## QUESTION #1

**State v. Soper (MPT-1)**

In this performance test, examinees are law clerks for the trial court judge assigned to the homicide prosecution of Daniel Soper, who is charged in the shooting death of Vincent Pike. The defense has filed a motion to exclude, on state law hearsay and federal constitutional grounds, statements made by Pike after the shooting during a 911 call and later at the hospital shortly before he died. Examinees' task is to draft a bench memorandum that will help prepare the judge for the evidentiary hearing. The File contains the judge's instructional memo, a "format memo," the defendant's Motion to Exclude Evidence, the 911 call transcript, and the police report. The Library contains excerpts from the Franklin Rules of Evidence (identical to the restyled Federal Rules of Evidence), a state case discussing the applicable hearsay exceptions, and a heavily edited version of *Michigan v. Bryant* (U.S. 2011) setting forth the test for determining whether statements are "testimonial" for purposes of the Confrontation Clause.

**MINNESOTA BAR EXAMINATION**
**JULY 2012**
**REPRESENTATIVE GOOD ANSWER**
**QUESTION 1**

MEMORANDUM

TO: Judge Leonard Sand

FROM: Applicant

RE: State of Franklin v. Soper, Case No. 2012-CR-3798
Bench Memorandum on Defendant's Pretrial Motion to Exclude Evidence

DATE: July 24, 2012

I. Analysis of Statements made by the Alleged Victim, Vincent Pike, in a telephone call with 911 Dispatcher on March 27, 2012.

1. State of Issues

A. Does the alleged victim's statement in the 911 call Violate FRE 801 or the 6th Amendment Confrontation Clause?

1. Does the alleged victim's statements qualify for a hearsay exception under FRE 801 as an excited utterance or a dying declaration?

2. Is the alleged victim's statements testimonial and therefore subject to the 6th Amendment Confrontation Clause?

2. Analysis

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay evidence is ordinarily excluded because it is not trustworthy; however, FRE 803 and 804 admit some hearsay statements regardless of whether the declarant is available as a witness. Rule 803 governs excited utterances or statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." FRE 803 Rule 804 allows statements made under the belief of imminent death, stating "a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances." FRE 804

In this case, the facts do not support the admittance of the alleged victim's statements under FRE 803, Dying Declaration. In Friedman, the Franklin Supreme Court stated "Franklin Rule 804 (b) (2) embodies the common law exception for dying declarations. In order for a statement to qualify under this exception, it must meet the following criteria: (1) the declarant must have died by the time of trial, (2) the statement must be offered in a prosecution for homicide or in a civil case, (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing that death was imminent. The circumstances surrounding the alleged victim's statements in the 911 call fulfill all but the fourth element of this test. In the 911 call on March 27, 2012, the alleged victim only said that he "didn't feel so good" and before the alleged victim identified the vehicle of the alleged shooter he stated "I'm doing better." These statements do not evidence express language that the alleged victim believed he was dying when making the 911 identification statements. While the prosecution may attempt to prove that the alleged victim believed he was going to die through the severity of his words, conduct or other circumstances. The declarant's own statement that he was feeling better will trump any evidence the prosecution may present. The alleged victim's statements in the 911 call are hearsay and do not qualify for an exception under FRE 803.

While the alleged victim's statements do not qualify for a hearsay exception under FRE 803, the victim's statements do qualify for an exception under FRE 804, excited utterance. In Friedman, the Supreme Court stated, "For a statement to qualify as an excited utterance under Rule 803 (2) of the Franklin Rules of Evidence, the statement must relate to a startling event or condition and the person making the statement (the "declarant") must be under the stress of excitement caused by the event or condition.

The alleged victim in this case had been shot and was bleeding. This sort of an event qualified in Friedman as a startling event and would also qualify here as a startling event. While the 911 call does not indicate how much time had elapsed between the shooting and the call, the victim was nevertheless still under the stress of the shooting. The alleged victim was still in his car, bleeding from the wound, and emergency personnel had not yet arrived on the scene. These facts show that the alleged victim had not had time to reflect and was still under the stress of the shooting.

Friedman went on to state "the lapse of time alone does not control our decision as to whether a declarant speaks under the stress of the startling event. Other factors include the declarant's physical and mental conditions, his observable distress, the character of the event, and the subject of his statements." Here the 911 call indicates that the alleged victim was bleeding from a gunshot wound at the time of the call, he was unable to hold the telephone and needed assistance from his neighbor, and the alleged victim needed prompting to answer questions and encouragement to "stay with me." These additional facts satisfy the factors needed to admit the alleged victim's 911 call statements as an excited utterance and an exception to the hearsay exclusion rule.

Before the victim's excited utterance statements can be admitted they must also be excluded from the 6th Amendment, Confrontation Clause. The Confrontation Clause states, "In all criminal prosecutions, the accused shall enjoy the right….to be confronted with the witness against him." Bryant. In Crawford, the court looked at the history of the clause and emphasized the words 'witness' and 'testimony.' In Crawford, the testimony was defined as, "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The court "limited the Confrontation Clause's reach to testimonial statements and held that in order for the testimonial evidence to be admissible, the 6th Amendment "demands what the common law required: unavailability and prior opportunity for cross-examination." In Davis, the court made clear that not all statements made to police, or 911 operators acting in a police interrogation capacity, are subject to the Confrontation Clause. Statements are non-testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to need an ongoing emergency. The court in Bryant looked to three facts when objectively determining whether the "primary purpose" of an interrogation was to "enable police assistance to meet an ongoing emergency." The court looked to the existence of an ongoing emergency, the medical condition of the victim, and the level of formality in the victim's encounter with the police.

In this case, the facts show that the alleged victim's statements were non-testimonial and therefore excluded from the 6th Amendment because the primary purpose of the police interrogation was to assist in an ongoing emergency. Here, at the time of the 911 call, there was an ongoing emergency. While this determination is fact-dependent, there are numerous facts to indicate that the alleged victim's girlfriend and the general public were still in danger. The 911 call indicated that there was a person who was armed and dangerous in the vicinity and that the shooter was looking for another victim ("He's going to get her"). The medical condition of the alleged victim is also important. Here the alleged victim was suffering from a gunshot, but was still able to give coherent answers to the police questions. The severity of his wound also provided contest for the first responders to judge the existence and magnitude of the continuing threat to the community. Finally, the encounter between the victim and the police was not formal. Bryant stated, "Formality suggests the absence of an emergency and therefore an increase likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution." Here the alleged victim was on the phone with the 911 dispatcher and the questions and statements were made in the context of resolving the current emergency. In this case, the alleged victim's statements were made on March 27, 2012. The 911 call should not be subjected to the 6th Amendment Confrontation Clause.

3. Recommendation

The alleged victim's statements in the 911 call are hearsay, but qualify for an exception to the hearsay exclusion under FRE 804, excited utterance. The 911

statements were made by the declarant while he was still under the stress of the shooting. These statements are not subject to the 6th Amendment Confrontation Clause because they are non-testimonial. The police interrogation was performed to resolve an ongoing emergency and therefore the statements were not given as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."

II. Analysis of Statements made by the Alleged Victim, Vincent Pike, in Response to Questioning by Police Officer, Timothy Holden on March 27, 2012.

1. State of Issues

A. Does the alleged victim's statement in the Police Report Violate FRE 801 or the 6th Amendment Confrontation Clause?

1. Does the alleged victim's statements qualify for a hearsay exception under FRE 801 as an excited utterance or a dying declaration?

2. Is the alleged victim's statements testimonial and therefore subject to the 6th Amendment Confrontation Clause?

2. Analysis

Again the alleged victim's statements in the March 27, 2012 police report are hearsay. In this case, the statements could not be admitted under FRE 804, excited utterance because the patient had recovered from the stress of the shooting and was in the hospital. Too much time had elapsed for the alleged victim to still be subject to the original condition. Instead, the alleged victim's statements in the police report would qualify as a dying declaration. In Friedman, the Franklin Supreme Court stated, "Franklin Rule 804 (b) (2) embodies the common law exception for dying declarations. In order for a statement to qualify under this exception, it must meet the following criteria: (1) the declarant must have died by the time of trial, (2) the statement must be offered in a prosecution for homicide or in a civil case, (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing that death was imminent. The alleged victim's statements fulfill each of these requirements. At the time of the statement, the police officer knew from the alleged victim's doctor that he was "not likely to make it." The victim was also located in the intensive care unit. The alleged victim's identification of the Defendant is admissible under FRE 803, dying declaration.

In Friedman, the court stated that the Supreme Court in dicta specifically discussed the dying declarations exception as such an exception that existed before the adoption of the 6th Amendment and therefore not subject to the Confrontation Clause. This is important to note because without this exception to 6th Amendment analysis the alleged victim's police report statements would be excluded. The police report statement was testimonial because the police officer

stated the prosecutor intent of the question. The police office illicited the alleged victim's statement saying "We need to put this guy away." Without the dying declaration exception to the 6th Amendment analysis the police report statements would be excluded.

3. Recommendation

The alleged victim's statements in the police report are admissible as a dying declaration under the exception to hearsay exclusion under FRE 803. Dying declarations are not subject to the 6th Amendment Confrontation Clause and therefore admissible.

## QUESTION #2

**Ashton v. Indigo Construction Co. (MPT-2)**

Examinees' law firm represents Margaret Ashton, a homeowner, in her dispute with Indigo Construction Co. A few months ago, Indigo bought a vacant lot behind Ashton's home and began storing dirt on the lot to use later in its construction and landscaping business. Although Indigo's use of the vacant lot is in compliance with the relevant zoning ordinances, its activities have negatively affected Mrs. Ashton—she is disturbed by noise from the trucks going to and from the vacant lot, and the huge dirt pile has caused substantial amounts of dust and mud to accumulate in her yard. Examinees are asked to draft the argument section of the brief in support of a preliminary injunction against Indigo. The File contains a memorandum from a firm partner asking the examinee to prepare the legal argument, a "format memo" that lays out the format for persuasive writing of trial briefs, two affidavits (from Margaret Ashton and from a firm investigator), and an article about the dirt pile from a local newspaper. The Library contains two cases from the Franklin Supreme Court: *Parker v. Blue Ridge Farms, Inc.* (dealing with the elements of the common law action of private nuisance) and *Timo Corp. v. Josie's Disco Inc.* (dealing with the standards for granting injunctive relief for a private nuisance).

**MINNESOTA BAR EXAMINATION**
**JULY 2012**
**REPRESENTATIVE GOOD ANSWER**
**QUESTION 2**

TO: Mr. Hunter

FROM: Examinee

DATE: July 24, 2012

RE: Margaret Ashton v. Indigo Construction Co.: Argument Section

I. Argument

Ms. Ashton seeks a preliminary injunction against Indigo Construction Co. to enjoin the activity of Indigo in the adjacent lot behind Ms. Ashton's residence because Indigo's activities constitute a private nuisance. Per Timo Corp. v. Josie's Disco, Inc., a plaintiff must show the following when seeking a preliminary injunction: (i) The likelihood of ultimate success on the merits; (ii) The prospect of irreparable injury if the provisional relief is withheld; and (iii) That the balance of equities tips in the plaintiff's favor. In determining the first factor of preliminary injunction analysis, the court must also analyze the elements of the plaintiff's underlying cause of action in order to determine the likelihood of success. Ms. Ashton asserts that Indigo's activities constitute a private nuisance which is a "non-trespassory invasion of another's interest in the private use and enjoyment of land." Restatement. Thus, the underlying argument of a private nuisance claim is that the defendant's activities are "an interference with the use and enjoyment of land." Prosser. The following analysis will show that the court should grant Ms. Ashton's motion for a preliminary injunction because her claim easily satisfies the elements constituting a private nuisance and the balance of equities tip in Ms. Ashton's favor.

A. Ms. Ashton's cause of action will succeed at trial because Indigo's commercial activity in a residential neighborhood constitutes an unreasonable interference with Mr. Ashton's use and enjoyment of her property.

In determining whether there is a likelihood of success on the merits, the elements for a private nuisance must be established. The defendant's conduct constitutes a private nuisance if: (i) The defendant's conduct was the proximate cause; (ii) Of an unreasonable interference with the plaintiff's use and enjoyment of his or her property; and (iii) The interference was intentional or negligent. Each is established below.

i) Indigo's construction activities are the only source of the disruption to Ms. Ashton's use and enjoyment of her residence.

Conduct is the proximate cause of a plaintiff's injury if it is the foreseeable consequence of the defendant's activities. Clearly, Indigo's activities constitute the proximate cause to the noise, dust, and rain water disruptions to Ms. Ashton's property. Indigo had constructive notice that the neighborhood was residential when it began its excavating activities on the lot behind Ms. Ashton's property. As a construction company, Indigo should have been aware that dump trucks are very loud and that loose dirt often deposits dirt throughout surrounding areas during windy conditions. Thus, the disruptions to Ms. Ashton's property were foreseeable for Indigo and as a result, Indigo's conduct is the proximate cause of the interference with Ms. Ashton's property.

ii) Indigo's activities are an unreasonable interference with Ms. Ashton's use and enjoyment of her property because Indigo was aware of the neighborhood's exclusive residential character.

Unreasonable is analyzed under an objective standard. Parker v. Blue Ridge Farms, Inc. Under the objective standard, the use may be unreasonable even if the defendant's conduct is reasonable. The Parker court provided the following factors: (i) The nature of both the interfering use and the use and enjoyment invaded; (ii) The nature, extent, and duration of the interference; (iii) The suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and (iv) Whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property. Furthermore, the fact that zoning laws permit certain uses of property is not conclusive for determining reasonableness under a private nuisance cause of action. In Parker, the court upheld the trial court's jury instructions which instructed the jury that the use of property in accordance with zoning laws can still constitute an actionable nuisance. In Parker, the jury determined that the mere element of odor from a property 1/3 of a mile away constituted a private nuisance. Similarly, in Timo Corp., the Supreme Court found that the plaintiff established a likelihood of success on the merits based upon the plaintiff's affidavit and the ability to infer the defendant's intent based upon notice. In this case, Ms. Ashton has provided an affidavit that establishes an unreasonable interference with her property. Ms. Ashton's affidavit establishes that she cannot sit outside longer than an hour due to the loud noise; her flowers are useless because they are covered in dirt; and runoff from the dirt pile routinely flows into her backyard. Unlike Parker, Indigo's land abuts Ms. Ashton's property which provides strong evidence of the unreasonableness of this commercial activity. Furthermore, Ms. Ashton's affidavit and the Appling Gazette highlight that the entire eight block housing area is exclusively residential. As highlighted in Parker, a zoning law cannot save the defendant if objectively the defendant's conduct is unreasonable. Under the vast majority of community standards, including Appling's community standards, continuous commercial excavating activity within a residential area is an unreasonable use. By its nature, a residential area is suitable for residential activities; not commercial activities. Finally, Indigo has

been aware of the neighborhood's complaints as evidence by an article written in the local newspaper. Indigo has failed to take steps to prevent most of the interference with the use of the property. Indigo may point to its limitation on the use of the lot. Under the standard of Timo Corp., Ms. Ashton has vastly exceeded the requirements of providing an affidavit that shows that the defendant's conduct is facially unreasonable.

iii) Indigo's interference with Ms. Ashton's property is both intentional and negligent due to the loose dirt.

Indigo has continued its unreasonable interference with Ms. Ashton's property in the face of complaints. Indigo intentionally continues its unreasonable commercial activity within a residential neighborhood. Similar to Parker, the mere continuance of the activity in the face of objections highlights the intent of Indigo. Furthermore, the fact that Indigo does not cover the dirt and allows the dirt to blow throughout the neighborhood, is evidence of a negligence. A prudent excavating in the defendant's circumstances would cover or spray the dirt with water to prevent large quantities of dust. Indigo's refusal to take these remedial measures highlights Indigo's intent and negligence. Thus, all three elements of a private nuisance have been established. Ms. Ashton is therefore likely to succeed at trial.

B. Indigo's activities disrupt Ms. Ashton's use of her property which constitutes irreparable injury due to the uniqueness of land.

Ms. Ashton must establish the second element for a preliminary injunction by showing the prospect of irreparable injury if the motion for preliminary injunction is denied. The court in Timo Corp., established that irreparable injury will always be established if the defendant's conduct results in a severe or serious impairment of the use of land. The Timo Corp. court highlighted the uniqueness of land which results in irreparable harm because no damages at court can adequately provide a remedy for the plaintiff's denial of the use of his or her land. In this case, Ms. Ashton is being denied the fundamental use of residential property. Instead of commercial use where the use of property is closely linked to financial benefits, the use of residential property is closely tied to personal activities such as gardening and lounging around the curtilage of the home. Ms. Ashton can no longer enjoy these activities because the dust from Indigo is covering her garden and the noise from the trucks is so loud that Ms. Ashton cannot be outside for more than an hour. The denial of these basic personal activities tied to one's home is the essence of a substantial interference with an individual's use of his or her residence. As a result, Ms. Ashton clearly established that irreparable injury will be established if her motion for a preliminary injunction is not granted.

C. Ms. Ashton holds the balance of equities because Indigo knowingly engaged in commercial activity in a purely residential neighborhood.

The final factor that a court must analyze when determining whether to grant a preliminary injunction is that the balance of equities tips in the plaintiff's favor. Here, that balance is heavily weighed in Ms. Ashton's favor. The sole equity that Indigo can point to is that the zoning provides for mixed use of the land. While Timo Corp. highlighted the defendant's equity interest in continuing the economic use, that factor should not apply in this case. The defendant's in Timo Corp. operated a rooftop bar on top of a sixth story building. Thus, the nature of the residence was more urban. Urban areas necessarily have more noise and disruption than residential areas. In this case, the defendant began operating a commercial excavating business in an eight block neighborhood of single family residences. No reasonable person would believe that they could engage in continuing commercial activity within a single family residential area. The nature of the neighborhood clearly prevents Indigo from claiming a valid economic interest in the property based upon Indigo's dirty hands when starting its economic activities. In comparison, Ms. Ashton has significant equitable interests in preventing Indigo's activities. Ms. Ashton lives on the property abutting Indigo's lot and her residential activities are being severely disrupted. She cannot stay outside for more than an hour, her garden is destroyed from dirt residue, and her yard routinely receives runoff from the dirt pile. Thus, Ms. Ashton's valid equitable interests heavily outweigh Indigo's claim to economic interests in the lot. As a result, the court should grant Ms. Ashton's motion for a preliminary injunction because she has satisfied all three elements of a preliminary injunction.

## QUESTION #3

Thirty years ago, Settlor entered into an irrevocable trust agreement with Trustee. Pursuant to the terms of this trust, all trust income was payable to Settlor's Husband, and upon Husband's death, all trust assets were to be distributed to "Settlor's children." The trust also provided that Husband's income interest would terminate if Husband remarried after Settlor's death.

When the trust was created, Settlor and Husband had three children. Five years later, Settlor and Husband had a fourth child.

Ten years later, Settlor died.

This year, when the trust principal was worth $750,000, Husband wrote to his four children. Husband noted that he was about to retire and wanted cash to buy a retirement home. He asked the children to agree to terminate the trust and to direct Trustee to distribute $250,000 of trust principal to Husband and the remaining $500,000, in equal shares, to the four children. All four children agreed to Husband's proposal. Husband and the four children then wrote Trustee the following letter:

> We, the only beneficiaries of the trust, direct you to terminate the trust and distribute $250,000 of trust assets to Husband and the remainder, in equal shares, to Settlor's four children.

Trustee's response stated:

> I cannot make the requested distribution to you for the following reasons:
>
> (1) The trust is irrevocable and cannot be terminated.
>
> (2) Even if the trust were terminable, termination would require the consent of all beneficiaries. This is not obtainable because, if a child of Settlor predeceases Husband, one or more of Settlor's future grandchildren might be entitled to trust assets at Husband's death.
>
> (3) Even if the trust were terminable, only the three children living when the trust was created have a beneficial interest in the trust; therefore no distribution of trust principal can be made to Settlor's youngest child.
>
> (4) The actuarial value of Husband's interest is only $150,000. Therefore, even if the trust were terminable, any distribution of trust principal to Husband in excess of that amount would be a breach of trust.

Is Trustee correct? Explain.

**MINNESOTA BAR EXAMINATION**
**JULY 2012**
**REPRESENTATIVE GOOD ANSWER**
**QUESTION 3**

**Issue 1 – Can the trust be terminated even though irrevocable?**

The trustee is correct that the irrevocable trust cannot be terminated. An irrevocable trust may be terminated upon the consent of all beneficiaries and the consent of the settlor. In absence of the consent of the settlor, the trust may be terminated if all beneficiaries agree and there is no valid trust purpose yet to be served. Here, Settlor has died, so cannot give consent to the termination of the trust. As such, all remaining beneficiaries must consent to the termination of the trust and there must be no valid purpose yet to be served by the trust.

Here, it appears that all existing beneficiaries consent to the termination of the trust. Husband clearly wishes for the trust to be terminated because he asked the children to terminate the trust. The four children who are alive have given written consent to the termination of the trust by stating that they wish the trustee to "terminate the trust and distribute $250,000 of trust assets to Husband and the remainder, in equal shares, to Settlor's four children." An issue remains as to whether consent by the existing beneficiaries is sufficient, which is discussed below with respect to Issue 2.

However, a court may decline to terminate the trust if it determines that a valid trust purpose is yet to be served. Here, the court may determine that such a valid trust purpose is to provide income for Husband for his life. As another alternative, the court may determine that the clause stating that Husband's income interest would terminate if Husband remarried after Settlor's death could be construed as a trust purpose to provide income to Husband until he remarries. However, this second alternative is unlikely because of the language of the condition. Conditions in trust instruments that discourage marriage will not be upheld as against public policy. Here, because the clause states that Husband's interest will terminate if he remarries, the court would likely find that the clause is discouraging marriage. In contrast, a clause that states that income should be provided until remarriage for support would likely be upheld.

In this case, a court would likely determine that a valid trust purpose to provide income to Husband for his life is still being served by the trust. Therefore, the court would likely hold that the trust is not terminable.

**Issue 2 – If terminable, would consent be obtainable in light of a possible future interest in Settlor's unborn grandchildren.**

Trustee is correct if the state has a valid anti-lapse statute. However, if no such statute exists, Trustee is incorrect. At common law, a recipient of a gift in a trust that predeceases a possessory interest is a gift lapse, and the gift fails. In the case of class gifts including a lapsed gift to one of the class members, the remaining class members take. The interest in the trust will become a possessory interest for the class of children

of Settlor when Husband dies. At that time, the children of Settlor still alive will take the interest. At common law, the interest of any child who predeceases Husband will lapse, and the remaining children will take. Therefore, at common law, Trustee is incorrect, because no grandchild of Settlor has an interest in the trust.

However, if the state has a valid anti-lapse statute, Trustee is correct. Under the UPC (and many states), when a gift is made to a grandparent or descendent of a grandparent of the settlor who leaves issue, and the gift lapses, the anti-lapse statute passes the interest in the predeceased's issue. Here, the gift is to the children of Settlor, who are covered by the UPC anti-lapse statute. That is, under the statute, if a child of Settlor predeceases the possessory interest and leaves issue, the issue will take the lapsed gift in equal shares. Therefore, it is possible that one or more of Settlor's future grandchildren might be entitled to trust assets at Husband's death. Such grandchildren would have to give consent to the termination of the trust. However, this is possible before they are ascertained, making the trust interminable at this point.

**Issue 3 – Which of the children have an interest in the trust?**

Trustee is incorrect that only the three children living when the trust was created have beneficial interest in the trust. When a trust names a class such as "children," the members of the class are ascertained at the time that the right becomes possessory. Here, the interest becomes possessory to the class of children when Husband dies. Absent an anti-lapse statute giving an interest to possible future grandchildren, the members of the class of "children of Settlor" will be ascertained as those children of Settlor alive when Husband dies. Therefore, the child of Settlor born after the creation of the trust has a valid future interest that may become possessory if the child is alive when Husband dies.

**Issue 4 – If the trust were terminable, would distribution of trust principal in excess of $150,000 be a breach of trust.**

Trustee is incorrect that distribution of trust principal in excess of the actuarial value of Husband's interest would be a breach of trust. As the trust instrument states, upon Husband's death, the principal is to be distributed to the children in equal shares. If the trust were terminable, upon termination, the beneficiaries may agree as to the distribution of the trust assets. Here, the beneficiaries would be free to direct Trustee to distribute trust assets to Husband, even in excess of his interest in the income.

## QUESTION #4

At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. "It'll be funny," Adam said. "When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch." "That's a stupid idea," Bob said. "In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event." "Oh, I'll bet someone will come," Adam replied. "And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy."

At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.

At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.

Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called "unlawful-act" involuntary manslaughter.

1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.

2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.

**MINNESOTA BAR EXAMINATION**
**JULY 2012**
**REPRESENTATIVE GOOD ANSWER**
**QUESTION 4**

1) Adam can be found guilty of involuntary manslaughter.

Involuntary manslaughter includes intentional conduct that is criminally negligent and that actually and proximately results in the foreseeable death of a human being. For conduct to be criminally negligent, the individual will have had to knowingly disregarded a substantial risk. Here Adam knew of the risks, as his action in fact created those risks. As an adult, Adam is held to the adult standard of care of a prudent person. Adam was aware that vehicles would drive through the intersection and that vehicles could be caused to wreck because of his actions. His comments to Bob indicate that he expected vehicles to come through the intersection, have trouble, and potentially wreck. In fact, this was Adam's intention.

Adam's intentional conduct includes placing the marbles in the intersection, which he intended to do, as evidenced by his prior comments.

Adam's action of placing the marbles was the actual cause of the accident, since but for the placement of the marbles, the women who drove through the intersection would have been able to stop and would not have hit the man's car, causing his son to be ejected from the car and killed.

If severe injury or death was foreseeable, then the action was also the proximate cause. Here, the death of a driver or passenger was foreseeable as part of the expected car crash and thus the actions of Adam could qualify as the proximate or legal cause.

It may be argued that the man's failure to secure his child's seatbelt was an intervening cause that occurred, since the child would not have been killed if he had been properly secured with a seatbelt. However, if this circumstance was foreseeable, it does not bar Adam from being criminally liable. Since some individuals drive their vehicles without wearing their required seatbelt, it was foreseeable that an individual not wearing a seatbelt could be seriously injured or killed.

2) Bob is guilty of involuntary manslaughter as an accomplice.

To serve as an accomplice, one does not merely stand by and observe a crime. Instead, one assists the principle in the planning or action of the crime, with knowledge of the principle's intent to commit the crime.

Here, Bob was aware of Adam's plans and was aware of the risks involved. Although he didn't spread the marbles in the intersection as Adam did, he assisted Adam by driving Adam to the intersection with the marbles.

It could be argued that Bob did not meet the standards of involuntary manslaughter, since he indicated that he did not believe that any crashes or harm would occur, since the cars, if any, would merely drive over the marbles. It could be argued that he did not foresee the harm, since he did not believe that the marbles would cause any damage. However, his action of waiting and watching at the intersection with Adam is an indication that he thought there was in fact a possibility of harm and thus the harm was foreseeable.

## QUESTION #5

Congress recently enacted the Violence at Work Act (the Act).

Title I of the Act provides that an employee who has been injured in the workplace by the violent act of a coworker has a cause of action for damages against that coworker.

Title II of the Act imposes several duties on employers subject to the Act and creates a cause of action against employers who do not fulfill those duties. Section 201 provides that all employers, "including all States, their agencies and subdivisions," who have more than 50 employees are subject to the Act. Section 202 requires employers subject to the Act to (i) train employees on certain methods of preventing and responding to workplace violence, (ii) conduct criminal background checks on job applicants, and (iii) establish a hotline to report workplace violence. Section 203 provides that if an employer subject to the Act does not fulfill the duties imposed by Section 202, an employee who has been injured by the violent act of a fellow employee may recover damages from the employer for the harm resulting from that violent act. Section 204 provides that any action brought pursuant to Section 203 may be brought in federal or state court and that "if brought in federal court against a State, its agencies or subdivisions, any defense of immunity under the Eleventh Amendment to the United States Constitution is abrogated."

The House and Senate committee reports on the Act note that Congress passed the Act under its power to regulate interstate commerce. To support its use of that power, Congress found that acts of workplace violence directly interfere with economic activity by causing damage to business property, injury to workers, and lost work time due to the violent acts and their aftermath. The House report estimated that total interstate economic activity is diminished by $5 to $10 billion per year as a result of losses associated with workplace violence.

After the Act's effective date, an employee of a state agency was injured in the workplace by the violent act of a disgruntled coworker. The state agency, which has over 100 employees, conceded that it had not implemented the measures required by Section 202 of the Act. Accordingly, the employee has sued the state agency in United States District Court to recover damages for the harm caused by the act of workplace violence. The state agency has moved to dismiss the lawsuit on three grounds: (1) Congress did not have the power to enact the Act, (2) Congress did not have the power to apply the Act to state agencies, and (3) the Eleventh Amendment bars the employee's lawsuit.

1. Is the Act a valid exercise of Congress's power to regulate interstate commerce? Explain.

2. Assuming that the Act is a valid exercise of Congress's power, may the Act constitutionally be applied to state agencies as employers? Explain.

3. Does the Eleventh Amendment bar the employee's lawsuit in federal court against the state agency? Explain.

**MINNESOTA BAR EXAMINATION**
**JULY 2012**
**REPRESENTATIVE GOOD ANSWER**
**QUESTION 5**

1. **Is the act a valid exercise of the Commerce Power?**

   The commerce power of the US Constitution is wide ranging and broad. (I note that my answers do not incorporate any potential impact the Health Care case has on commerce) Congress can regulate the instrumentalities of commerce such as roads and waterways. Moreover, Congress can regulate activities that are purely intrastate that, if the aggregate impact were totaled, would impact commerce.

   To regulate under the commerce power, Congress has to have a rational basis in that the activity to be regulated has an impact on commerce. Here, the Committee reports note that the total interstate commerce loss is $5 - $10 billion. However, the Court has also said that when there is no connection between commerce and what the government is trying to regulate, this will be outside commerce's reach. This came from a case in about 1995 in which Congress used its commerce power to regulate guns in school zones. There, the Court found that there was no connection, or an insufficient connection between commerce and the subject being regulated.

   Here, workplace violence will meet the test of being related to Commerce. In this situation, workplace violence is directly causing financial harm in huge sums. This is not attenuated and not related as it was in the 1995 case. Thus, in this situation, this is a valid exercise of the Commerce power.

2. **Assuming it is valid; may the act be constitutionally applied to state agencies as employers?**

   Congress' power to legislate under the commerce power is broad. Up until about 1986, Congress did not have the ability to regulate state agencies as employees under the commerce clause; however, San Antonio v. Garcia, a federal labor law case, changed that. In that case, the Supreme Court held that the commerce power enabled the federal government to apply certain wage and hour regulations on a state.

   Here, this is precisely what has happened. If it is a valid exercise of the commerce power, Congress has been held to have the authority, as indicated by the US Supreme Court, to allow its regulations to apply to a state. The regulation applied to the state agency.

   However, in doing so, Congress cannot commandeer a state agency and force it to carry out federal programs. Printz. Moreover, Congress cannot force states to enact certain laws. While it can resort to economic coercion by using its taxing

and spending power to entice, as Justice Connor said in South Dakota v. Dole, it cannot tell the state what to enact. Here, the facts do not support that the federal government is forcing the state to enact any laws, just to enact programs within their state agencies.

Ultimately, because Congress has stepped out of its bounds by commandeering and forcing a state agency to enforce and carry out its law, this will not be constitutionally applied to state agencies.

**3. Does the 11th Amendment bar the employee's suit in federal court against the state agency?**

The 11th Amendment of the US Constitution prohibits a state from being sued in federal court by its citizens, unless it consents. It does not, however, bar a suit against the state in state court. In certain circumstances Congress can abrogate a state's 11th Amendment power and allow for suits against it to take place in Federal court. However, the instances in which this is allowed, flow from Section 5 of the 14th Amendment. This section was enacted after the Civil War and gives Congress the power, generally when enforcing 14th Amendment rights such as equal protection and due process to abrogate a state's 11 Amendment immunity, commonly called sovereign immunity.

Here, in this situation, the law is being passed by the commerce clause. It is not being used to enforce due process or equal protection acts. Rather, it is being done as a purely economic issue: workplace violence is negatively impacting commerce. The law clearly states that it abrogates the states' rights to be free from suit in federal court by a private citizen without consenting. This violates the 11th Amendment as it abrogates sovereign immunity without the proper method in doing it.

## QUESTION #6

Susan, a student at University, lived in a University dormitory. Access to Susan's dormitory was restricted to dormitory residents and guests who entered the dormitory with a resident. Entry to the dormitory was controlled by key cards. Dormitory key cards opened all doors except for a rear entrance, used only for deliveries, that was secured with a deadbolt lock.

On November 30, at 2:00 a.m., Ann, a University graduate, entered the dormitory through the rear entrance. Ann was able to enter because the deadbolt lock had broken during a delivery four days before Ann's entry and had not been repaired. Ann attacked Susan, who was studying alone in the dormitory's library.

Jim, another resident of Susan's dormitory, passed the library shortly after Ann had attacked Susan. The door was open, and Jim saw Susan lying on the floor, groaning. Jim told Susan, "I'll go for help right now." Jim then closed the library door and went to the University security office. However, the security office was closed, and Jim took no other steps to help Susan. About half an hour after Jim closed the library door, Susan got up and walked to the University hospital, where she received immediate treatment for minor physical injuries.

One day after Ann's attack, Susan began to experience mental and physical symptoms (e.g., insomnia, anxiety, rapid breathing, nausea, muscle tension, and sweating). Susan's doctor has concluded that these symptoms are due to post-traumatic stress disorder (PTSD). According to the doctor, Susan's PTSD was caused by trauma she suffered one month before Ann's attack when Susan was robbed at gunpoint. In the doctor's opinion, although Susan had no symptoms of PTSD until after Ann's attack, Ann's attack triggered PTSD symptoms because Susan was suffering from PTSD caused by the earlier robbery. The symptoms became so severe that Susan had to withdraw from school. She now sees a psychologist weekly.

Since the attack, Susan has learned that Ann suffers from schizophrenia, a serious mental illness. From August through November, Ann had been receiving weekly outpatient psychiatric treatment from her Psychiatrist. Her Psychiatrist's records show that on November 20, Ann told her Psychiatrist that she "was going to make sure" that former University classmates who were "cheaters" got "what was coming to them for getting the good grades I should have received." Ann's Psychiatrist did not report these threats to anyone because Ann had no history of violent behavior. Ann's Psychiatrist also did not believe that Ann would take any action based on her statements.

At the time of the attack, Susan knew Ann only slightly because they had been in one class together the previous semester. Susan received an A in that class.

Susan is seeking damages for the injuries she suffered as a result of Ann's attack and has sued University, Jim, and Ann's Psychiatrist.

1. May Susan recover damages for physical injuries she suffered in Ann's attack from

   (a) University? Explain.
   (b) Jim? Explain.
   (c) Ann's Psychiatrist? Explain.

2. Assuming that any party is found liable to Susan, may she also recover damages from that party for the PTSD symptoms she is experiencing? Explain.

**MINNESOTA BAR EXAMINATION**
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**REPRESENTATIVE GOOD ANSWER**
**QUESTION 6**

General Rule: To recover from a party for negligence, Susan must prove (1) Duty (she was foreseeable and they owed her a duty of care. The standard duty of care is to act as a reasonably prudent person under the circumstances, but that duty can be supplemented in special situations); (2) Breach of duty (they did not live up to their duty of care); (3) Causation (both actual and proximate); and (4) Damage.

**The University**

(1) Duty: Susan was a foreseeable plaintiff because she was a resident of one of the University's dorms, and was a student at the University. The University owed her a duty of care, but it went beyond the standard duty of a reasonably prudent person. They had a special relationship akin to a landlord tenant relationship. In these situations, the tenant (Susan in this case) is treated like an invitee – she is on their premises to confer an economic benefit (i.e. paying rent/tuition). Thus, the landlord/University has a duty to protect her from hidden defects that it either (1) knew about or (2) should have known about. In addition, the University assumed a higher duty of care by making it a "secure" building – they had a key card access and deadbolts. In these cases, where landlords voluntarily assume higher duties, they can be held liable for failing to monitor/maintain that added security. Thus, the University owed Susan a higher duty of care than the default standard – not only as a landlord, but as someone who voluntarily undertook extra safety obligations.

(2) Breach: The University breached his duty by failing to repair the broken deadbolt in four days. Given the heightened security measures, a reasonable person would inspect them every so often to make sure they were still in proper working order and providing the security benefits they have promised. In this case, it had been broken for four days. We do not know if the delivery man told the University about the break, in which case the breach would be even clearer. But even if they were unaware, by voluntarily taking extra security precautions, they had a duty of upkeep, which they breached by letting the lock remain broken for four days.

(3) Causation

(a) Actual Causation – The broken lock was the "but for" cause of Susan's injury. If the lock had not been broken, Ann would not have been able to enter because she no longer had a key card. Thus, the breach was the actual cause of Susan's injury.

(b) Proximate Causation – While it can be argued that Ann's criminal acts were an unforeseeable intervening force that negates proximate cause, this argument will not stand. When a tortfeasor's act makes a criminal act more possible than it would have been without the tortfeasor's act, that tortfeasor is still the proximate

cause. In this case, the University's failure to repair the lock created the opportunity for Ann to commit the crime. Thus, it was foreseeable that a broken lock would expose residents to crime, and the failure to inspect and repair is the proximate cause of Susan's injuries.

(4) Damage – Ann suffered personal injuries, and she took steps to mitigate the damage by receiving immediate medical treatment from the University hospital. She may also recover from the University for all of her injuries (even PTSD) under the "eggshell skull" doctrine. Under this doctrine, a defendant takes their plaintiff "as he finds her." In other words, even if the extent of the damage is unforeseeable because of a Plaintiff's unique condition, the Defendant will still be liable for the full extent of the damage. Thus, in this case, even though Susan's experience with the gunpoint robbery created her unique susceptibility to PTSD, the doctor noted that Ann's attack triggered the PTSD symptoms. Thus, the University may be held liable for the full extent of Susan's injury. Susan may recover for PTSD from the University, but not Jim or Ann's Psychologist (which will be discussed subsequently).

**Jim**

(1) Duty: Susan was a foreseeable plaintiff because she was the person Jim was attempting to rescue. In general, there is no duty to rescue. However, in certain situations, a duty to rescue may be created (i.e. special relationship (employee/employer or parents/children), creation of the peril, etc.). In this case, Jim voluntarily undertook the task of rescuing Susan. At this point, he incurred a duty to act as a reasonable person to carry out the rescue. If he abandons the rescue or fails to act reasonably, he will be held liable for harm to the Plaintiff. Many states have Good Samaritan statutes to protect rescuers in this context, but there is no evidence of such a statute here. Thus, Jim had a duty to act in a reasonable manner to effectuate the rescue.

(2) Breach: Jim breached his duty by abandoning the rescue after discovering that the security office was closed. At that point, he still had a duty to render further assistance – he knew that Susan was injured and lying on the floor, groaning, in need of medical attention. The closure of the office did not satisfy his duty, there were still reasonable steps he could have taken to help, such as calling 911 or taking Susan to the hospital himself. Furthermore, he closed the door to the library, preventing others from seeing her lying, injured, and rendering aid. This breached his duty as a voluntary rescuer.

(3) Causation

(a) Actual Cause: Jim can be seen as the but-for cause of Susan's injuries. If he would have honored his duty, she would have gotten to the hospital sooner and some of her injuries may have been avoided or mitigated. Or if he would have left the door open, another passerby may have seen her and gotten her to the hospital moments after Jim left. However, Jim would likely argue that he was not the but-for cause. Susan only had to lie there for a half hour, and then she

walked to the hospital herself. Her injuries were minor, so it was unlikely that the extra time exacerbated her injuries to the point of causing extra harm.

(b) Proximate Cause: It was foreseeable that, by abandoning his attempt to rescue, Jim's actions would exacerbate Susan's injuries because she did not get to a hospital right away. Again, Jim would make the same arguments he made under actual cause, but the act of an abandoned rescue and closing the door are sufficient to imply that her injuries would have been less severe if she would have received earlier medical attention.

(4) Damage – Ann suffered personal injuries, and she took steps to mitigate the damage by receiving immediate medical treatment from the University hospital. Thus, she could recover from Jim under the theory that his failed "rescue" delayed her medical treatment and worsened her physical injuries. However, Ann could not recover from Jim for the PTSD. While defendant's take their plaintiff "as they find them" under the eggshell skull doctrine, Jim's acts were not responsible for any mental injuries. At best, they were responsible for an exacerbation of her physical injuries. The PTSD was caused by the attack itself (not the physical injuries or their extent) which Jim had no role in instigating. Thus, since Jim had no role in the act that triggered the psychological damage, he cannot be liable for her "eggshell" condition in the psychological realm.

**Ann's Psychologist**

(1) Duty: Psychologists have a duty of patient-doctor confidentiality. However, they have a duty to disclose if they reasonably fear the patient is an imminent threat to a third party.

(2) Breach: Ann's Psychologist did not breach this duty because Ann did not specifically name an individual victim – she just spoke generally about classmates who were "cheaters" that got good grades. The Psychologist had no way of knowing that Ann and Susan had been in a class together and Susan received an A in that class. She had no way of warning Susan (because she was unaware of her identity and her relationship to Ann), and had no duty to warn the entire University. Furthermore, Ann had no history of violent behavior. Thus, the psychiatrist had no reason to believe that this generally non-violent woman was going to act on a general "threat" to a large group of people. Thus, the facts were not sufficient to overcome her duty of patient-doctor confidentiality and there was no duty to disclose Ann's threats.

Absent a duty and a breach, there can be no causation and no responsibility for damage. Thus, the psychiatrist is not liable for Susan's physical injuries or her PTSD symptoms.

## QUESTION #7

Plaintiff, a female employee of Defendant, a large manufacturing firm, sued Defendant in federal district court for violating a federal statute that creates a right to be free of sex discrimination in the workplace.

Plaintiff alleged the following: (1) Plaintiff worked for Defendant in a position for which females had seldom been hired in the past. (2) Shortly after Plaintiff was hired, male coworkers began to make sexually charged remarks to Plaintiff. (3) Plaintiff's male supervisor asked her out on dates and became angry each time she refused. (4) There were occasional incidents in which the supervisor or another male worker "accidentally" made contact with various parts of Plaintiff's body. (5) No one from company management ever took steps to monitor or limit behavior of this sort. (6) As a result of this behavior, Plaintiff began to suffer from various physical ailments that were related to stress. (7) Plaintiff made no complaint to management about the situation because the job paid very well and there were, to her knowledge, no comparable opportunities that would be available to her if she lost this particular job.

Defendant's answer to the complaint admitted that Plaintiff was an employee and that the individual named as her supervisor was her supervisor. Defendant denied all allegations relating to the alleged sex discrimination.

A well-established affirmative defense is available in cases of this sort if the defendant employer proves that (a) the plaintiff employee was not subject to any adverse job action (firing, demotion, loss of promotion opportunity, etc.), (b) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (c) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

In a pretrial deposition, Plaintiff admitted that she had suffered no loss of pay or promotion opportunity. Plaintiff also admitted that she was aware of company policies forbidding sex discrimination and sexual harassment, as well as the procedures that employees could use to complain about perceived discrimination. Plaintiff stated that although she was aware of those policies and procedures, she had not seen any effort on the part of Defendant to enforce the policies and was afraid that she would suffer retaliation if she made use of the procedures available to complain of sex discrimination.

After the close of discovery, Defendant moved to amend its answer to add the affirmative defense set forth above. It also moved for summary judgment, claiming that Plaintiff's deposition testimony sufficiently established the elements of the affirmative defense to warrant a judgment in Defendant's favor.

Plaintiff opposed both motions. The trial judge ruled in Defendant's favor, allowing the amendment and granting summary judgment.

Did the judge err? Explain.

**MINNESOTA BAR EXAMINATION**
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**REPRESENTATIVE GOOD ANSWER**
**QUESTION 7**

I. Amending the Answer

Rule 15 of the Rules of Civil Procedure allows for amendment of the pleadings. There is a time period in which the judge must allow the pleadings to be amended. Pleadings can typically be amended if the amendment relates back to the initial pleading – that is, if it could have been pleaded at the time of the initial pleading. Additionally, judges can allow for pleadings to be amended if doing so is required by the interests of justice. But certain defenses must be raised at the time of the Defendant's first response, whether it be by motion or answer. If a defense, such as improper venue or the raising of an affirmative defense, is not raised, the defense is deemed waived.

Here, failure to raise an affirmative defense in its answer would normally have waived the defenses. The Defendant did not raise any affirmative defenses in its answer, but rather denied all allegations relating to the alleged sex discrimination. Typically, this would waive the defense. But the judge may be able to allow amending the answer under Rule 15. Because this is just the close of discovery, the pleadings may be presumed to be amendable. But even if the time for that has passed, the judge may be able to allow the answer be amended in the interests of justice. If so, this would seem to be an appropriate instance. First, trial has not yet started and if there is additional discovery that needs to be conducted as a result of allowing the defense, the judge could so allow. Second, the judge found that the Plaintiff's own deposition testimony sufficiently established all elements of the affirmative defense. If the judge's finding is accurate to allow the Plaintiff to proceed on a claim that is fully defensible merely because the defense was not raised in a timely manner would substantially impair justice.

Applying these rules, the result hinges on whether the judge correctly found that the Plaintiff's own testimony fully established the elements of the affirmative defense. If so, he did not err in granting the Defendant's motion to amend the answer to contain the affirmative defense. If the judge wrongly found that the affirmative defense was fully established, the interests of justice are less pressing and the argument to allow amendment of the answer is significantly weaker, and his decision likely would have been in error.

II. Granting Summary Judgment to the Defense

Rule 56 of the Rules of Civil Procedure allows for the granting of a motion for summary judgment where there is no genuine issue of material fact. Summary judgment requires evaluating the evidence in the light most favorable to the nonmoving party. In this case, that would require viewing the evidence in the light most favorable to the Plaintiff.

The Plaintiff still suffered no loss of pay or promotion opportunity. The employer had policies and procedures for complaints about perceived discrimination that she never used. But she stated that she had not seen any effort of the part of the Defendant to enforce the policies and was afraid that she would suffer retaliation if she made use of the procedures. Viewing these facts in the light most favorable to the Plaintiff, there is a material dispute as to whether the employer did exercise reasonable care to prevent and promptly correct any sexually harassing behavior. In fact, the Plaintiff's testimony is that she did not believe such care was exercised and that she would suffer retaliation if she reported the alleged misconduct. Accordingly, the Plaintiff's testimony does not establish all the elements of the affirmative defense and there is a genuine dispute over material facts. The grant of summary judgment was therefore in error.

## QUESTION #8

Acme Inc. manufactures building materials, including concrete, for sale to construction companies. To create a market for its building materials, Acme enters into agreements with construction companies under which Acme and the construction company agree to form a member-managed limited liability company (LLC). The LLC builds the project, purchasing building materials from Acme and contracting for construction services with the construction company.

The operating agreements for these LLCs always provide that Acme has a 55% voting interest, that Acme and the construction company contribute equally to the capital of the venture, and that the parties share in profits at a negotiated rate. The agreements are silent as to the allocation of losses.

Acme entered into such a relationship with Brown Construction Co. LLC (Brown), forming Acme-Brown LLC (A-B LLC) to build 50 homes. The operating agreement for A-B LLC gives Acme a 55% voting interest and provides for a 20%/80% division of profits in favor of Brown.

A-B LLC built all 50 homes and sold them to homeowners. The members received a distribution of profits from the sales, split between them according to their agreement on the division of profits. However, all the concrete manufactured by Acme and sold to A-B LLC for the foundations of the homes proved to be defective. After a year, the concrete dissolved, collapsing the homes and rendering them worthless. In a class action by the homeowners against A-B LLC, the plaintiffs were awarded a $15 million judgment. The LLC has no assets with which to pay the judgment.

Although Acme would be liable to A-B LLC for the loss caused by the defective concrete, A-B LLC has not brought a claim against Acme. Acme has the financial resources to pay damages equal to the amount of the $15 million judgment in the homeowners' lawsuit and to fully cover A-B LLC's liability.

Brown has sent a letter to A-B LLC demanding that A-B LLC bring a claim against Acme to recover those damages and pay the judgment to the plaintiffs, after which A-B LLC would be dissolved. But Acme, as the manager of A-B LLC, has refused to do so.

Acme's lawyer has sent a letter to Brown stating the following:

(1) Acme has no fiduciary obligations to either A-B LLC or Brown that require it to have A-B LLC bring the concrete claim against Acme.

(2) Brown cannot bring a claim against Acme.

(3) Brown does not have sufficient grounds to seek the judicial dissolution of A-B LLC.

(4) Because the A-B LLC agreement provides for a 20%/80% division of profits, the losses arising from the judgment obtained by the plaintiffs against the LLC should also be allocated 20% to Acme and 80% to Brown.

Is Acme's lawyer correct? Explain.

**MINNESOTA BAR EXAMINATION**
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**REPRESENTATIVE GOOD ANSWER**
**QUESTION 8**

As an introductory matter, a limited liability company, an LLC, is a business entity in which the members of the LLC have limited liability for the debts and obligations of the entity, but still receive the favorable pass-through tax treatment that partners in a partnership receive. Formation of an LLC requires a filing with the state, and is typically managed by an operating agreement that details how the LLC will be managed and how it will operate. An LLC typically has a board of managers or a manager who is responsible for the daily operation of the LLC.

(1) Acme does owe fiduciary obligations to A-B LLC and to Brown, but these fiduciary duties do not necessarily require that it determine that A-B LLC bring the concrete claim against Acme. Since Acme has a 55% voting interest, it has effective control of A-B LLC and Acme is the manager of the LLC, assumedly as outlined in the operating agreement. First, managers of an LLC owe the fiduciary duties of care and loyalty to the LLC. They must act in the best interest of the LLC at all times and exercise due care and diligence in deliberating on and making decisions regarding the LLC. Managers also owe a duty of loyalty in which they will refrain from engaging in self-dealing transactions with the LLC and will not take or use corporate assets or opportunities for their own personal gain. As a side note, it appears that there was a breach of the duty of loyalty here because Acme, as manager of A-B LLC entered into an agreement with Acme to provide the concrete for the project. On the facts, it appears that it would be in the LLC's best interests to bring a claim against Acme to recover the damages because the LLC does not currently have the assets to pay the class action judgment against it. If it does not bring the claim, A-B LLC will be bankrupt by the claim against it. Therefore, Acme does have a fiduciary duty as a manager of an LLC to bring the claim because it is in the best interests of the LLC. Moreover, Acme arguably has a fiduciary duty to Brown as well because Brown is a minority shareholder in the LLC. It effectively has no voice in the management of the entity because of its 45% voting power. An interest or stake in an LLC is very liquid. It cannot be sold without the approval of the other members. Therefore, some courts will protect minority shareholders in LLCs and punish majority shareholders that act purposefully to harm the interest of the minority.

(2) Brown can bring a claim against Acme on behalf of the LLC. This is called a derivative suit. A shareholder in an LLC may bring a derivative suit against the entity to attempt to force the entity to bring a valid claim that the entity has. This requires that a demand on the company be brought in order to bring the claim. The facts state that Brown had sent such a letter. However, demand is excused when it would be futile. That is the case here. Acme is the controlling 55% shareholder and has refused to bring the claim against Acme on behalf of A-B LLC. This is sufficient to show that demand would be futile. Moreover, it would essentially involve convincing the controlling shareholder, Acme, to bring a claim against itself. This is also a futile

demand. Therefore, Brown can bring a derivative suit against Acme on behalf of A-B LLC through the use of the shareholder derivative suit process.

(3) Brown does have sufficient grounds to seek the judicial dissolution of A-B LLC. Judicial dissolution will be granted when there is deadlock within the company that threatens the future of the entity. That is the case here. The LLC faces an extremely large judgment that it cannot pay, and there is an available means to pay for the judgment by bringing suit against Acme, but the majority member will not exercise that claim. So, there is disagreement between the 45% and the 55% shareholder that could potentially bankrupt the LLC. This will qualify as sufficient grounds for dissolution. Brown should be aware, though, that in a suit for dissolution, a court can order that a complaining member's interest be bought out by the other members.

(4) Brown will not be responsible for 80% of the losses. In an LLC it is assumed that profits and losses are shared equally unless otherwise provided for in the operating agreement. Here, the members have agreed that Brown will receive 80% of the profits and Acme will receive 20% of the profits. This is an enforceable arrangement. However, the operating agreement is silent on the sharing of losses. The general rule is that losses will be shared in the same way that profits are shared. This means that Brown would be responsible for 80% of the losses, and Acme will be responsible for 20% of the losses. However, one of the benefits of the formation of an LLC is that members do not have individual liability for the debts and obligations of the LLC beyond their initial investment in the company. Therefore, Brown will not be responsible for 80% of the judgment unless the court decides to disregard the LLC formation under a theory of piercing, but the facts do not provide for such a finding.