

BOARD OF BAR EXAMINERS
OF THE DELAWARE SUPREME COURT

2018 BAR EXAMINATION

Monday, July 23, 2018

9:30 a.m. – 12:30 p.m.

Questions 1-4

Question #1

Plaintiff is a former employee of Corporation, which is in the business of construction contracting. Before being terminated, Plaintiff was Corporation's bid coordinator, responsible for preparing and submitting bids on construction contracts. Defendant is the president of Corporation. According to Defendant, Plaintiff was terminated for deficient job performance—specifically, making mistakes on bid paperwork. According to Plaintiff, the reason given by Defendant is pretext, and in fact Defendant terminated Plaintiff in retaliation for pointing out that Defendant made the error on the bid paperwork.

After exhausting all applicable administrative remedies, Plaintiff properly files an action (the "Action") against Defendant in the Superior Court of the State of Delaware (the "Court") asserting a claim for wrongful termination.

Spouse is married to Defendant. One evening after the Action is filed, Defendant has a private conversation with Spouse. "Now that we have a moment alone, I want to tell you something in confidence. Plaintiff's claims are very serious—and largely true—but I'm going to fight them with all I've got," Defendant says before walking to the kitchen to get a snack. Upon returning to the room an hour later, Defendant says, "Tell our Kids not to make the same mistakes I did; they should never wrongfully terminate their employees, like I did." Spouse never discloses any aspect of the conversations to anyone, including Kids. At a press

conference a few days before trial, Defendant mentions having had “a candid discussion with Spouse” about the alleged wrongful termination.

Weeks after Plaintiff’s termination, a Corporation employee, Accountant, rushes into the office of another Corporation employee, Witness. Accountant yells, “I’ve just seen Defendant fire someone else! The employee mentioned another mistake Defendant made and Defendant immediately told the employee, ‘You’re fired for poor performance.’ I’ve seen Defendant do the same thing to everyone who points out Defendant’s mistakes for 10 years! This is the tenth time! I can’t stand it anymore!” before storming out of the building.

At the same time the Action is filed, Defendant is running for election as Governor of Delaware. In the lead-up to the election, Plaintiff writes on social media, “I would never vote for someone who wrongfully terminates their employees” (the “Social Media Post”). Despite the election having been conducted by secret ballot, Defendant’s counsel properly obtains credible evidence during discovery suggesting that Plaintiff voted for Defendant in the gubernatorial election.

During discovery, Defendant properly discloses the intention to present expert testimony from Elliot regarding whether Plaintiff’s job performance as bid coordinator was satisfactory. Elliot dropped out of high school at age 16 and has no educational degrees or certifications. Elliot has worked for 35 years at Xcellent Construction—Corporation’s primary competitor in Delaware—including 20 years

as the manager of the department responsible for preparing and submitting Xcellent's contractor bids, in which role Elliot has: (i) overseen the preparation and submission of over 1,000 bids; and (ii) been responsible for all hiring and termination decisions. For the last five years, Elliot has taught courses on construction business management. Elliot has never been qualified as an expert in any legal proceeding.

During the pretrial conference in the Action, Defendant requests the Court to take judicial notice of the fact that Defendant ran for election as Governor (the "Request for Judicial Notice"). After giving Plaintiff's counsel a chance to oppose the request, the Court takes the Request for Judicial Notice under advisement.

1. Before trial, Plaintiff moves to preclude Elliot from testifying on the basis that Elliot is not qualified to provide expert opinion. What arguments should Defendant make in opposition to the motion?

2. Plaintiff's counsel calls Spouse to testify at trial, and asks Spouse about what Defendant said to Spouse described above. What, if any, of those statements may Spouse properly refuse to disclose? Explain the basis for your answer.

3. During the cross-examination of Plaintiff at trial, Defendant's counsel properly admits the Social Media Post into evidence. Defendant's counsel then asks Plaintiff whether Plaintiff voted for Defendant in the gubernatorial election. May Plaintiff properly refuse to answer the question? Explain your answer.

4. During cross-examination of Plaintiff at trial, Defendant's counsel attempts to impeach Plaintiff's credibility with evidence Plaintiff was convicted of misdemeanor perjury seven years earlier. Plaintiff's counsel objects. How should the Court rule on the objection? Explain your answer.

5. Plaintiff calls Witness to testify. Plaintiff's counsel properly informs the Court that Witness is intimidated by Defendant, who once threatened to fire any employees who testify at the trial. Plaintiff's counsel asks the Court to sequester Defendant during Witness' testimony. How should the Court rule on the request? Explain your answer.

6. Witness intends to testify as to what Accountant said, described above. Defendant's counsel objects to the proffered testimony as (a) hearsay, and (b) improper evidence of prior bad acts. What arguments should Plaintiff's counsel make in opposition to the objections?

7. Following the conclusion of witness examinations at trial, but before closing arguments, the Court notifies the parties that it will grant the Request for Judicial Notice. Assume that the fact is properly the subject of judicial notice. Can the Request for Judicial Notice properly be granted at this point in the trial? Explain your answer.

8. Assume the Court can and does take judicial notice. Defendant requests that the Court instruct the jury regarding the judicially noticed fact. The Court instructs the jury as follows: "The Court has taken judicial notice of the fact that Defendant ran for election as Governor. This means that you, as factfinders, may accept this fact as true unless you believe there is a compelling reason not to do so." Is this instruction proper? Explain your answer.

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Question #2

****For purposes of this essay, assume all business entities are formed in Delaware, all persons are Delaware residents, and all acts occur in Delaware.****

XYZ, Inc. (“XYZ”) is a corporation in the business of manufacturing rubber tires used in various industries. Customer is a commercial supplier of tires in the retail market.

Customer telephones XYZ’s principal Delaware manufacturing facility and inquires into the price for 1,000 tires. During the call, an XYZ sales representative tells Customer, “the price is \$50,000 for 1,000 tires, F.O.B. destination.” The sales representative also tells Customer that, as a service to any retailer that purchases \$10,000 or more worth of tires, XYZ will feature the retailer’s name as an “approved distributor” on XYZ’s website, effectively providing free advertising for the retailer. No other terms are conveyed to Customer on the call. Customer then replies “OK, I’ll take the tires at that price.”

The next day, the XYZ sales representative mails the following letter to Customer:

This will confirm our contract for the sale of 1,000 tires for a total purchase price of \$50,000, plus shipping charges for immediate shipment, payment due on delivery.

Customer receives and reads the letter, but does not reply to it.

XYZ ships the tires to Customer and encloses an invoice for \$51,500, which comprised the following two line items: “(1) 1,000 tires—\$50,000; (2) shipping charges—\$1,500.” Customer accepts the tires as tendered and makes no complaint about their quality or any defects, but Customer does not pay XYZ.

One month later, the XYZ sales representative telephones Customer because the invoice is 30 days past due. During the call, Customer acknowledges owing XYZ \$50,000 for the tires, but refuses to pay the shipping charges because “I never signed anything agreeing to pay for shipping.”

1. Does the Uniform Commercial Code govern all or any part of the transaction between XYZ and Customer? Explain your answer. If the Uniform Commercial Code governs only a part of the transaction, explain which part and why.

2. Applying only the Uniform Commercial Code, does the fact that Customer never signed anything agreeing to pay for shipping mean that Customer is not liable for the \$1,500 shipping charges? Explain your answer. Do not address any theories of liability other than under the Uniform Commercial Code.

* * *

Because Customer has not paid for the tires, XYZ has an account receivable for the unpaid amount. While that account balance is still outstanding, XYZ enters into a loan agreement with Bank (the “Loan”). Among other terms, the Loan requires XYZ to make regular interest payments on specified dates. Nonpayment of

any regular interest payment is an immediate event of default without opportunity for cure under the Loan. In connection with the Loan, XYZ also grants Bank a security interest in all of its property, including all of its accounts receivable. All of the Loan documentation is in writing and signed by all of the parties to the Loan. Bank perfects its security interest. XYZ has no other debt or creditors.

XYZ fails to make a required interest payment under the Loan. Bank immediately declares an event of default and exercises its rights to cause all of XYZ's accounts receivable to be assigned to Bank. (Assume that the existence and perfection of the security interest in, and the assignment to Bank of, the accounts receivable are valid and lawful.)

Because Customer still has not paid for the tires, Bank sends Customer a signed writing on Bank's letterhead, notifying Customer that XYZ's accounts receivable (including specifically with respect to Customer's unpaid balance for the sale of the tires) have been assigned to Bank following XYZ's default on the Loan and instructing Customer to pay the outstanding balance for the purchase of the tires directly to Bank. Bank's letter also contains reasonable proof that XYZ's accounts receivable have been assigned to Bank.

Customer is ready to pay the outstanding balance, but is unsure whether to pay XYZ or Bank. Ultimately, Customer decides to pay the full outstanding balance for the sale of the tires directly to XYZ, reasoning "I have no relationship with Bank

and XYZ will probably forward the money to Bank if Bank is supposed to have it under their loan documents, so I should just pay XYZ and let them sort it out.”

XYZ does not forward the payment to Bank. Later (but within the applicable statute of limitations), Bank sues Customer to collect on the full amount of the account receivable as of the time of XYZ’s default.

3. Applying only Article 9 of the Uniform Commercial Code, is Customer liable to Bank for the purchase price of the tires even though Customer has already paid XYZ? Explain your answer.

XYZ resolves its financial difficulties and returns to profitability, ultimately deciding to “go public” by listing shares of its common stock (the “XYZ Shares”) on a national securities exchange. The XYZ Shares are issued in book entry form without certificates.

Broker maintains securities accounts for others in the ordinary course of its business. Broker is the registered holder of 1,000 XYZ Shares, which Broker holds credited to a securities account for Investor, one of Broker’s many clients.

XYZ properly declares and pays a dividend on every XYZ Share consisting of a promissory note issued by XYZ (the “XYZ Promissory Note”) evidencing an unconditional promise to pay \$50 to its bearer on January 1, 2020. Shortly thereafter, XYZ delivers 1,000 XYZ Promissory Notes to Broker as the registered holder of the

1,000 XYZ Shares held for the account of Investor. Broker promptly credits the 1,000 XYZ Promissory Notes to Investor's securities account.

4. As to each of (a) the XYZ Shares and (b) the XYZ Promissory Notes credited to Investor's securities account, identify under Article 8 of the Uniform Commercial Code whether it is a security, a financial asset in which Investor holds a security entitlement, both or neither. Explain your answer.

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Question #3

Alice and Bob are forming a Delaware corporation called Clothing Corp. Clothing Corp. is in the business of manufacturing children's clothing to be sold on the East Coast of the United States. They filed a certificate of incorporation with the Division of Corporations in the Delaware Department of State including the following provisions pursuant to 8 *Del. C.* § 102:

- (1) name of the corporation;
- (2) the name and address of the registered agent;
- (3) the nature and purpose of the business;
- (4) the name and address of the incorporator; and
- (5) an authorization for the corporation to issue only 100 shares of common stock, all such shares having no par value.

Alice served as the initial incorporator and signed a consent of incorporation that appointed herself and Bob to the Board of Directors of Clothing Corp. (the "Board") and adopted bylaws. Alice and Bob then held a Board meeting ratifying the initial bylaws and authorizing the issuance of all of the 100 shares of common stock to themselves for \$10,000 per share. For its first two years of existence, Alice held 55% of Clothing Corp.'s common stock, held a directorship and served as

Chairperson of the Board, while Bob held 45% of Clothing Corp.'s common stock, held a directorship and served as the Chief Executive Officer.

During its second year, Clothing Corp. needed additional financing to expand its distribution beyond its existing geographic footprint. Alice and Bob agreed to have Clothing Corp. issue 1,000 shares of Series A preferred stock ("Series A") at \$4,000 per share, having no par value. The Series A would be entitled to 20% of Clothing Corp.'s aggregate voting rights (which would reduce Alice's aggregate voting power to 44% and Bob's aggregate voting power to 36%).

1. How can Alice and Bob create and issue the Series A? Your answer should identify and explain all action necessary in their capacities as both stockholders and directors.

After following all steps required by the Delaware General Corporation Law to properly create 1,000 shares of Series A, Alice and Bob unanimously vote as directors to issue all such Series A shares to Denise, generating \$4 million in capital for Clothing Corp. and entitling Denise to the Series A voting rights.

Bob, acting in his capacity as CEO, immediately and without obtaining Board approval or consulting Alice or Denise, used \$3.8 million of the Series A proceeds to purchase supplies from Thrifty Threads, Inc. Unbeknownst to Bob, Thrifty Threads, Inc. is a seedy overseas manufacturer known for selling substandard and

chemical-laden fabrics that cannot be sold in the United States due to regulatory restrictions. Upon learning of the purchase, Alice re-sells the fabric to an overseas manufacturer for pennies on the dollar, recouping only \$50,000 of the original \$3.8 million purchase price.

Alice and Bob decide to amend the bylaws of Clothing Corp. in their capacities as directors and add a provision exculpating directors from any personal liability for monetary damages for a breach of fiduciary duty. That bylaw provides that, "A director or officer of the corporation shall not be personally liable to Clothing Corp. or its stockholders for monetary damages for breach of fiduciary duty as a director or officer except for any breach of the duty of loyalty to Clothing Corp. or its stockholders." Upon learning these facts, Denise wants to file an action against Alice and Bob.

2. Prior to filing suit, what statutory avenue(s) does the Delaware General Corporation Law provide to Denise for investigating possible mismanagement by Bob? Your answer should discuss how Denise must pursue that statutory right and the scope of her rights.

3. Explain why the bylaw amendment is valid or invalid under the Delaware General Corporation Law.

4. Identify the claims that Denise may bring against Alice, Bob or the Board and evaluate the strengths and weaknesses of those claims, and possible defenses. In your answer, address any claims that may arise from action or inaction and discuss whether Alice and Bob's actions to amend the bylaws has any implications on the claims and defenses of the parties to Denise's potential lawsuit.

With only \$250,000 left in its operating account, Clothing Corp. begins to seek additional contracts and relationships that will restore it to profitability. At a clothing conference, Bob meets Edward, whose company manufactures children's shoes. Edward proposes that he and Bob form a new company to manufacture children's shoes, which would require Bob to personally make an initial investment of \$248,000 in the new company. Clothing Corp. would not have any interest in the new company.

5. Identify and discuss the factors the Court will consider in evaluating whether Bob has an obligation to disclose this offer to form and invest in the new company to the Clothing Corp. Board. Please explain your answer.

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Question #4

Harold Homeowner came home from work at 4:00 p.m. on February 1, 2018. He walked up to the back door of the house and found the back door to have been badly damaged and pried open. He entered the house and found his home was ransacked. Harold quickly walked through the house and then called 911. When the police arrived, he pointed out the damaged back door and told the police that a safe which contained over \$2,000, his class ring, and his mother's estate jewelry was missing from his spare bedroom closet. He also noticed that his recently refilled prescription for a controlled substance, which he kept in the medicine cabinet in the second floor bathroom, was missing.

Once the police took the necessary information, a detective, Detective Law, arrived and began to process the scene and collect anything of potential evidentiary value. Detective Law collected fingerprint evidence on the exterior back door window. Detective Law did not recover other physical evidence, but she did photograph the door and interior of the residence.

Back at the police station, Detective Law matched the fingerprints as being Jim Jones' fingerprints. Jones' criminal history indicated he had numerous prior felony convictions, but none within the last 10 years. The next day, Detective Law located Jones in a park, and after advising Jones of his *Miranda* rights, Jones waived his rights and agreed to talk to the detective. Detective Law asked Jim Jones if he

knew Harold Homeowner and whether he had ever been to his residence. Jim Jones expressly denied knowing Howard Homeowner and denied involvement in any criminal activity at Harold's residence. Jim Jones then ended the interview.

Detective Law continued her investigation and learned that Harold's class ring was pawned at ABC Pawn Shop early on February 2, 2018. Surveillance video obtained from the owner of the pawn shop showed Sally Smith pawning the ring, as Jim Jones stood next to her. The ABC Pawn Shop also provided Detective Law receipts of Sally Smith pawning the ring, as well as a copy of Sally's drivers license.

Detective Law then drove to Sally's home a few blocks away and asked her about the ring pawned at the ABC Pawn Shop. Sally Smith told the police she found the ring on a sidewalk, so she decided to make some money from it. She denied knowing a man named Jim Jones, and when shown a photograph of Jones, Sally claimed to not recognize him. Detective Law concluded the interview. As Detective Law was leaving Sally Smith's residence, she looked back towards an upstairs window of the home and saw Jim Jones hiding behind a curtain in the window.

Upon seeing Jones, Detective Law ran back to the front door and forcibly entered Sally's home. As she did so, in plain view on a kitchen table she saw two black handguns, a small amount of marijuana and controlled substance pills. Sally Smith then fled the residence, running down the stairs and out the back door. Detective Law pursued Sally, but Sally shoved her and Detective Law fell down the

stairs, receiving several bruises to her left arm and torso. As other units arrived on scene, they apprehended Sally about a block away. Upon arrest, the police patted Sally down and in her pocket they found a pipe, commonly used for ingesting crack cocaine. Sally became uncontrollable and kicked the door of the police car, causing a dent. She also screamed profanities at her neighbors and the police. Sally was then taken to the police station, where the police seized her phone. During that time as the police possessed the locked phone, text messages popped up on the home screen, revealing her involvement in selling illegal drugs.

Assisting police officers found Jim Jones in an upstairs bedroom, hiding under a bed. In Jones' pocket, the police found Harold's mother's estate jewelry. Police continued to search the bedroom after securing Jones in custody. In a dresser drawer in the same bedroom, they found distinctive jewelry. The jewelry in the dresser drawer matched jewelry taken from a home a month prior located at 21 Main Street.

Carol Clark, who lives at 21 Main Street, reported to the police that on New Year's Day 2018, two masked individuals armed with firearms, entered her home. The intruders threatened Carol Clark, tied her to a chair, and removed more than \$3,000 in jewelry from her bedroom. They then left her tied to a chair in her kitchen. Carol was unharmed and only freed when her daughter came to check on her the next day.

When the police apprehended Sally Smith and brought her to the police station, a second Detective, Detective Justice, came into the room. He said, "I'm going to ask you some questions. If you tell me the truth, you don't have anything to worry about." He then began questioning her. Sally Smith admitted to the police that she and Jim Jones were at Carol Clark's residence about a month prior. Sally then told Detective Justice that she would not be making further statements without an attorney.

1. You are the prosecutor assigned to this investigation. What crimes, if any, can Jim Jones be charged with? Identify the crime(s) and the elements of the crime(s).

Do not charge lesser-included offenses. For any crime for which there is more than one degree, specify which degree you are charging.

2. (a) Identify any and all 4th Amendment issues raised by the above facts. Explain your answer.

(b) Assuming that you represent Jim Jones, what claims would you raise on his behalf in a Motion to Suppress? Explain your answer.

3. The prosecution plans to use the statement of Sally Smith against her at trial. Assuming you represent Sally Smith, what arguments would you raise on her behalf against the admissibility of her statement? Explain the legal analysis the court should follow in making its determination.

In April 2018, a neighbor of Harold Homeowner told the police he just heard about the incident at Harold's house on February 1, 2018. He told the police that he was not sure if it was important, but he was home that day and he recalled seeing a man leaving Harold's house around 2:00 p.m. He believed that if he saw a photo of the man, he would recognize the person he saw at Harold's house. Detective Law then presented the neighbor a photo line-up which included Jim Jones' photograph. After reviewing the photos for a couple minutes, the neighbor told the police he did not see the person he thinks he saw leaving Harold's house in the photos provided.

4. You are the prosecutor assigned to this case. What obligations, if any, arise from the neighbor's review of the photo line-up in relation to the prosecution of Jim Jones? Explain your answer, identifying any applicable legal doctrines.

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GENERAL INSTRUCTIONS

The Essay Section of the 2018 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this morning session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.

BOARD OF BAR EXAMINERS
OF THE DELAWARE SUPREME COURT

2018 BAR EXAMINATION

Monday, July 23, 2018

2:00 p.m. – 5:00 p.m.

Questions 5 - 8

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Question #5

Paula is a Delaware resident. Outdoor Kitchen and Patio Design, Inc. (“Outdoor”) is incorporated in Delaware but has its principal place of business in Maryland, just across the state line a few miles from Paula’s home in Delaware. Paula calls Outdoor to inquire about building an outdoor kitchen at her home. Paula speaks to Dan, the lead designer and salesperson at Outdoor, who is a Maryland resident. Dan sends another Outdoor employee to Paula’s home in Delaware to perform survey work, and then Paula meets with Dan at Outdoor’s design center in Maryland to review design options.

Paula contracts with Outdoor to construct an outdoor kitchen at her home. The total contract price is \$65,000. The contract requires Paula to make an initial down payment of \$13,000 before the work begins, a second interim payment of \$22,000 after site preparation is completed, and the remaining \$30,000 upon completion of the work. The contract provides that Outdoor will commence construction no later than one month after Paula makes the \$13,000 down payment and that Outdoor will complete construction within four months of receipt of the down payment. Paula makes the \$13,000 down payment and Outdoor cashes her check. After that, Outdoor does not begin any work on the new outdoor kitchen. Paula tries to contact Outdoor, but her calls are not returned. Four months pass.

Paula decides to sue Outdoor for breach of contract, asserting that she is due \$13,000 in damages to compensate her for the down payment.

1. Explain whether Paula could properly file her complaint for breach of contract seeking monetary damages against Outdoor in each of the following Delaware state courts: Superior Court, Court of Chancery, Court of Common Pleas, Justice of the Peace Court? Explain your answer as to each of those courts.

Before Paula files a complaint against Outdoor, Dan finally returns one of her calls and explains that due to an illness, he had not been able to coordinate the work on her outdoor kitchen or return her calls. Dan offers to reduce the total contract price by \$10,000 to \$55,000 and to enter into an accelerated construction schedule. Paula and Outdoor sign an amended contract, which provides for the lower contract price and requires Outdoor to complete construction within two months after the date the amended contract is signed. The amended contract otherwise tracks all the other terms of the original contract and does not include any other changes. Neither the original contract nor the amended contract contains a provision shortening or lengthening the applicable statute of limitations.

Outdoor begins construction one week later and completes the site preparation work. Paula immediately pays the second interim payment of \$22,000, as still required by the amended contract, and Outdoor cashes her check. But Outdoor

performs no further construction, and for approximately two years, Paula is unable to get anyone at Outdoor to return her phone calls.

Paula decides again that she will sue for breach of contract. She decides to sue not only Outdoor but also Dan individually. Paula files her complaint in the Delaware Court of Chancery two years after she and Outdoor entered into the amended contract. Count I of the complaint seeks an order of specific performance requiring Outdoor to complete construction within two months. Count II seeks damages from Outdoor for breach of contract as an alternative to the specific performance remedy. Count III is asserted against Dan individually, seeking to hold him liable for damages under a theory of fraud.

Outdoor and Dan file and serve answers to Paula's complaint. The answers deny many of the allegations of the complaint, but do not state any defenses other than failure to state a claim upon which relief can be granted.

There is little activity in the litigation for a little over one year, when Outdoor and Dan file a motion for judgment on the pleadings. Outdoor seeks judgment dismissing the specific performance claim for failure to state a claim upon which relief can be granted, and Outdoor and Dan seek judgment dismissing the remaining claims against them for lack of subject matter jurisdiction in the Court of Chancery. Dan also seeks dismissal of the claims against him for lack of personal jurisdiction

over him in the State of Delaware. In response to the motion for judgment on the pleadings, Paula argues that she has stated a claim for specific performance, that defendants have waived the defense of lack of subject matter jurisdiction, and that Dan waived the defense of lack of personal jurisdiction.

2. What is the standard applicable to a motion for judgment on the pleadings? Describe the standard.

3. Have Outdoor and Dan waived the defense of lack of subject matter jurisdiction, and has Dan waived the defense of lack of personal jurisdiction? Explain your answer.

Approximately a year and a half after Paula first filed suit, and before the court decides the motion for judgment on the pleadings, Paula and Dan reach a settlement of Paula's claims against Dan. Three months later, the Court of Chancery enters an order dismissing Paula's specific performance claim against Outdoor for failure to state a claim upon which relief can be granted. The court also dismisses Paula's remaining breach of contract claim for damages against Outdoor for lack of subject matter jurisdiction in the Court of Chancery.

Thirty-five days after the Court of Chancery's final order dismissing Paula's damages claims against Outdoor for lack of subject matter jurisdiction, Paula transfers the litigation to the Superior Court of the State of Delaware pursuant to

Section 1902 of Title 10 of the Delaware Code by filing a written election of transfer in the Court of Chancery and discharging all remaining court costs. The Register in Chancery thereafter transfers the complaint and all other papers that were filed in the Court of Chancery action to the Prothonotary, and Paula pays all required costs in the Superior Court.

Outdoor files a motion to dismiss in the Superior Court. In the motion, Outdoor argues that although Paula filed her original complaint in the Court of Chancery before the statute of limitations on her breach of contract claim had run, the Superior Court action should be dismissed under the statute of limitations because she did not transfer her case and file her complaint in Superior Court until nearly four years after the parties signed the amended contract and over 3-1/2 years after the time specified in the amended contract for Outdoor to complete construction.

4. Under Delaware law, how long is the statute of limitations for Paula's breach of contract claim for damages against Outdoor? Explain when the limitations period commenced for Paula's claim against Outdoor for breach of the amended contract.

5. Will Outdoor prevail on its argument that Paula's claim should be dismissed because the statute of limitations ran before Paula transferred her case to the Superior Court? Explain your answer.

Assume for purposes of the remaining questions that the Superior Court denies Outdoor's motion to dismiss. After the parties complete discovery, Paula moves for summary judgment in her favor on the remaining breach of contract claim for damages.

6. What is the standard applicable to a motion for summary judgment? Describe the standard.

The Superior Court enters an order granting summary judgment in favor of Paula on the issue of liability, finding that Outdoor breached the amended contract, but the court declines to grant summary judgment on the issue of damages, holding that damages must be determined after a trial. The order is entered on the docket the same day. Outdoor files a timely motion for reargument pursuant to Superior Court Rule 59(e), asserting that the Superior Court erroneously granted judgment in favor of Paula on the issue of liability. Paula files a timely response, and the Superior Court enters an order denying the motion for reargument 12 days after it entered the order granting summary judgment on the issue of liability.

The next day, Outdoor files a motion asking the Superior Court to certify an interlocutory appeal to the Delaware Supreme Court. Three days later, the Superior Court issues an opinion denying the request to certify an interlocutory appeal. Forty

(40) days after the Superior Court entered its original order granting summary judgment in favor of Paula on the issue of liability, Outdoor files a notice of appeal with the Delaware Supreme Court. The Delaware Supreme Court issues an order to show cause why the interlocutory appeal is not untimely. Outdoor argues that the time for filing the notice of appeal was tolled by both the motion for reargument and the motion to certify an interlocutory appeal.

7. Under Delaware law, what is the period of time in which a party has to file a notice of appeal from an interlocutory order of the Superior Court? Explain whether the date the order was entered and the date the notice of appeal is filed are counted in calculating that time period, and how weekends and holidays affect the calculation of time.

8. Does the filing of either the motion for reargument or the motion to certify an interlocutory appeal toll the period in which Outdoor had to file its notice of appeal with the Delaware Supreme Court? Explain your answer.

9. Assuming that the notice of appeal was timely filed, does the fact that the Superior Court declined to certify the interlocutory appeal bar the interlocutory appeal? Explain your answer.

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Question #6

Tess Testator died a resident of Delaware with a Will that left the bulk of her estate in trust for her surviving spouse and descendants. Tess is survived by her spouse (Sam), her three adult children (Able, Bertha and Clyde), and ten minor grandchildren. The Will names Trust Company located in Wilmington, Delaware to serve as trustee, along with Tess' spouse, Sam. The trust holds a majority stake in the family business, Corporation, Inc., and marketable securities.

The Trust provides in pertinent part:

Trustees may distribute any part of the income and principal of the trust to or among my spouse and then-living descendants, in their sole and absolute discretion.

Any action taken by the trustees in good faith shall be proper, and I relieve the trustees of all personal liability except for gross negligence or willful misconduct.

During any time that an individual trustee is serving with a corporate trustee, the individual trustee shall have sole responsibility for any investment decisions.

Any trustee may resign by giving written notice to the beneficiaries of the trust. If at any time there is no corporate trustee remaining to serve as trustee, a majority in interest of the beneficiaries then eligible to receive income may appoint a successor corporate trustee.

Among the authorities the Will grants to the trustees is the authority “to make loans against adequate collateral, to borrow from any person, including the trustees, and to pledge or mortgage as security any real or personal property, and to invest in any kind of property, real, personal, or mixed, regardless of the laws governing investments by fiduciaries, without any duty to diversify investments.” The trust is and has been administered in the State of Delaware at all times.

Sam also serves as CEO of Corporation, Inc., a position he held at the time Tess executed her Will. In order to expand Corporation, Inc.’s business, Sam directs a loan of trust funds to Corporation, Inc., documented with an unsecured promissory note bearing a market-rate of interest. The loan is not disclosed to the beneficiaries, and the promissory note does not appear on the trust statements.

1. Please explain the fiduciary duties that Sam owes as a trustee, whether he breached his fiduciary duties, and if so, whether he can be held personally liable for such breaches.

2. Assuming Sam breached his fiduciary duties to the trust and beneficiaries, describe the remedies the Court of Chancery may employ.

3. Assuming Sam breached his fiduciary duties, explain any fiduciary duties that Trust Company may have violated and why.

Assume for the purpose of this question that before loaning Trust funds to Corporation, Inc., the Trustees disclose the details of the loan to Able, Bertha and Clyde and receive written consents from each of them.

4. Would any of the beneficiaries be successful in a suit for breach of fiduciary duty for making the loan? Please explain who could sue and on what grounds, including any possible defenses of the Trustees.

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Question #7

Greenacres consists of 180 acres of cleared, wooded and marsh land north of Lewes, Delaware. It has been owned by various members of the Douglas family since the mid-1800's. In 1890, Greenacres was conveyed to two brothers as tenants in common. Greenacres was a portion of a larger farm which surrounded Greenacres. The deed to Greenacres reserved an easement which ran from its southeasterly boundary line over Greenacres to the banks of a creek. On the same day, a 20 acre tract contiguous to Greenacres on the southeast, known as Blueacres, was conveyed to a third brother. The deed to Blueacres granted 20 acres together with the right of ingress and egress over the easement recited in the deed to Greenacres.

In 1990, Greenacres and Blueacres were owned by Oliver Wendell Douglas by virtue of a devise from his father. Oliver, a widower, had three adult sons, Alf, Beanie and Cecil. He had a good relationship with Alf but was estranged from Beanie and Cecil. He decided that he wanted Alf to have Greenacres but did not want to leave it to him by will for fear of a challenge from his other two sons.

Because Greenacres had not been surveyed for many years, Oliver arranged to have a survey made of the property. The survey showed that a neighbor's chicken house encroached on Greenacres' western boundary by 20 feet. Oliver did not realize that the chicken house encroached on his land prior to having the survey

made. He was friendly with his neighbor, however, and decided not to confront him about the encroachment.

The survey also showed a tidal creek located 300 feet from Greenacres' northern boundary, running from its eastern boundary to its western boundary. The creek was full of fish and Oliver and his friends fished frequently. Over time, fishing shacks appeared on the banks of the creek, although Oliver wasn't sure who had built most of them. Despite the apparent use of the creek by strangers, Oliver never posted "No Trespassing" signs and took no other measures to discourage trespassers. The survey also showed the location of the easement running from Greenacres' southeasterly boundary line in a northwesterly direction up to the banks of the creek.

After completion of the survey, Oliver visited his cousin who was an attorney and asked that a deed to Greenacres be drawn with Alf listed as the grantee. In lieu of a description in the deed, a copy of the survey was to be attached as an exhibit to the deed and was referred to as the lands to be conveyed. The lawyer drafted the deed which Oliver signed. The lawyer notarized Oliver's signature. Oliver asked the attorney to keep the deed in his office, saying that he would let him know when he was ready to have it recorded.

For the next ten years, Oliver continued to farm Greenacres and fish on the property. In 1998, the land bordering on the northeast of Greenacres and north of

Blueacres was sold to a couple who started a kayak rental business. Kayakers began using the creek. Occasionally, the kayakers would fish while kayaking or from the banks of the creek near the fishing shacks; often they brought picnic lunches. In 2000, Oliver's neighbor tore down his chicken house and built a new, much larger chicken house along with a pig pen. The new chicken house and pig pen were located in the general vicinity of the old house, but Oliver wasn't sure whether they encroached on Greenacres.

Some years later, Oliver became ill. His son, Alf, hired a nurse to act as his live-in care giver. She was a very caring woman who became devoted to Oliver. Oliver married her and made a valid will. In it, he left her a life estate in Greenacres along with the right to all rents and profits from it during her lifetime. After her death, Greenacres, Blueacres and all his personal belongings were to be divided among his sons. He left the will in his desk and told no one of its existence. Oliver died in 2008, after which his will was found and filed with the Register of Wills in Sussex County.

A year after the estate was closed, Oliver's cousin, who was retiring and cleaning out his office, gave the deed he prepared in 1990 to Alf, who recorded it. In the years since Oliver's death, Alf continued farming operations and paid the taxes on Greenacres.

You have been hired by Buyer to investigate the title to Greenacres in anticipation of Buyer making an offer to buy some or all of Greenacres with a view to developing residential lots. What advice will you give him on the following questions?

1. (a) Greenacres has been held by what type of tenancies since 1890?

(b) Assume the will is a validly drawn will. Is the will effective to transfer title to Greenacres? Explain the arguments Beanie, Cecil and Oliver's widow would make in favor of the effectiveness of the will to transfer Greenacres.

(c) Did recording the deed affect transfer of title to Greenacres to Alf? Explain the arguments that Alf would make: (1) In support of the validity of the deed; and (2) In support of the effectiveness of the deed to transfer title.

(d) Who has valid title to Greenacres? Explain.

2. Assume the chicken house and the pig pen built in 2000 encroach on Greenacres.

(a) What action should Buyer require, if any, with respect to chicken house and pig pen?

(b) What defenses would the neighbor raise?

3. (a) Can Buyer successfully require the fishing shacks be removed? Explain.

(b) Can Buyer successfully require that the kayakers be excluded from using the creek? Explain.

4. (a) What type of easement is shown on the 1990 survey?
(b) Will it affect development of Greenacres?

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Question #8

Ellen is the 17-year-old neighbor of Homeowners. Every year the Homeowners host a raucous New Year's Eve party attended by neighborhood families, and every year several teenagers over-consume alcohol.

Homeowners' 2018 party is no different. Ellen spends most of her time during the party drinking alcohol in the Homeowners' basement with other neighborhood teens, and quickly becomes drunk. As guests start to leave, Ellen goes outside to the driveway where she encounters one of the guests, Norm the Neighbor, visibly drunk and bleeding from a cut to his forehead he suffered falling over a scooter left on the front steps by the Homeowners' son.

Norm asks Ellen for a ride to the emergency room, so she runs to her car and speeds up the driveway. As Ellen is pulling up, however, she accidentally presses the gas instead of the brakes and slams into Carl the Caterer loading leftover food into the trunk of his car. Carl is seriously injured. Frightened by the accident, Ellen drives off. Seeing Ellen leave, Norm decides to try to drive home, but he blacks out leaving the Homeowners' driveway and crashes into a responding ambulance, causing injuries to Paul the Paramedic.

Homeowners are concerned about their potential liability for the injuries sustained by Carl the Caterer, Norm the Neighbor and Paul the Paramedic, and consult with you to provide the following opinions:

1. What, if any, duties did Homeowners owe Carl the Caterer as a business invitee? Explain whether Carl the Caterer has a cause of action against Homeowners for the injuries caused by Ellen.

2. Does Delaware's Guest Premises Statute bar a claim by Norm the Neighbor for the injuries he suffered falling over the Homeowners' son's scooter? Explain your answer.

3. Can Paul the Paramedic maintain a cause of action against the Homeowners for the injuries he suffered in the accident with Norm? Explain your answer.

Ellen leaves the Homeowners' driveway at a high rate of speed. As she approaches an uncontrolled intersection, Ellen crosses into the opposite lane of travel in order to pass a vehicle. While still travelling in the opposite lane, Ellen enters the intersection at exactly the same time as Billy the Bicyclist, who is wearing all dark clothing and riding without a light. Billy is thrown from his bicycle and suffers serious injuries.

Billy hires you to sue Ellen for his injuries. During your investigation, you learn that: (i) Ellen caused two other accidents when she was 16; (ii) both of Ellen's

parents signed her driver's license application; (iii) at the time of the accident with Billy, Ellen was driving a vehicle the Homeowners lent her to provide guests with rides home from their party; and (iv) Ellen was cited for and pled guilty to driving on the wrong side of the road and DUI as a result of the accident with Billy.

Based on the facts of the accident and your investigation:

4. What causes of action will you assert against Ellen and why? How will a court analyze any comparative negligence on the part of Billy? Explain your answer.

5. What causes of action will you assert against Ellen's parents and/or the Homeowners and why? Explain your answer.

As a result of being hit by Ellen, Carl the Caterer has several months of left leg pain. Carl consults with Doctor, who recommends a surgical procedure but does not tell Carl that removing bone will leave his left leg noticeably shorter than his right leg. Carl elects to have surgery and, as a result, now walks with a permanent limp. During the surgery, Doctor also leaves an extra titanium screw in Carl's leg that caused pain and required a second surgery to remove.

Carl consults with you about potentially suing Doctor. Based on the facts presented:

6. What causes of action will you assert against Doctor and why? What elements will Carl be required to prove in order to recover under each cause of action you identify? Explain your answer.

7. Is an Affidavit of Merit required in order to initiate a legal action against Doctor? Explain your answer.

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GENERAL INSTRUCTIONS

The Essay Section of the 2018 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this afternoon session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.