions.

Nine months ago, Wife learned that Husband was having an extramarital affair, and she immediately moved out of the marital home. Wife has refused to return despite Husband's repeated requests that she do so and his assurances that the affair was brief and had terminated.

Six months ago, Husband conveyed Roadland to Serv by a deed which he executed individually and on behalf of Wife, using the power of attorney. Husband did not inform Wife of the conveyance and has retained the proceeds of the sale.

When Dom recently attempted to use the road over Roadland to again cut firewood on Backland, Serv stopped him and told him that he could not use the road.

Wife has commenced an action against Serv seeking a declaration that she owns an undivided one-half interest in Roadland.

- (1) (a) Does Husband now have grounds for a divorce from Wife, and  
(b) Assuming he does, would his adultery provide Wife with a defense?
- (2) Is Roadland subject to an easement in favor of Backland?
- (3) Should Wife prevail in her action against Serv?

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## **MPT**

### **Williams v. A-1 Automotive Center**

The client, Robert Williams, took his minivan to A-1 Automotive Center (A-1) for a routine oil change. After being told by the repair shop's owner that the minivan's transmission was in imminent danger of failing, Williams agreed to have a rebuilt transmission installed for \$1,700. Williams subsequently found out from a local dealership that A-1 had not performed the agreed-upon work, but had in fact reinstalled his original transmission. He now wants to file suit against A-1. Applicants' task is to analyze several potentially actionable statements made by A-1's owner and to determine which statements are actionable and which are not.

Next, applicants are to draft a cause of action for fraud based on those statements determined to be actionable. In doing so, applicants are expected to follow the firm's drafting guidelines, which provide an example of a well-pleaded cause of action. The File contains the instructional memorandum from the supervising attorney, the law firm's guidelines for drafting causes of action, client interview notes, a memorandum from the supervising attorney identifying four potentially actionable statements, and A-1's receipt for the alleged repairs. The Library contains three cases discussing the pleading requirements for a fraud cause of action.

## **JULY 2008 NEW YORK STATE BAR EXAMINATION**

### **SAMPLE CANDIDATE ANSWERS**

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

## **ANSWER TO QUESTION 1**

1. a. The issue is whether a landlord is liable to invitees who are injured in a common area and the injury is the result of a condition that the landlord is not aware of but that could have been seen by the invitee.

A landlord is liable for maintaining and repairing all common areas. Thus, a landlord may be liable in tort for injuries that occur in the common area due to the landlord's negligence. The elements of negligence are 1) a duty of care, 2) a breach of the duty of care, 3) both actual and proximate causation and 4) damages. New York no longer classifies guests on property as trespassers, lessees, or invitees but intend a reasonably prudent standard of care is owed to all people on the property. However, whether the plaintiff was a trespasser, lessee, or invitee does impact the standard of care because it affects how foreseeable the injury was and whether reasonable precautions were taken.

In this case, Payne would be classified as an invitee; thus, his presence on the property was quite foreseeable and therefore Owen, as owner of the premises, was under a duty to take reasonable precautions to prevent his injury within the common area. Thus, Owen owed Payne a duty of care. Furthermore, Owen breached that duty by not inspecting the common area regularly for defect. If Owen had done so, he would have corrected the problem or, at least known of it. Therefore, Owen's negligence was with the actual and proximate cause of Payne's injury but for the defective sidewalk, Payne would not have been injured. Lastly, there are clearly damages, as Payne broke his hip. Therefore, all of the elements to negligence action are present and Owen's motion should be denied.

It should be noted that in judgment, a matter of law will only be granted if a reasonable jury would not find the defendant guilty, which is clearly not the case here.

It should also be noted that whether or not the condition was obvious will be a question of fact for the jury and may be relevant in determining contributing negligence.

b. The issue is whether a tenant can be liable in tort for failing to warn of a dangerous condition located in a common area.

The maintenance and repair of common areas is the responsibility of the landlord, not the tenant. The tenant is responsible for maintaining and repairing the space that the tenant leases. As a result of this distinction, the tenant is

generally liable for torts that result from a dangerous condition within the leased area; whereas, a landlord is liable for conditions within common areas.

In this case, the injury occurred in a common area, thus in an area that Owen is responsible for the maintenance and upkeep of. Furthermore, the lease did not utter this obligation in any way, as it was silent on the point. Therefore, Art, as a lessee, cannot be held liable for a condition in an area that he had no control over. Furthermore, Art, as a lessee, owed no duty to Payne to warn him of dangerous conditions in a common area (if he did, he would have breached the duty and all of the elements of negligence would be present). Therefore, a reasonable jury could not find Art guilty and, as a result, he is entitled to judgment as a matter of law.

2. Does Payne's conduct amount to contributing negligence?

In New York, pure comparative negligence is used. This means that as long as the plaintiff is not one hundred percent at fault, the defendant will be held liable for a portion of the plaintiff's damages. To be contributory negligent, the plaintiff must not be acting as a reasonably prudent person would in the circumstance. Thus, the plaintiff is at fault for a portion of the damage suffered.

In this case, Payne breached his duty of care. People have a duty of care to watch where they are walking. In this case, Payne breached that duty by carrying a sculpture, which partially obstructed his view in that he could not see where he was walking. But for having his view obstructed, Payne would have likely seen the defective sidewalk and therefore would not have been injured. Therefore, Payne was contributory negligent.

Where a plaintiff is contributory negligent, his damages are decreased by the percentage of fault he is found to be at. Therefore, Payne's damage award will be reduced by whatever percentage of fault he is found to have had in the accident.

### **ANSWER TO QUESTION 1**

1. Art & Owen's motions

The first issue is when a motion for judgment as matter of law is timely. A judgment as matter of law can be brought at the close of the Plaintiff's case or at the close of all evidence. Here, Art and Owen have brought their claims at the close of all evidence. Their claim is therefore timely.

a. Owen's motion

The first issue is whether a Plaintiff can recover in negligence against a lessor where the injury took place in the common areas.

A motion for judgment as matter of law should be granted where, viewing all evidence in light favoring the non-moving party, a reasonable jury could reach only one conclusion about the outcome of the case.

In a case for negligence, the plaintiff must show 1) duty 2) breach 3) causation and 4) damages. A landowner owes a duty to all foreseeable persons who would enter the land. New York has by statute gotten rid of the common law distinctions among types of entrants (invitee, licensee, etc), and has instead adopted a duty of reasonable care for all entrants. However, the status of the entrant has a bearing on the level of care that is reasonable in a given situation. Thus, the landowner would still owe a higher duty to persons who at common law would be considered invitees.

Where the landowner leases part of the land to another party, the landowner remains responsible to keep all common areas of the property in good repair absent an agreement to the contrary.

Here, Owen leased a store in a shopping plaza to Art and the lease was silent about the obligation to maintain or repair common areas. Therefore, Owen retained the responsibility as a matter of law. Owen thus owed a duty to all entrants into the shopping plaza. At common law, Payne would be an invitee. However, because New York has abolished the common law rules, Owen only owes the duty of reasonable care - but the level of care is affected by Payne's common law status. The owner of a public shopping center owes a greater duty of care to maintain the premises than would a private landowner. Whether or not he caused the condition or was aware of it does not matter, because Owen is under a duty to be appraised of the conditions of the premises and to repair any dangerous conditions present.

Here, Owen breached his duty to Payne by not keeping the sidewalks in good repair. This breach caused Payne to trip and fall, which resulted in a broken hip. Owen would be liable in negligence for these injuries.

The second issue is whether a risk being open and obvious negates the landlord's liabilities in negligence.

Where a risk is open and obvious, at common law a plaintiff would be found to have assumed the risk of injury. Moreover, at common law certain landowners only had to repair or warn of non-obvious dangers. However, under New York law the law is comparative negligence and assumption of risk will not bar recovery. Moreover, a landowner's duty is reasonable care. Thus, landowner

may still be liable for an open and obvious risk if they were negligent in allowing it to persist.

Here, a three inch rise in the sidewalk may be open and obvious. That would be a matter for the jury. But regardless, Owen can still be held liable for his negligence to the extent that his negligence was the cause of the injuries.

Because a jury could find that Owen was negligent in failing to repair the sidewalk, he is not entitled to a judgment as a matter of law.

b. Art's motion

The first issue is whether a lessee has a duty to repair common areas.

A lessee is required to keep the areas demised under his or her lease well maintained. However, the duty to maintain common areas is not delegated to the lessee, even where he or she has a right to use those areas, absent an agreement to the contrary. Therefore, a lessee is under no obligation to repair the common areas.

As such, Art was not responsible for repairing the sidewalk.

A second issue is whether a lessee can be held liable in negligence to customers injured in the common areas of the building for failure to warn customers about a known danger.

A person is liable in negligence where they 1) owe a duty 2) breach the duty 3) causing an injury 4) with damages. A duty owed is owed to all persons who could foreseeably be injured by their conduct and the duty is that of a reasonably prudent person in similar circumstances.

Generally, persons will not be liable for omissions, only affirmative conduct. The exceptions are where they create the danger or owe a specific duty to the person. Here, a lessee does not owe customers a duty for injuries that take place outside of the property that they actually control - the area demised in the lease. Thus, even though a reasonably prudent lessee would have told the out of state landlord about the sidewalk being dangerous, Art cannot be liable because he did not owe a duty to Payne. Moreover, because Payne was a regular customer, a reasonably prudent person probably would not see the need to warn about the step every time a customer left the store.

Thus, Art cannot be found liable for negligence in failing to repair the condition or warn Payne of its presence. He would therefore be entitled to judgment as a matter of law.

2. Impact of Payne's conduct on his right to recover

The issue is whether contributory or comparative negligence will bar or diminish Payne's recovery.

Under common law, contributory negligence would bar any recovery by a negligent plaintiff. However, New York has adopted a pure comparative negligence rule. Under that rule, the plaintiff's negligence will reduce his or her recovery by the amount of fault. A plaintiff who is more than 50% at fault can still recover in full. The one limitation on this rule is that in a personal injury suit, a defendant who is less than 50% at fault cannot be held responsible for more than 50% of non-economic damages (e.g. pain and suffering). There are several exceptions to this rule, including automobile accidents.

Here, Payne had walked over the same sidewalk many times before, so was likely appraised of the danger (a three inch rise would be hard to miss). However, because he was carrying a sculpture that partially obstructed his view, he failed to see the step this time. A jury could conclude that this behavior was negligent and that he had contributed to his own injury. This negligence will not bar his recovery however, because New York has a comparative negligence rule. His recovery will be reduced by whatever percentage of fault the jury attributes to him.

In addition, Payne will not be able to recover more than 50% of non-economic damages from any defendants who are less than 50% at fault, because none of the exceptions to the CPLR limitation apply.

## **ANSWER TO QUESTION 2**

1. Motion to suppress the gas can.

The issue is whether the seizure of the gas can is in violation of the Defendant's fourth amendment right and whether it can be admitted into the evidence.

The Fourth Amendment provides that everyone should be free from unreasonable search and seizure. To assert one's Fourth Amendment right, there has to be a government action and Defendant has to have reasonable expectation of privacy in the areas searched and the items seized. The police officer needs a warrant to conduct a search and seize for items. Evidence obtained without a valid warrant should be excluded unless it falls under the exceptions that permit

warrantless search and seizure. Relevant exceptions that may apply in this case are: (1) search incident to an arrest - where an officer has reasonable cause to make an arrest, the officer can search the area within the Defendant's wingspan for contraband and weapons; it is no longer required that the officer has to fear for his safety in order to conduct the search; (2) plain view doctrine - where an officer is legitimately on the premises, an item that is apparently evidence of crime is in plain view, the officer can seize the evidence; (3) automobile exception applies when the officer has probable cause to believe that the automobile contains evidence of crime or contraband, the officer can search the automobile without a warrant.

In this case, Officer is a government agent, so there was government action. The Bookkeeper has reasonable expectation of privacy in his own car and the items in his car. Officer conducted his search and seized the gas can in the car without a warrant. However, as stated above, several exceptions may apply to justify Officer's search and seizure.

Officer heard the bulletin, through which Detective informed that Bookkeeper was wanted for arson, who was last seen driving a late model silver convertible, license number 123. Officer saw the car that matched the description and stopped it, so he has probable cause to stop the car in order to apprehend a possible felon wanted by the law enforcement. The auto exception applies, since the car itself can qualify as evidence of crime. Bookkeeper used it to get away after he allegedly committed the arson.

In addition, when Officer approached the car, he saw an empty gas can on the front seat next to the driver. He has probable cause to believe that Bookkeeper is the person wanted, who has committed arson. So the arrest was proper. Officer can conduct a search within Bookkeeper's wingspan to find evidence of crime and weapons. The gas can was on the front seat, which Officer has a right to search after the arrest. The Supreme Court has held that a police officer can search the passenger compartment after a valid arrest.

Finally, the evidence can also be admitted under the plain view doctrine. As explained above, Officer has reasonable cause to stop the car; i.e., he was legitimately standing next to the car, and the gas can on the front seat was in plain view. So, Officer can legitimately seize the gas can.

The court was right in denying Bookkeeper's motion to suppress.

## 2. Watchman's testimony

The issue is whether Watchman's statement can be admitted into evidence

now that Watchman has died and is unable to testify. Two issues are raised here: hearsay objection and Defendant's Sixth Amendment right to confrontation.

Hearsay is an out of court statement offered for the truth of the matter asserted. A hearsay statement should be excluded unless an exception applies.

In this case, Watchman's statement in response to Detective's question "NO, only Bookkeeper was in the building. I saw her spread gasoline, light it, and take off in a new silver convertible, license number 123," was offered for the truth of the matter asserted. So, it is hearsay. Unless an exception applies, it should not be admitted.

Possible applicable exceptions are excited utterance and present sense impression. An excited utterance is a statement concerning a startling event, made while the declarant is still under the stress of the exciting event. The present sense impression is a statement made by the declarant while observing the event or immediately thereafter. The contemporaneousness is the key.

In this case, arson is certainly a startling event. Detective arrived at the scene, immediately asking Watchman, "is anyone in the building?" Watchman exclaimed, when he answered Detective's question, indicating that he was still under the stress and excitement from witnessing the arson. He has no time to reflect and fabricate events.

The facts state that Detective immediately asked Watchman once he arrived at the scene, suggesting that the contemporaneous element for the present sense impression may be met, in the sense that Watchman related his observation immediately after the event.

As a side note, although Watchman died in the end, his statement cannot be admitted under dying declaration exception because it was not made while in contemplation of death, or related to the cause of his death.

Defendant has a 6th amendment right to confront his witness. The Supreme Court has held that Defendant only assert the right when the statement is testimonial in nature. The Supreme Court has declined to give a definitive definition of "testimonial." At the very least, statements made in response to a police interrogation are testimonial. However, in this case, Detective was not interrogating Watchman when he posed the question: "Is anyone in the building?" Instead, the question was more posed to ensure that no one was in the building so that no one would be hurt by the fire. Watchman's statement was spontaneous. There was no indication of the police domination. Detective was merely asserting information to protect the public. Therefore, a Sixth Amendment objection will not stand.

The court was right in allowing Detective to testify to what Watchman said.

3. The issue is whether the court was correct in directing Bookkeeper not to discuss her testimony with her attorney over the weekend.

Defendant has a right to counsel at trial. During a brief recess, Defendant may be kept away from his attorney. However, during an overnight break, Defendant has the right to discuss her testimony with her attorney, so as to devise more effective strategy.

In this case, the court granted Prosecutor's application to adjourn the trial until Monday to commence the cross-examination of Bookkeeper. There is the whole weekend, during the interim, Bookkeeper should be allowed to discuss her testimony with her attorney. Consequently, the court was wrong in its instruction.

## **ANSWER TO QUESTION 2**

1. The issue is whether the detective had probable cause to stop Bookkeeper's car from the tip from Watchman.

Under the Fourth Amendment, applicable to the states under the Fourteenth Amendment of the U.S. Constitution as well as Article 1, Section 12, of the New York State constitution, all persons have the right to be free from unreasonable searches and seizures. This usually means that arrests can only be made with probable cause and that searches can only be conducted pursuant to a warrant, issued by a neutral and detached magistrate on the demonstration of probable cause. However, there are many exceptions to the warrant requirement including the "automobile exception." The automobile exception allows warrantless searches of cars where the police have probable cause. Because the police do not have the time to get a warrant due to the nature of car travel warrantless searches are allowed. If there is probable cause to stop a car, the police can search the entire car looking for the contraband or other items/instrumentalities of crimes.

A police officer does not need first hand knowledge to have probable cause, it can be based on the first hand knowledge of another. The tip or informer needs indicia of reliability and some basis for the facts. The police would be severely limited if they had to have firsthand knowledge for all situations.

Here, the detective was told by Watchman who had first hand knowledge of the events. He saw Bookkeeper commit the arson and saw Bookkeeper drive off in the car with the license plate 123. The detective acting on this tip had probable cause to stop a car with the license plate of 123. The security guard was reliable

and the police officer acted properly in stopping the car.

Once he stopped the car, he was able to search the entire car. Additionally, when he pulled over the car, which he had probable cause to do so, he saw the gas cans in plain sight. There is also a plain view exception to the warrant requirement, if an officer is in an area for a proper, legal purpose, then if he or she sees contraband or other instrumentalities of a crime, he or she can seize it. Here, he was legally entitled to stop the car, and because he was legally entitled he was allowed to seize the gas cans.

A police officer can arrest a person for probable cause; an arrest warrant is needed only to arrest someone in their home. Here, Bookkeeper was in the car, and only needed probable cause to arrest. The gas cans and the license plate gave the officer probable cause to arrest Bookkeeper and thus both the arrest and seizure of gas cans were legal. The court was correct in denying the motion.

2. The issue is whether the statements made by Security Guard to the Detective were "testimonial" in violation of *Crawford*.

The U.S. Supreme Court has held that the Sixth Amendment right to confront witnesses (as applied to the states via the Fourteenth Amendment) applies to statements that are "testimonial" and that if the declarant of such statements is unavailable to be cross-examined by the defendant, the statements may not be introduced in court. This prohibition is subject to some exceptions such as dying declaration and wrongdoing by the defendant.

Statements made to grand juries and other similar situations are testimonial in nature. The more interesting issue is whether statements made to police after crimes are considered testimonial or merely are assisting the police in preventing an emergency. For example, statements made to a 911 operator about a wife being beaten by her husband were not testimonial as police needed to know what was happening to find the criminal, while statements made to police long after the acute violence was over was considered testimonial when describing what had happened. The key is whether the situation was such that the police were collecting testimony to be used at a later trial, or if they were using the information to catch a criminal or prevent acute violence or crime.

Here, the statements made by Watchman were made after the crime was committed but they were right after, the facts say he was asked "immediately" about the crime and that Watchman "exclaimed" about the statement. It seems that these statements were made in the heat of the moment trying to prevent the commission of further crimes and find information to catch the person in the immediate premises not in preparation for use at trial later. If the motivation was

to save this information for later trial, then it would be a Crawford violation and would be inadmissible. However, here the facts point that it was nontestimonial and not subject to the Crawford confrontation clause issues. Even though Watchman is dead, and unable to testify at trial, his statements still could come in because they were not testimonial in nature.

There is still the issue of whether this information can be admitted into evidence due to hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless there is an exception. Hearsay is suspect because the declarant is not on the witness stand able to be cross-examined or seen by the trier of fact to determine whether or not the declarant is telling the truth.

This statement by Watchman is an out of court statement offered for the truth that Bookkeeper committed the arson, and the witness is not available due to his death. There is an exception for "excited utterance" where a person during or soon after perceiving an exciting or intense event says something about that event. Here, the arson was an exciting event and Watchman "exclaimed" and would probably fall under this exception, there is no reason to believe that he would be lying right after this event happened, and thus it can be admitted under the hearsay exception as well.

3. The issue is whether a court can prevent a defendant from talking to his lawyer and thus denying him his right to counsel during a weekend.

The general rule is that defendants are entitled to the right to counsel by the Sixth amendment (as applied to the Fourteenth amendment to the states) and the "indelible right to counsel" under New York law. Defendants are able to participate in their own defense and communicate with their counsel about the trial, the conversations are limited by the code of professional responsibility, i.e. a lawyer cannot knowingly subordinate perjury.

However, there is an exception for when witnesses are on the stand being examined and cross examined. A court may prevent a witness (or as in this case, a witness-defendant) from talking to counsel during short breaks or other times between examination and cross examination. This is to uphold the order of the court and prevent perjury. Here, the court instructed the lawyer not to talk to his client for an entire weekend until the cross examination resumes the following Monday. This is not appropriate and denies the defendant the right to counsel. The court was incorrect in its direction for the lawyer not to communicate with his client over the weekend.

It should be noted however, that the lawyer should not talk to the defendant

during the weekend. It is a violation of the Code of Professional Responsibility to refuse to comply with a court order. The lawyer should appeal the decision and not break the court order. Court order can only be attacked through appeal, not through their violation unlike other criminal matters.

### **ANSWER TO QUESTION 3**

#### 1. Art against Beth

Art has one major claim against Beth - to compel an accounting.

#### Compelling an Accounting

In a partnership, a partner may generally not bring actions against other partners, who share all liabilities jointly and severally. The exception is the action to compel an accounting, in which a partner may bring an action against a co-partner where the co-partner acts outside the scope of the partnership, wastes the partnership assets, or otherwise acts illegally or in contravention of the partnership agreement.

In bringing the accounting, the court may hold co-partners liable to the extent of the partnership assets that they have wasted or lost while acting outside the scope of their authority.

In doing so, Art may argue that since ABL "does not operate" in the winter, Beth was acting outside the scope of her authority when she offered ABL to be the general contractor for Carl's home. Even though Beth can ordinarily enter into contracts on behalf of ABL, the evidence suggests that ABL does not operate at all in the winter months, and that she was therefore acting outside the scope of her authority. She could then be liable to Art to the extent that ABL suffered on a loss on the project.

It should be noted that the absence of a written partnership agreement is irrelevant, since a partnership is formed by the intent of two or more people who intend to enter into a business together, and their sharing of profits and losses, and not be any other written agreement. However, a written agreement, including a provision about when ABL "operates" would be useful to Art in claiming that Beth acted outside her authority.

#### Partnership Liability

Additionally, to the extent that Art is personally liable for any shortfalls or

debts arising under the project, Beth is also liable. In a partnership, all partners are jointly liable for any debts incurred by the partnership. Though not a claim per se, Art would want to keep this in mind when Clear Windows demands payment.

2. Carl is liable for the full \$100,000 due to ABL.

a. The additional \$25,000 in March 2008

The issue is whether the signed note to pay an additional \$25,000 is a valid promise to pay as a modification of the original contract.

Contracts must generally, include an offer, acceptance, and consideration in order to be valid. At common law, any modification of contracts required consideration for the modification. The forbearance of a threatened breach of contract is not valid consideration under common law. In New York, however, contracts may be modified without consideration, as long as there is a written and signed agreement to do so. Courts are reluctant to interfere with parties' freedom to enter into, or modify, contracts. Therefore, the agreement between ABL and Carl should be enforceable.

(It should be noted that contracts are void if entered into under duress, and Carl might argue that he only signed the note under duress, since Beth told him that ABL would not be able to complete the house without an additional \$25,000 for materials. But there is no indication that Beth's actions were anything other than a good faith attempt to prevent necessary breach by getting the necessary funding for materials, and not to take advantage of Carl's situation, but instead to help him to realize the benefit of his bargain.).

Accordingly, Carl is obligated to pay the \$25,000 to ABL.

b. The \$75,000 final installment

The issue is whether there was a material breach of the contract where virtually identical windows are installed in a home, though they are not the exact brand specified in the contract.

Contracts are valid if they include an offer, acceptance, and consideration, and there are no defenses to enforceability. Here, the initial agreement met these requirements.

Additionally, a contract is void if it is entered into by a party without authority to do so. However, apparent authority suffices to create a valid contract.

Here, Beth had apparent authority to enter into the contract, so Carl is obligated to perform his side of the bargain.

Generally, a material breach will excuse the non-breaching party's performance. A minor breach, however, will not excuse performance, and the non-breaching party must still perform (though he may bring a separate action for damages resulting from the breach).

Here, ABL did not materially breach its obligations under the contract when it installed Clear Windows instead of Wonder Windows. Since the windows are identical in appearance, quality, and price, and the contract was to build the entire house, the supplier (or the name) of the windows does not deprive Carl of the substantial benefit of his bargain. Accordingly, it is only a minor breach, and he must still pay the remaining \$75,000 due under the original contract.

Lastly, contracts are generally not severable. Installment contracts may be severable, but only where the installments are equal and attributable to separate attributable actions or performances, such as the construction of three separate buildings in sequence. Further, New York courts are unlikely to find installment contracts to be severable, unless these requirements are strictly met. Here, the installments paid were merely for Carl's convenience, and he is obligated to pay the full contract price as long as ABL does not materially breach its obligations.

Accordingly, Carl must pay an additional \$75,000.

### 3. Liability to Clear Windows

#### a. ABL

The issue is whether the partnership is liable for debts incurred outside the scope of a partner's authority.

A partnership is liable for all debts incurred in the furtherance of its partnership activity. Additionally, partners each act as agents of the partnership. Even where a partner acts outside the scope of her authority, the partnership is liable for debts incurred where a partner - acting as agent - has apparent authority to enter into a contract, and the other party has no reason to know that the agent lacks the capacity to act.

Here, ABL is liable to Clear Windows since Beth was acting with apparent authority when she entered into the contract to buy the windows. There is no evidence that Clear Windows should have known that Beth was acting outside her

authority, so ABL is liable as principal on the debt.

(It should be noted that the issue of unilateral mistake may be raised in the contract, when Beth ordered Clear Windows instead of Wonder Windows. If Clear Windows had seen the building contract, or had any reason to know that Beth was under the impression that she was ordering Wonder Windows, the contract may be void - but there is no evidence of such knowledge here.)

b. Beth

The first issue is whether a partner (acting outside the scope of her authority) is personally liable for partnership debts.

In partnership, each partner is personally liable for the debts of the partnership. As noted above, written agreement is not necessary.

Here, Beth was a partner in ABL, and is therefore personally liable for all debts incurred by the partnership. (Where a co-partner refuses to pay, the other partners are each individually liable, and may have an action for accounting against the refusing partner).

The second issue is whether an agent is personally liable to a third party when she exceeds the scope of her authority.

An agent acting outside the scope of her authority is liable to both the principal and to the other contracting party. Here, Beth would be liable on the debt both as partner in ABL and as an agent exceeding the scope of her authority.

The damages on both of these accounts are the complete contract price, since the windows have been delivered and installed, plus any incidental costs or damages.

### **ANSWER TO QUESTION 3**

1. Art's Remedies Against Beth To Recover Loss on the Building Contract

The issue is whether a partner can bring an action against a co-partner for losses caused by the co-partner's unauthorized actions in breach of her partnership duties.

Under New York partnership law, partners are agents of the partnership with regard to carrying out the general partnership business. They do not,

however, have authority to unilaterally act outside the scope of the partnership business. Partners are also fiduciaries of the partnership and of each other, and they owe duties of care and loyalty. A partnership can bring an action for accounting against a partner who has breached her duties, thereby causing loss to the partnership. This is the only type of action that a partnership can bring against its breaching partners.

In this case, Beth was not authorized to enter into the contract on behalf of ABL with Carl because it was not in the course of ABL's general business, and indeed was an entirely different field of work in which neither the partnership nor, it appears, she had any experience. Further, she signed the contract without the knowledge or permission of Carl. She was thus acting in breach of her fiduciary duties by entering into the contract and by wasting partnership assets in carrying out the contract. Her breach caused a loss to the partnership. Art, on behalf of ABL, may bring an action for accounting against Beth in order to assess and hold her liable for any losses caused by her breach.

2. Additional \$25,000 Owed By Carl

a. The issue is whether a written, signed promise to pay additional money for a pre-existing duty on a contract that is already partially performed is enforceable.

At common law, a service contract could not be modified unless there was new consideration. This rule was aimed at preventing a party to a contract from taking advantage of the other party by threatening to halt performance mid-way through unless additional money was promised. However, in New York, a written signed modification (including increase in payment) is enforceable if made in good faith.

In this case, Carl's promise to pay the additional \$25,000 was made in writing and signed by him. However, it is questionable whether the modification was in good faith. Under ordinary circumstances, an increase of costs of building materials that would cause a general contractor to run a loss on a contract would probably be considered cause for a good faith modification. However, in this case, where Beth entered into an unauthorized contract in an area in which she had no expertise or experience, the modification could very well be the result of her own incompetence. An experienced contractor may have left a larger profit margin or may have been able to anticipate the market trends in building materials. Thus, Carl's promise to pay the \$25,000 would probably not be enforceable.

b. \$75,000 Final Installment Owed By Carl

The issue is whether a non-material breach by a substantially performing party excuses performance under the contract of the other party.

In a contract for services, performance need only be "substantial" in order for the performing party's contractual duties to be deemed satisfied. (This is in contrast with Article 2 of the UCC, which applies a perfect tender rule to goods contracts.) Substantial performance may include small breaches that do not materially impair the value of the contract to the other party.

In this case, Beth did breach the contract by installing Clear Windows instead of Wonder Windows. However, this breach was not material because the two brands of windows are identical in appearance, quality, and price. Thus, she has clearly substantially performed the contract, and Carl is liable for the \$75,000 final installment.

It should be noted that even if the breach were material, thereby excusing Carl from performance under the contract, Beth may be able to recover the reasonable cost of her services on a quasi-contractual basis.

### 3. Action by Clear Windows against ABL

a. The issue is whether a partnership can be held liable on an unauthorized contract entered into by a partner.

A principal is liable on its authorized contracts entered into on its behalf by agents. Partners are agents of the partnership in administering general partnership business. This is because there is assent, benefit, and control - thus forming a principal-agent relationship. Further, partners either have express or implied authority to carry out contracts with third parties on behalf of the corporation so long as they are in the course of regular business by the partnership. However, a partnership is not liable for contracts entered into by partners who exceed the scope of their authority. Beth was an agent of ABL. However, in entering into a contract for the sale of goods (windows) with Clear Windows for use in the construction of a new home, where ABL was usually engaged in the business of landscaping, she was acting outside the scope of the agency relationship.

Clear Windows may argue that ABL should be liable on the contract anyways, under the theory that Beth had apparent authority. Apparent authority exists when an agent is cloaked with the appearance of authority and a third party detrimentally relies. However, because ABL did not "cloak" Beth with apparent authority in this case - in fact, her co-partner Art did not even know that she had entered into the construction contract until much later - this theory will likely fail. Thus, Clear Windows will not be able to recover the unpaid invoice amount from ABL.

b. Action by Clear Windows against Beth Individually

The issue is whether a partner is individually liable on a contract that she entered into on behalf of the partnership without any authority to do so.

An agent who acts outside the scope of her authority to enter into an unauthorized contract, will be liable for the contract if the principal is not. Further, partners may generally be held individually liable for any partnership liabilities, even when those liabilities are validly incurred by the partnership (i.e., there is no limited liability in a general partnership).

Thus, Clear Windows can successfully recover the invoice price from Beth individually, whether or not ABL is held to be liable for that amount.

**ANSWER TO QUESTION 4**

1. The first issue is whether or not a will signed by two witnesses at separate times, when one witness did not see the testator sign, may be admitted to probate. Under the New York EPTL, a will is duly executed and may be admitted to probate when it is signed by the testator in front of two witnesses. The testator does not have to sign in front of the two witnesses but can just acknowledge his or her earlier signature. The two witnesses need not attest to the testator's signature in front of each other; they can attest separately so long as the entire process of execution takes place within 30 days of the signature of the first witness. In this case, Testator signed the will in front of Witness One, who also signed. Ten days later, Testator acknowledged her signature to Witness Two and Witness Two signed. This was within 30 days of Witness One. Therefore, the will was properly witnessed and executed and may therefore be admitted to probate.

2. The issues here pertain to the various rights of Jill, Bob, Doris and Fred under the NYEPTL.

a. Jill

The issue is whether an adopted child can inherit under a bequest to the adopting parent's "issue". Under the New York EPTL, an adoptive child inherits the same as a natural when the adoptive child is not the relative of the adopting parent. This applies to inheritance rights not only of the adopting parent, but the adopting parent's family. Therefore, if a class gift is made to the issue or children of an adopting parent, the adoptive child will share in that gift as would a natural child of that parent. In this case, there is no evidence that Jill was adopted by a relative, so the special rules pertaining to that case do not apply. As Ann is thus

Jill's only child, she will inherit the \$25,000 gift that Testator made to the class of Ann's issue.

b. Bob

The first issue is whether a specific gift will adeem if the testator later makes it an inter vivos gift that is permanent to another. Under NYEPTL, specific gifts of a specific property will adeem if they are lost or given away by the testator. Ademption refers to the fact that the beneficiary cannot receive the value of this gift from other sources in the testator's estate. In this case, testator made a specific gift of the painting to Bob, but later made it a permanent gift to Museum. Bob has therefore no rights to the painting or its value under the will.

Therefore, Bob will inherit the residuary of Testator's estate after the bequests to Jill and Charles of \$25,000 and \$100,000 respectively, but nothing with regards to the painting. He will not be required to give any of the residuary to Doris.

c. Doris

The issue is the inheritance rights of a child of the testator not provided for in the testator's will. Under the NYEPTL, a child alive at the execution of a will and not provided for will get nothing. If the child was born after the execution of the will and other children were provided for, that child will share in the other children's gifts as though they were a class gift. In this case, there is no evidence that Doris was born after the will. Therefore, Doris will get nothing under the will.

d. Fred

The issue is whether a bequest to an adopted-out child will lapse after the death of that adopted-out child. Under the NYEPTL, an adopted-out child loses all rights to intestate inheritance from the natural family. However, the testator may still make a specific gift to that child. If a person receiving a gift from the will of a testator (a will beneficiary) predeceases the testator, the gift may lapse or fail, unless 1) the beneficiary is either the issue of the testator or the brother or sister of the testator, and 2) the beneficiary dies leaving issue. In this case, Charles was the son of Testator, and left Fred as his issue. However, Charles was adopted out of Testator's family, so would not qualify as issue.

However, New York has ruled that where a child was adopted out, yet made a will beneficiary by name, and that child predeceases the testator, the issue

of that child may still inherit under Anti-Lapse Statute. Therefore, Fred is entitled to the \$100,000 bequest.

3. a. The issue is whether or not a security interest in personal property will survive the gift of that property to a third party. Under the NYEPTL, a specific gift will not exonerate a lien unless expressly put forth by the donor. A donor cannot thus give away the property on which the security interest is placed and thus simply remove that interest. It will remain the security interest of the creditors. In this case, Bank A and Bank B had a security interest in the Van Gogh painting. When Testator defaulted on payments, it gave rise to Bank A's and Bank B's rights as creditors. Testator could not shield her assets by giving them away. Therefore, the security interests of Bank A and Bank B survive the lifetime gift.

b. The issue is whether a perfected creditor has priority over a later in time perfected creditor, who filed before the first creditor. Under the UCC Article 9 which governs secured transactions, a creditor achieves priority by "perfecting", which involves 1) giving value, 2) recording or putting other creditors on notice, of 3) over property the debtor has a right to. Therefore, filing is a key element to perfecting the security interest. The rule is "first in time, first in right" with regards to priority, which means that the first creditor to perfect by filing has the first priority. In this case, while Bank A had the first security interest, Bank B was first to perfect by filing. Therefore, Bank B has priority over the Van Gogh painting.

#### **ANSWER TO QUESTION 4**

1. The issue is whether a will should be admitted to probate when the two attesting witnesses did not sign in each other's presence. According to the EPTL, in order for a will to be valid, it must be signed by the testator, published, and signed by two witnesses. There is no requirement that the two witnesses sign in each others presence. But, instead the requirement is that the second witness signs within 30 days of the first witness' signature. In this case, the first witness signed the will on June 16, and the second witness signed the will ten days later. Therefore, the ceremony was completed within 30 days and is valid under the EPTL. Likewise, the will was published because the testator declared the instrument to be her will to both of the witnesses.

The second issue is whether a will should be admitted to probate when the testator did not sign the will in front of one of the witnesses. According to the EPTL, a will is valid so long as a testator acknowledges her signature to the attesting witnesses. In this case, although the testator did not sign the will in front

of Witness Two, she acknowledged her signature on the will in front of him. Therefore, the will is valid.

Note: For a will to be valid, the testator must be 18 or over and have signed at the end of the will as well, but neither of these things are addressed here.

2. The issue presented under the bequest to “Ann’s issue”, is whether adopted children inherit the same as natural children. Under the EPTL, adopted children inherit from their adopted families as if they were natural children. They are treated the same. Therefore, since Jill is Ann’s adopted daughter, she qualifies as Ann’s issue, and thus inherits \$25,000 under Testator’s will.

Another issue presented by the bequest to “Ann’s issue” is when the class closes. There is a possibility that Ann may have more children, thus expanding “her issue”. However, under the EPTL, class gifts close at the death of the testator. In this case, Ann’s only child at the time of Testator’s death is Jill. Therefore, Jill will take the entire gift.

The issue presented with the Van Gogh painting bequeathed to Bob is whether the gift or the value of the gift is his at the time of the testator’s death. Under the EPTL, specific gifts which no longer exist at the time of the testator’s death adeem, which means they are totally void. In this case, Testator gave the painting away before she died. Therefore, the gift adeems and Bob has no rights to the painting. However, he will still be entitled to the residuary of the estate.

The issue presented by Doris is whether children left out of a will have any rights to the estate. Under the EPTL, a child has no rights to her parent’s estate if the parent chooses to leave him or her out of the will. The only time a child will have rights even when omitted from the will, is if she is a pretermitted child, which is a child born after the will was made. Since the facts say that Doris is estranged from Testator, it seems more likely that Testator chose to leave her out of the will. Thus, she has no right, unless she could show she was a pretermitted child.

The issue presented by Fred is whether New York’s anti-lapse statute applies to a testamentary gift given to a child who was given away for adoption. Under the EPTL, the general rule is that adopted children lose their inheritance rights from their natural family. Thus, under anti-lapse, usually an adopted-out child would not count as a natural parent’s issue. However, there is an exception to this rule when an adopted-out child is specifically mentioned in a natural parent’s will. The New York courts have said under these circumstances the adopted-out child will be considered the testator’s “issue” for anti-lapse purposes.

Therefore, since Testator specifically bequeathed \$100,000 to Charles in her will, then anti-lapse will allow the gift to pass to Fred.

Note: Anti-lapse requires the devisee to be testator's issue or brother or sister and also requires the beneficiary's issue to survive the testator, as happened here.

3. a. The issue is whether both attached and/or perfected security interests survive a testator's gift of the encumbered personal property. Under Article 9 of the UCC, both perfected and attached security interests which came before the gift will survive. In order for a security interest to attach, value must be given, a security agreement must be entered into, and the debtor must have rights in the collateral. In this case, both Banks signed a security agreement with Testator, both banks gave value in the amounts of their loans, and Testator had rights in the collateral, because Testator was the owner of the property. Therefore, both Banks' interests attached, and thus survive the gift.

b. The second issue is which Bank's security interest has priority. According to Article 9 of the UCC, the first security interest to perfect its interest will have priority. In order to perfect the security interest, creditor must file a financing statement. In this case, Bank B filed its financing statement first, and hence its security interest will have priority over Bank A's interest, even though Bank A's interest attached first.

### **ANSWER TO QUESTION 5**

1. a. The issue is whether a party has an action for divorce when the spouse has left for nine months and refuses to return.

In New York, there are five grounds for divorce: 1) cruel/inhuman treatment, 2) adultery, 3) abandonment, 4) three years of consecutive imprisonment, and 5) a conversion divorce. To constitute a valid claim for divorce based on abandonment, the spouse must have left voluntarily, without justification, and with no intent to return. There is no statute of limitations for a divorce claim based on abandonment. The abandonment must have been for at least one year to provide grounds for a divorce.

Here, Wife has arguably abandoned husband because she has left and has expressed no intent to return. However, it is arguably "justified" because Husband committed adultery, and furthermore has been for only nine months. Therefore, Husband has no valid claim for divorce. He could seek a separation based on abandonment, which has no one year requirement, or alternatively wait three

months and bring the action for divorce then.

b. The issue is whether adultery of the abandoned spouse is a valid defense to a divorce action premised on abandonment.

Under New York law, when a spouse brings an action for divorce based on adultery the other spouse may use the defense of recrimination - that is, the suing spouse committed adultery himself or herself. The adultery of the other spouse is not considered a valid defense to a divorce premised on another ground, but nevertheless may be relevant to determine whether an abandonment was "unjustified." Furthermore, if a spouse seeks to prove adultery in a divorce action, it must be proved through circumstantial evidence and not the testimony of the spouse as to the alleged adultery.

Here, assuming Husband has a valid claim for divorce based on abandonment, Wife may not use the defense of recrimination because it is not recognized unless the grounds for the divorce itself is adultery. However, she may argue that her abandonment of Husband was not unjustified, but rather was perfectly appropriate because of his extramarital affair, and it was improper to cohabit after that (otherwise she would be subject to the defense of condonation if she were to sue for divorce based on the adultery). She could further bring a counterclaim for divorce based on adultery, but must prove the adultery with circumstantial evidence and not her own testimony alone.

2. The issue is whether the transfer of a landlocked parcel of property creates an easement of access by operation of law.

Under New York law, an easement by necessity will arise when property is divided and a portion that is landlocked is transferred to another person. This easement arises by operation of law and requires no express grant or language in the deed. It is an easement appurtenant, because it arises in favor of a benefited parcel (the landlocked property) and burdens a servient parcel (the property you must cross to reach the landlocked parcel). An easement appurtenant is enforceable against transferees of the servient parcel, as it is a property interest in the dominant parcel. It will only be extinguished if the ownership of each parcel becomes vested in the same person, the servient land is condemned or destroyed, it is expressly relinquished in writing, the owner of the servient parcel relies to their detriment on the dominant owner's assurances it is no longer valid, it is abandoned, or is divested by prescription. Abandonment must be more than mere nonuse, but must be an affirmative relinquishment of rights in the easement. To terminate the easement by prescription in New York, the easement must be blocked or otherwise frustrated in a way that satisfies the elements of adverse

possession: hostilely and under a claim of right, openly and notoriously, adversely and exclusively for a period of ten years.

Here, when Greenacre was divided and Backland was transferred to Dom, an easement by necessity arose by operation of law. A right of access to the parcel is necessary for its use and enjoyment, and therefore one is implied and enforceable over Roadland. Although Dom only crossed Roadland once to access Backland and has not returned since, mere nonuse is insufficient to satisfy the elements of abandonment. The easement therefore continues in Roadland. When Roadland was transferred to Serv, the easement was not terminated - there is a road accessing Backland across the western boundary of Roadland, and therefore Serv was on inquiry notice of the easement's existence. Although it has been over ten years since Dom has accessed Backland, the elements of prescription have not been satisfied. Neither Grantor, nor Husband and Wife, did anything to frustrate or impede the use of the roadway under a claim of right. An easement by necessity will terminate by operation of law once the necessity no longer exists, but because the parcel is still landlocked it remains enforceable and Dom can enforce the easement against Serv.

3. The issue is whether one spouse may transfer property owned as tenants by the entirety without the consent of his spouse, pursuant to a durable power of attorney.

In New York, a tenancy by the entirety is a very protected form of co-ownership of property. It is property owned by a husband and wife jointly with the right of survivorship, and cannot be severed or partitioned by one party alone. In New York, one spouse may mortgage his or her interest in the tenancy, but this does not affect the title held by the other spouse. That spouse's rights will survive a unilateral transfer. A tenancy by the entirety is dissolved when the spouses divorce, one spouse dies, or both spouses mutually agree. A durable power of attorney is the grant to another person of the right to make legally binding decisions on your behalf, including the disposition of your property, and because it is "durable" it will survive the death of the granting party.

Here, although Husband and Wife owned the property jointly as tenants by the entirety and one party cannot generally encumber or alienate the interest of his spouse in the tenancy, the durable power of attorney gave Husband the explicit power to make dispositions of real estate on behalf of Wife. This is a good mechanism when planning for incapacity, so that property does not become inalienable if one spouse is unable to legally consent to a transfer. The durable power of attorney gives Husband the legal power to consent to the transfer on behalf of Wife, and therefore the transfer of the tenancy to Serv was valid because it operates as a grant by each spouses voluntarily. The sale terminated both

spouse's interest in the property. The proceeds of the sale are, however, marital assets and Husband cannot keep them for himself. Therefore, Wife should not succeed in her claim against Serv.

### **ANSWER TO QUESTION 5**

1. a. Husband does not presently have grounds for a divorce from Wife.

In New York, there are several grounds on which one spouse may seek a divorce from another spouse. Based on the facts presented, Husband's only possible claim for a divorce will be on the basis of abandonment.

To get a divorce on the basis of abandonment, the plaintiff spouse must show (1) voluntary separation by the defendant spouse, (2) without the consent of the plaintiff spouse, (3) the separation must be without justification, and (4) plaintiff spouse must show that defendant spouse has no intent to return. In addition, where plaintiff spouse seeks to use abandonment as grounds for a divorce, rather than just a legal separation, he must show that the abandonment has been on going for at least 1 year.

In this case, Husband will not prevail in his action to seek a divorce from Wife. While Husband can show that Wife left him voluntarily, without his consent, and without intent to return, it is unlikely that Husband can show that the separation was "without justification." Here Husband committed adultery, wife discovered it and left. Adultery on the part of a spouse is sufficient "justification" to defeat Husband's claim for a divorce on the basis of abandonment.

In addition, Husband's claim will not succeed because Husband and Wife have only been separated for nine months, and notwithstanding the defects in Husband's substantive claim, abandonment cannot support a cause of action for divorce unless it has been on going for at least a year.

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- b. The question is whether, in an action for a divorce on the grounds of annulment, that adultery on the part of the plaintiff spouse can serve as a defense against the divorce.

In New York, where a divorce is based on a claim of adultery, there are three special defenses that can be asserted to prevent the divorce: recrimination (claims that the other spouse has also been adulterous), condonation, and connivance. These special defenses apply only in an action for a divorce on the grounds of adultery.

Because in this case Husband's only possible grounds for a divorce are on

the basis of abandonment, Wife will not be able to assert his adultery as a special defense to the divorce.

However, notwithstanding that Husband's adultery cannot be asserted as a special defense to the divorce action, it is relevant to determining whether Husband's claim for abandonment will prevail and in that sense Wife can use the claims of adultery to defeat his claim for abandonment.

2. The issue is whether a court will imply an easement by necessity and whether the easement will bind subsequent buyers of the burdened Roadland.

The rule is that where there is no express language creating an easement, a court may imply an easement by necessity where a common grantor transfers part of his property that has no way out except over grantor's remaining land. Where a grantor conveys landlocked property, a court may imply an easement by necessity.

In this case, when Grantor conveyed Backland to Dom, it was a landlocked parcel with no way out except by crossing over Grantor's remaining land, Roadland. Because Grantor conveyed a landlocked parcel with no way out except over his other land, the court may imply an easement by necessity in this situation.

It should be noted that none of the other doctrines for formation of an easement are applicable here because Dom has been absent from Backland since 1996.

Having established that there existed an easement by necessity, the next issue is whether the easement can be enforced against Serv in favor of Dom.

The rule is that an easement transfers automatically with the benefitted property (Backland), and will run automatically with the burdened land so long as the buyer of the burdened land is a bona fide purchaser for value without notice (actual, inquiry, or record) of the easement.

In this case, the subsequent buyers, Husband, Wife and Serv, all purchased Roadland for value and without notice of the easement. There was no actual notice, because the Grantor never informed Husband and Wife of the easement and Dom had not used the road to access Roadland since 1996, well before Husband and Wife purchased the property in 2002. Similarly, when Husband sold the property to Serv, he did not inform Serv of the easement. There was also neither inquiry nor record notice to Husband and Wife or Serv with respect to the easement running with the land. The easement was never recorded in the deed and since Dom had not used the easement between 1996 until sometime in 2003, the

new owners of Roadland had no notice of the easement.

Therefore, while there was an easement implied by necessity in favor of Backland, it will not bind the subsequent owners of Roadland because they did not have notice of the easement.

3. The issue is whether one spouse may unilaterally convey property held as tenants by the entirety when acting pursuant to a durable power of attorney on behalf of the other spouse.

The general rule is that a tenancy by the entirety may not be defeated by a unilateral transfer of property rights by one cotenant. Property held as tenants by the entirety can only be conveyed with the consent of both spouses. Unilateral transfers are ineffective, and instead will only create a contingent future interest in the property in the event that the contracting spouse outlives the other spouse.

Under the general rule, the transfer from Husband to Serv is invalid because it was a unilateral transfer of property held as tenants by the entirety.

However, where one spouse is acting on behalf of the other spouse pursuant to a durable power of attorney, unilateral transfer may be permissible if he was acting within the scope of the power of attorney and so long as the power of attorney was in writing.

The general rule is that an agent can bind his principal on authorized contracts, where the agent is acting within the scope of his authority. Authority can come in various forms, both oral and in writing. However, where the contract in question is one dealing with the conveyance of an interest in real property, the delegation of authority from principal to agent must be in writing.

In this case, the power of attorney executed by Wife in favor of Husband was in writing and expressly granted authority to Husband for "real estate transactions." Because the power is in writing, the statute of frauds is satisfied and the power is enforceable unless it has been revoked.

In this case, because there is no evidence that the power had been revoked, and the parties were still married at the time of the sale to Serv, Wife should not prevail against Serv.

It should be noted that if the power of attorney is not enforceable, then Wife will prevail against Serv because a tenancy by the entirety cannot be

terminated by unilateral transfer. Because Husband conveyed the parcel held as tenants by the entirety to Serv unilaterally, the transfer is void. Serv's rights in the property will be a contingent future interest and will only become possessory if Husband survives Wife.

## **ANSWER TO MPT**

### **MEMORANDUM**

To: Tania Miller  
From: Applicant  
Re: Williams v. Biggs d/b/a A-1 Automotive Center  
Date: July 29, 2008

You have asked me to write a memorandum identifying which, if any, of the four actionable statements by Mr. Biggs that you identified are actionable and which are not, along with my analysis for each conclusion. In addition, for each statement that I have found to be actionable, I have drafted a separate cause of action according to our firm's drafting guidelines.

As discussed below, I have identified Statement 1 ("Biggs had 'found a notification from Dodge about a defect causing the gears to grind down") and Statement 2 ("Your transmission is going to fail, and soon!") as supporting a cause of action for fraud. While Statement 3 and Statement 4 both meet several of the criteria for fraud, they are missing some of the key elements (significantly, they are both missing reliance).

1. Statement 1: Biggs had "found a notification from Dodge about a defect causing the gears to grind down."

This statement satisfies the five elements that are necessary for fraud: (1) a material misrepresentation of fact by the defendant; (2) made with knowledge of its falsity; (3) made with intent to deceive or induce reliance; (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation.

Every element of the cause of action for fraud must be specifically pleaded and the facts constituting the fraud must be alleged with sufficient particularity to allow a defendant to understand fully the nature of the charges made.

When Williams took the minivan to Mission Dodge, Mission informed Williams of the fact that Dodge has not circulated any notification about any

problems with the transmissions in its 2003 minivans. Thus, since Dodge has never issued a notification about a defect causing gears to grind down, defendant Biggs made a material misrepresentation of fact. As stated in *Foster v. Panera*, a misrepresentation is material if a reasonable person would consider it important in deciding to enter into the transaction. Clearly, a warning by the carmaker - the day before Williams was to take his family on vacation in the car - would induce a reasonable person to engage in the transaction, and thus this information was a material misrepresentation of fact.

Since there was no basis in fact at all of this statement, Biggs must have known of its falsity. However, while we will need to pursue additional evidence to establish that Biggs did in fact know this statement was false, it should not be difficult to prove since there is no reasonable basis for him to believe that Dodge did ever issue such a statement. Nevertheless, we should ensure that we have sufficient evidence to prove Biggs' knowledge that Dodge never issued this warning.

In making this false misrepresentation, Biggs intended to induce Williams to rely on this statement, thus spending more money on these unnecessary tasks. As a reasonable person, and under the *Foster v. Paner* standard for reasonable reliance, it is clear that had Williams known that the statement about Dodge was false, he would not have moved forward with the action. In particular, Williams specifically stated that he believed that the transmission was in good condition and did not think that there was anything wrong with it. Indeed, the only reason that he believed that the transmission needed work was because Biggs induced him to rely on the false statement about Dodge. Williams did reasonably rely on the statement from Biggs, because Biggs held himself out to be an expert in cars and in possession of special knowledge on the parts. While *Madison v. Brooks* established that vendors have the right to express an opinion, this was no mere opinion - it was an expression of fact, and Williams was reasonable in relying on this statement.

The fifth element of loss is easily established since Williams had to cancel his family vacation, paid \$1,887 to Biggs for unnecessary work, and then had to pay \$128 to Mission to repair those unnecessary and damaging actions.

#### Cause of Action for Fraud Pleading pursuant to Statement 1:

1. When Biggs told Williams that Dodge issued a warning about transmissions in 2003 minivans, he engaged in a material misrepresentation of fact, since Dodge has never issued such a warning.
2. Since Biggs is the owner of a car repair shop and Dodge never issued a

warning about 2003 minivans, Biggs made this statement knowing its falsity.

3. When Biggs made this false statement to Williams and knew of its falsity, he intended to induce Williams reliance on his expertise so that Williams would spend money on unnecessary car repairs.

4. Since Williams is in possession of far less knowledge than Williams about cars and was appropriately concerned for the safety of his family in this car, he acted as a reasonable person in relying on the false statement from Biggs.

5. As a result of Biggs' knowingly false statement and Williams' induced reliance, Williams suffered damages including cancelling his family vacation, \$128 to Mission car dealership, and \$1,887 to A-1 Automotive.

2. Statement 2: "Your Transmission is going to fail, and soon!"

This statement also satisfied the five elements that are necessary for fraud: (1) a material misrepresentation of fact by the defendant; (2) made with knowledge of its falsity; (3) made with intent to deceive or induce reliance; (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation.

Every element of the cause of action for fraud must be specifically pleaded and the facts constituting the fraud must be alleged with sufficient particularity to allow a defendant to understand fully the nature of the charges made.

The statement that the transmission is going to fail and soon should be treated as a material misrepresentation of fact, though the defendant will likely try to treat this as a protected opinion. According to *Madison v. Brooks*, as a general rule, fraud cannot be predicated upon the mere expression of an opinion which is understood to be only an estimate or a judgment. The person to whom such a statement is made has no right to rely upon the statement and does so at his peril. However, there is an exception to this rule where the opinion relates to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth. Where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or is possessed of superior knowledge respecting such matters with a design to deceive and mislead, the positive assertion of a matter, which stated in another form might be mere opinion, may be actionable if the statement was false. The statement from Biggs certainly meets these criteria, because there was a wide disparity between the parties in their knowledge and expertise about cars and transmission parts. Biggs had special knowledge of the facts underlying the opinion because it was his employee that took the car out for a ride, and it was his supposed-inspection that triggered the statement about the

transmission failing. The certainty that Biggs made this expression with, and the speed with which he stated the failure would happen took this from a mere opinion to a material misrepresentation of fact.

Since this expression that the transmission was going to fail was known to be false by Biggs, it is clear that it was only stated to induce Williams to engage in additional work and payment to A-1. In making this false misrepresentation, Biggs intended to induce Williams to rely on this statement, thus spending more money on these unnecessary tasks. As a reasonable person, had Williams known that the statement about Dodge was false, he would not have moved forward with the action. In particular, Williams specifically stated that he believed that the transmission was in good condition and did not think that there was anything wrong with it. Indeed, the only reason that he believed that the transmission needed work was because Biggs induced him to rely on the false statement about Dodge. Williams did reasonably rely on the statement from Biggs, because Biggs held himself out to be an expert in cars and in possession of special knowledge on the parts. As a reasonable person, Williams relied on this statement, because believing that this transmission was imminently about to fail he took what he believed to be the necessary precautions to prevent a catastrophe befalling him or his family.

The fifth element of loss is easily established since Williams had to cancel his family vacation, pay \$1,887 to Biggs for unnecessary work, and then had to pay \$128 to Mission to repair those unnecessary and damaging actions.

#### Cause of Action for Fraud Pleading pursuant to Statement 2:

1. When Biggs told Williams that his transmission was about to fail and soon, he made a statement that is an expression of opinion that is actionable as fraud given his special knowledge of the facts underlying the opinion in his position as owner of A-1 and the person who examined the car.

2. Since Biggs is the owner of a car repair shop and was the one who engaged in the inspection of the transmission, he knew that his statement about the transmission was false, since as was established by Mission, there was no damage to the transmission and it actually was in good condition.

3. When Biggs made this false statement to Williams and knew of its falsity, he intended to induce Williams' reliance on his expertise so that Williams would spend money on unnecessary car repairs.

4. Since Williams is in possession of far less knowledge than Williams about cars and was appropriately concerned for the safety of his family in this car,

he acted as a reasonable person in relying on the false statement from Biggs regarding the certainty and speed with which his transmission was about to fail.

5. As a result of Biggs knowingly false statement and Williams' induced reliance, Williams suffered damages including cancelling his family vacation, \$128 to Mission car dealership, and \$1,887 to A-1 Automotive.

3. Statement 3: "It would also help if we installed an extra cooler to keep it from running hot."

This statement is likely not actionable for fraud, because Williams did not act in reliance on it. To be sure, this statement is also a false statement, and it is quite likely that Biggs was aware of its falsity. Moreover, he made this statement intending to induce Williams to act in reliance on it. However, Williams responded that he did not want the extra cooler and stated that Dodge would have installed one if it were necessary. This statement by Williams makes it clear that he did not rely on the materially false statement from Biggs in this particular instance.

4. Statement 4: "I guarantee this job."

This statement might potentially be actionable for fraud, but is a much weaker ground than Statement 1 and Statement 2. The key issue with this statement is whether this promise - which Biggs clearly had no intention of following through on - constitutes a misrepresentation of fact.

Under *Rogers v. Statewide Insurance Co.*, the court concluded that when the promise is made with no intent to perform, it constitutes a misrepresentation of fact. If the other elements of fraud are present, a cause of action for fraud exists. If the maker of a promise honestly intends to follow through on that intention at the time of the promise, the statement cannot give rise to an action for fraud. However, if at the time of the promise, the promisor has no plans to perform, then he has misrepresented his present intention, which is a misrepresentation of fact. That misrepresentation can be used to support a claim for fraud. However, he must prove that the promisor did not intend to perform at the time the promise was made.

It is readily apparent that at the time that Biggs made the statement guaranteeing the job, he actually had no intention of following through on it, because before he said it he had already prepared a receipt that said "Not Guaranteed." Moreover, Biggs later claimed that the reason he could not guarantee the job was because Williams had not installed the additional cooler. However, Biggs was already aware that Williams was not going to be installing the extra cooler at the time he said "I guarantee this job." Quite clearly, this was a

promise that Biggs had no intention of ever following through on. This meets the *Rogers v. Statewide* test for conversion of a promise to a material misstatement of fact.

However, the difficulty that we face in establishing this cause of action for fraud is the reliance element. When Biggs stated this false promise, Williams had already requested the unnecessary repairs (under false inducement and fraud), and had already paid the bill. There were no further actions that Williams took in reliance upon this false promise that caused him damages. The fact that Biggs did not tell him that "I guarantee this job" until Williams was leaving the shop makes it difficult to establish the critical element of reliance.

Therefore, I would not recommend Statement 4 as a cause of action for fraud to pursue.

### Conclusion

As you can see from my analysis above, I believe that we have a very strong case for establishing causes of action for fraud under Statement 1 and Statement 2 given that they both satisfy all of the five elements that are necessary to establish fraud. While Statements 3 and 4 both involve a knowing, material misrepresentation of fact, they both fail on the elements of reliance. It is clear that Mr. Williams has suffered serious damages, and I look forward to successfully pursuing this claim on our clients behalf.

## **ANSWER TO MPT**

### MEMO

To: Tania Miller  
From: Applicant  
Date: July 29, 2008  
Re: Williams v. Biggs d/b/a A-1 Automotive Center

### INTRODUCTION

You have asked me to review the file for the potential claim of Williams v. Biggs d/b/a A-1 Automotive Center and specifically to consider whether our client, Robert Williams (hereinafter "Williams"), has a claim for fraud against Biggs and A-1 Automotive based on any of four specific statements made by Aaron Biggs (hereinafter "Biggs") to Williams. For the reasons that follow, I have concluded that statements one and two made by Biggs would likely be actionable

under a theory of fraud, but statements three and four would not constitute fraud.

### ISSUE

- I. Discuss whether or not each of the four statements made by Biggs would be actionable in an action for fraud.
- II. For each of the four statements determined to be actionable, draft a separate cause of action.

### DISCUSSION

The elements for establishing a claim of fraud are: (1) material representation, (2) made with knowledge of falsity, (3) made with intent to deceive or induce reliance (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) damages. *Foster v. Panera* (2003). To prevail on a claim for fraud, the plaintiff must specifically plead each element for a cause of action for fraud, and the facts constituting the fraud must be alleged with sufficient particularity to allow the defendant to fully understand the nature of the charges made. *Id.* In determining whether a representation is material, the court will consider whether the reasonable person would consider it important in deciding to enter into the transaction. *Id.* Although statements of opinion generally do not constitute fraud, the court will make an exception and find fraud in the case of an opinion, if the other elements of fraud are satisfied and if the statement relates to a subject to which the parties do not have equal knowledge or means of ascertaining the truth. *Madison v. Brooks* (1979). Lastly, since fraud only applies to past or present statements, promises of future intent will not constitute fraud, unless the plaintiff can establish that at the time the defendant made the statement he did not intend to follow through with his future promise. *Rogers v. Statewide Insurance Co.* (1995).

The above rules and factors will be considered in determining whether each of the four statements in question would constitute fraud.

(1) Biggs had "found a notification from Dodge about a defect causing the gears to grind down."

This statement would likely be actionable. This statement was false. Biggs knew the statement was false, since he never received a notification from Dodge. The fact that Dodge never sent these notifications is confirmed by the statements by Dodge Mission who informed Williams that Dodge had not circulated any information about any problems with its 2003 minivans. The statement was made with the intent to deceive Williams because Biggs wanted to incur additional business and have Williams replace or repair his transmission. Williams did rely

on this statement when he decided to repair his transmission and Williams incurred damages as a result of his reliance on the fraudulent statement because but for Biggs statement Williams would not have thought or known there were any problems with his transmission and thus he would not have incurred the expense from Automotive of replacing his transmission, the expense from Dodge Mission of correcting the improper installation from A-1 or any incidental expenses that resulted from him having to cancel or delay his vacation plans. Furthermore it is likely that a Court would find these statements to be material because a reasonable person would rely on the fact that a manufacturer had notified automotive shops about problems with their transmissions in coming to the conclusion that there was a problem with their transmission. Furthermore, the fact that Biggs was the owner of an automotive shop made it reasonable for Williams to rely on Bigg's superior knowledge. Thus it was reasonable for Williams to conclude that if there was in fact a problem with the transmission, that Biggs rather than Williams would have superior knowledge about this information.

(2) "Your transmission is going to fail and soon"

Applying the factors above, this statement would constitute fraud. This statement was false. The falsity of this statement was established by the fact that when Williams took the minivan to Mission Dodge the day after Biggs had allegedly replaced the transmission, the Mission Dodge dealer informed Williams that the transmission was in fact the original transmission and that any damage was the result of A-1's improper reinstallation of the transmission. Furthermore, Biggs intended that Williams would rely on this misrepresentation because Biggs wanted Williams to have A-1 either rebuild the transmission or repair his transmission, and Williams did rely on this misrepresentation by having A-1 Automotive install a rebuilt transmission. Williams has sustained damages as a result of the fraud, including the money he paid A-1 Automotives to fix his transmission and the additional money he paid Dodge Mission to correct the mistakes that A-1 automotive made, none of which he would have incurred but for Biggs' misrepresentation, because prior to the misrepresentation Williams did not think or know he had a problem with his transmission. Lastly, although Biggs can argue that his statement "Your transmission is going to fail soon" is an opinion and therefore could not constitute fraud, this claim would likely fail, because Biggs, a car mechanic working in an automotive shop had superior knowledge about the failure of transmissions than Williams. Williams went to Automotive seeking their expertise with cars to change his oil and therefore it is reasonable that Williams would have relied on Biggs' statements because Biggs had superior knowledge than Williams concerning these matters relating to his car.

(3) "It would also help if we installed an extra cooler to keep it from running hot"

This statement did not constitute fraud because Williams did not take Biggs' suggestion, and therefore Williams did not rely on Biggs' false statement. This statement is probably false and Biggs most likely knew it was false at the time that he made the statement. However, since Williams rejected Biggs' suggestion and responded, "if the minivan had needed an extra cooler the manufacturer would have installed one," Williams did not rely on Biggs' false misrepresentation and as a result the statement is not actionable.

(4) "I guarantee the job."

This statement would not constitute fraud because it was not a statement that Biggs intended that Williams would rely on. This statement was false, since Biggs did not in fact guarantee the job. Furthermore, at the time that Biggs made the statement he knew it was fraudulent because he had already stamped the receipt (or had one of his employees stamp the receipt) "No Guarantee." However the statement would not be actionable because the statement was made after the work was already completed and therefore it was not made with the intention of plaintiff relying on the statement to induce plaintiff to use A-1 Automotive Center to do the work on his car. At the time the statement was made, the work on Williams' car by A-1 Automotive was complete and Biggs' statement did not induce Williams into having any subsequent or additional work done to his car.

### CONCLUSION

For the foregoing reasons, statements one and two would most likely be actionable, but statements three and four would most likely not be actionable. Please see below for the drafting of the causes of action for statements one and two.

Cause of Action - Statement One: "Biggs had found a notification from Dodge about a defect causing the gears to grind down."

1. When Williams brought his car in for an oil change to A-1 Automotive Center, he was informed by the owner of A-1 Automotive Center, Biggs, that there was a problem with the transmission in his Dodge Minivan. Biggs informed Williams that Dodge had sent a notification that there was a defect in their automobiles causing the gears to grind down.

2. Biggs made this statement despite knowing that there had been no notification from Dodge.

3. Biggs made the statement about the notification for the purpose of

inducing Williams into paying to have A-1 Automotive either repair or replace his transmission despite the fact that nothing was actually wrong with the transmission.

4. Williams relied on Biggs' statement about the notification because Biggs was in the business of automotive repair and therefore he would have greater access to car dealerships and thus it would be reasonable for Williams to conclude that Biggs would be likely have more information from manufacturers about defects that existed in particular cars. In reliance on this information, Williams had A-1 Automotive install a rebuilt transmission into his minivan.

5. Williams sustained damages that resulted from him having to replace the transmission with a rebuilt transmission when in fact there was nothing wrong with his original transmission. Furthermore, Williams sustained additional damages that resulted from him having to have Dodge Mission fix the leak in his transmission that A-1 improperly reinstalled.

Cause of Action - Statement Two: "Your Transmission is Going to Fail and Soon."

1. When Williams brought his car in for an oil change he was informed by the owner of A-1 Automotive Center, Biggs, that "your transmission is going to fail, and soon."

2. Biggs made this statement despite knowing that there was nothing wrong with the transmission in William's Dodge Minivan.

3. Biggs made this statement for the purpose of inducing Williams into paying A-1 Automotive to either replace or repair the transmission in Williams' car.

4. Williams relied on Biggs' statement about the failure of the transmission because Biggs was in the business of automotive repair and therefore he had superior knowledge about problems relating to defects and failure of transmissions. As a result of his reliance, Williams had A-1 Automotive install a rebuilt transmission in his minivan.

5. Williams sustained damages that resulted from him having to replace the transmission with a rebuilt transmission when in fact there was nothing wrong with his original transmission. Furthermore, Williams sustained additional damages that resulted from him having to have Dodge Mission fix the leak in his transmission that A-1 improperly reinstalled.