

# **Florida Board of Bar Examiners**

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

## **Florida Bar Examination Study Guide and Selected Answers**

**July 2006  
February 2007**

**This Study Guide is published semiannually with essay questions  
from two previously administered examinations  
and sample answers.**

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# **PART I – ESSAY QUESTIONS AND SELECTED ANSWERS**

## **JULY 2006 AND FEBRUARY 2007 FLORIDA BAR EXAMINATIONS**

### **ESSAY QUESTIONS AND SELECTED ANSWERS**

Part I of this publication contains the essay questions from the July 2006 and February 2007 Florida Bar Examinations and one selected answer for each question.

The answers selected for this publication received high scores and were written by applicants who passed the examination. The handwritten answers are typed as submitted by the applicant. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 2.

## ESSAY EXAMINATION INSTRUCTIONS

### Applicable Law

Questions on the Florida Bar Examination should be answered in accordance with applicable law in force at the time of examination. Questions on Part A are designed to test your knowledge of both general law and Florida law. When Florida law varies from general law, the question should be answered in accordance with Florida law.

### Acceptable Essay Answer

- Analysis of the Problem - The answer should demonstrate your ability to analyze the question and correctly identify the issues of law presented. The answer should demonstrate your ability to articulate, classify and answer the problem presented. A broad general statement of law indicates an inability to single out a legal issue and apply the law to its solution.
- Knowledge of the Law - The answer should demonstrate your knowledge of legal rules and principles and your ability to state them accurately on the examination as they relate to the issue presented by the question. The legal principles and rules governing the issues presented by the question should be stated concisely and succinctly without undue elaboration.
- Application and Reasoning - The answer should demonstrate your capacity to reason logically by applying the appropriate rule or principle of law to the facts of the question as a step in reaching a conclusion. This involves making a correct preliminary determination as to which of the facts given in the question are legally important and which, if any, are legally irrelevant insofar as the applicable rule or principle is concerned. The line of reasoning adopted by you should be clear and consistent, without gaps or digressions.
- Style - The answer should be written in a clear, concise expository style with attention to organization and conformity with grammatical rules.
- Conclusion - If the question calls for a specific conclusion or result, the conclusion should clearly appear at the end of the answer, stated concisely without undue elaboration or equivocation. An answer which consists entirely of conclusions, unsupported by statements or discussion of the rules or reasoning on which they are based, is entitled to little credit.
- Suggestions
  - Do not anticipate trick questions or attempt to read in hidden meanings or facts not clearly expressed by the questions.
  - Read and analyze the question carefully before commencing your answer.
  - Think through to your conclusion before writing your opinion.
  - Avoid answers setting forth extensive discussions of the law involved or the historical basis for the law.
  - When the question is sufficiently answered, stop.

# **Q** QUESTION NUMBER 1

## **JULY 2006 BAR EXAMINATION - FLORIDA CONSTITUTIONAL LAW**

You are an associate at a firm that represents plaintiffs. The legislature recently passed “An Act Relating to the Reform of the Courts” that was signed into law. The terms of the Act are:

- (1) The Florida Supreme Court shall have jurisdiction to review any decision of a district court of appeal affirming a final judgment exceeding one million dollars that is based upon a jury verdict.
- (2) Any rule of procedure promulgated by the Florida Supreme Court shall be presented to the governor for approval in the same manner as a bill passed by the legislature.
- (3) Any claim of medical malpractice shall be tried before an administrative hearing officer. The hearing officer shall determine fault and award damages in accordance with existing law. Any final order may be appealed to the First District Court of Appeal.
- (4) It is a second-degree misdemeanor to pass a school bus that displays a stop signal.

The Act’s history shows it was drafted over concerns of excessive jury verdicts and rules of procedure overly favorable towards plaintiffs. The Act was amended during floor debate to add Section 4. A similar amendment was made on two other bills.

Please prepare a memorandum of law analyzing the provisions of this Act including their validity under Florida law. The memorandum should only address claims that arise after the effective date of the Act.

## SELECTED ANSWER TO QUESTION 1

### (July 2006 Bar Examination)

*The Act passed by the Florida Legislature has several problems. If a challenge to this Act was sought, a plaintiff with proper standing would be one directly affected by one of the invalid clauses. Thus, someone who wanted to sue for medical malpractice in court but could not or someone whose case was appealed to the Florida Supreme Court via the jurisdiction of this Act. If the Act was found invalid, the District Court of Appeal in the appropriate District and then the Florida Supreme Court would have mandatory jurisdiction to hear the appeal, depending on the court the claim originated in. The problems with the various clauses are discussed by clause as follows:*

#### Clause 1

*Clause one attempts to modify the appellate jurisdiction of the Florida Supreme Court. The Florida Constitution gives the Florida Supreme Court the discretionary jurisdiction to hear appeals from the District Courts of Appeal for a variety of reasons, including if two DCA opinions conflict, if they are certified to the Florida Supreme Court as of great importance, or if they affirm the validity of a Florida Statute or Constitutional provision. The Florida Supreme Court has mandatory jurisdiction of appeals arising out of the District Courts of Appeal relating to bond validation proceedings, imposition of the death penalty, and the invalidation of a statute or Constitutional provision. Clause 1, providing for Florida Supreme Court jurisdiction of a DCA case affirming a final judgment exceeding one million dollars based on jury verdict, does not fit within the Florida Supreme Court's area of discretionary jurisdiction, unless the case, as stated above, conflicts with another DCA or is certified to the Florida Supreme Court as of great public importance. The Florida legislature may not extend or enlarge the discretionary jurisdiction of the Florida Supreme Court as Constitutionally mandated. This clause is unconstitutional because it attempts to do so. In contrast, under the Federal Constitution, Congress has the power to enlarge or reduce the appellate jurisdiction of the U.S. Supreme Court, provided that it does so without excluding appellate jurisdiction of an entire subject of review.*

#### Clause 2

*Clause 2 attempts to create a way to modify the creation of rules of procedure created by the Florida Supreme Court. Normally, the legislature passes a bill by a majority of each house, and then presents such a bill to the Governor to either veto or to sign. Under the Florida Constitution however, the Florida Supreme Court has the **exclusive** authority to create rules of procedure for the Florida courts. The legislature may reject such rules created by the Florida Supreme Court by a 2/3 vote, but the legislature, may not amend or modify such rules. The Florida legislature has no power to create rules of court procedure, as this power is exclusively vested in the Florida Supreme Court according to the Florida Constitution. This clause attempts to give the Governor the power to veto or accept such rules of court, according to the procedure for enacting other bills in the legislature. This is clearly unconstitutional because it violates Separation of Powers. The Florida legislature cannot delegate its power to reject the Supreme Court's rules by 2/3 vote to the Governor. The Florida Constitution expressly provides for this procedure. Any attempt by the Governor to veto the Florida Supreme*



*Court's rules would violate this constitutional provision. This clause is unconstitutional and cannot be enforced. If so provided, the clause could be severed from the act if the rest of the act is determined to be valid.*

### Clause 3

*Clause 3 attempts to limit the use of the courts for medical malpractice actions, forcing them to be heard before an administrative hearing officer. This may be problematic because the Florida Constitution guarantees its citizens access to the courts for all actions at law. The legislature may not deny access to the courts without providing a reasonable alternative unless it can justify such an action with a compelling governmental interest, and show that such action is narrowly tailored to fit that interest. An administrative hearing may be considered a reasonable alternative, because it still allows plaintiffs to bring their actions before a quasi-judicial officer, and the law allows that any final order may be appealed. However, an administrative hearing may not be seen as a reasonable alternative, as would perhaps an arbitration or mediation type of alternative. A plaintiff might argue that such a hearing was not reasonable because it was not enough like a court.*

*However, if the hearing is not considered a "reasonable" alternative to trial, then the legislature must satisfy the strict scrutiny test. The legislature could probably argue that medical malpractice actions are clogging the court dockets, and that there is a compelling interest in the efficiency of the courts. The legislature may also argue that this is the most narrowly tailored option, because it still provides for some type of hearing, and allows an appeal. The process therefore would not take away a right to trial, but merely put in place a type of screening process for these types of cases. However, the facts indicate that the legislature's purpose behind the clause was excessive jury verdicts and rules of procedure overly favorable towards plaintiffs. These reasons would probably not meet the compelling interest test, unless the legislature can successfully make the argument that jury verdicts tend to favor plaintiffs and award large verdicts is compelling. This clause would probably be upheld because the clogging of court dockets has traditionally been recognized as a major problem.*

*In addition, a jury trial must be provided in all criminal cases and all civil cases where such a jury trial right existed at the time of the Florida Constitution's adoption. Because this right is removed by Clause 3 as to medical malpractice cases, an opponent of the legislation could argue that a jury trial right existed as to such professional negligence actions in 1845, and thus must be protected now.*

*Clause 3 may also run afoul of existing Florida Statutes, which mandate procedure for medical malpractice cases without mention of such an administrative hearing.*

*Clause 3 also attempts to vest judicial authority in an administrative hearing officer. This may offend the Separation of Powers provision in the Florida Constitution by vesting an administrative or legislative branch officer with judicial authority.*

*Clause 3 also attempts to vest the First District Court of Appeal with the power to hear appeals from all cases appealed from the hearing officer for medical malpractice actions. However, the District Courts are vested with the power to hear appeals from their own districts, and one district court of appeal cannot be vested with the power to hear appeals from anywhere in Florida. This is unconstitutional.*

#### *Clause 4*

*This clause is a problem because it relates to a different subject than the rest of the Act. The Florida Constitution requires that all statutes enacted by the legislature contain only one subject. The single subject rule exists to provide notice and assure that each title adequately describes what is contained within the statute. The Act contains several provisions relating to the courts, but the Fourth provision relates to a criminal law. This would clearly not fall under the subject of court reform, and therefore would cause the act to be unconstitutional.*

*The facts also indicate that the Act was amended during floor debate to add section 4. This is improper. Pursuant to the Florida Constitution, an act may not be amended during floor debate to add a new provision. In addition, this provision violated the "single subject" rule, as stated earlier.*

*The facts also indicate that amendments were made to two other bills during floor debate of the Act. Pursuant to the Florida Constitution, the legislature may not make changes to other bills while debating one bill on the floor. This may serve to invalidate the legislation.*

# **Q**

## **QUESTION NUMBER 2**

### **JULY 2006 BAR EXAMINATION - REAL PROPERTY/CONTRACTS**

Owner owned Blackacre, a 75-acre parcel of farmland in Central County, Florida. In 2000, Owner and Farmer entered into a written lease whereby Owner leased Blackacre to Farmer for a term of thirty years in exchange for rent payments of \$20,000 per year. Each year, Farmer planted and harvested crops on Blackacre. Farmer did not reside on the land.

In 2003, Owner and Farmer amended the lease to give Farmer or his heirs the option to purchase Blackacre for \$250,000 at any time during the term of the lease. In the amendment, which was in writing and signed by Owner and Farmer, Owner acknowledged receipt of Farmer's deposit of \$1,000 to be placed in an interest-bearing trust account. The amendment provided that, upon exercise of the option, the deposit plus accrued interest would be credited to the purchase price of Blackacre. If the option was not exercised, the deposit plus interest would be returned to Farmer or his heirs. Neither the lease nor the amendment was recorded.

In 2005, Owner executed a warranty deed conveying Blackacre to Buyer, who paid Owner \$300,000. The language of the warranty deed complied with the form prescribed by Florida Statute. Before purchasing Blackacre, Buyer searched the property records of Central County and determined that record title to Blackacre was in Owner. Also prior to the purchase, Buyer inquired of Owner as to Farmer's interest in Blackacre. Owner gave Buyer a copy of the lease, but Owner did not tell Buyer about the amendment and Buyer was unaware of Farmer's option when Buyer purchased Blackacre.

In 2006, Farmer gave Buyer proper notice of the exercise of the option to purchase Blackacre and tendered to Buyer the purchase price. Buyer refused to convey Blackacre to Farmer.

Prepare a legal memorandum addressing the following issues:

1. Is Farmer's option to purchase Blackacre valid? Will Farmer be successful in enforcing the option? Discuss fully.
2. In an action by Buyer against Owner, what claim(s) are available to Buyer? Will Buyer be successful? Discuss fully. Do not discuss any claim based on negligence or an intentional tort.



## SELECTED ANSWER TO QUESTION 2

### (July 2006 Bar Examination)

*First of all, this isn't homestead property. Homestead property is 160 acres of contiguous property, but it has to be lived on. Farmer doesn't live on the property, thus any assertions from farmer saying that this is homestead property will not succeed.*

*Is farmer's option to purchase Blackacre valid?*

*Here, the lease was for 30 years so it should have been recorded even without the option on it.*

*Although, farmers lease said that it was a lease, it seemed to be much more than that.*

*This is an option contract and it must satisfy the **Statute of Frauds**. A contract for the sale of land or for an option to purchase land must be a writing, describing the property and the price to be paid, and it must be subscribed by 2 witnesses and recorded.*

*An option to purchase property should be recorded like a deed & have consideration for the option to be left open. Here in the facts, there was \$1,000 agreed upon to hold the option open. The amount for the purchase of the land is \$250,000. Here in the facts, the lease was amended to add the option and signed by the farmer and the owner. So we have a writing. It doesn't say that it described the property but the facts say that it was 75 acres so I will assume that this was in the lease and that element is met. Here in the facts, there weren't 2 witnesses to sign the option contract. The option contract was also not recorded thus later purchasers were not on record notice of the lease, however they were on inquiry notice because Farmer was on the land planting and harvesting the crops & making use of the crops.*

*Since the option contract wasn't signed by 2 witnesses, it doesn't meet the requirements in Florida to be valid. However, at this point, under the **Statute of Frauds** all that farmer needs to prove is that he has a writing, signed by the party charged (OWNER) that evidences the agreement. Farmer does meet all of these elements because he has the lease that was amended & it is signed by the owner & it evidences that he had a 30 year lease & an option to buy and now that Owner made a contract with Buyer, Owner is in breach of this contract that meets the Statute of Frauds because owner conveyed this property that he had leased & given an option contract on to another party.*

*It is likely that the **exceptions to the Statute of Frauds** which are **part performance & equitable Estoppel** are met here also. So if Farmer couldn't satisfy the Statute of Frauds he could use the exception to **recover damages or get specific performance**.*

*Under part performance, a person who increases the value of the land by working on it or building on it or paying part of the cost of it is said to have an interest in the property. Here in the facts, Farmer has increased the value of the land because he has crops on it. He has also paid the price of the option that is going to be credited toward his purchase of the property. However, Owner will argue that since the option is in an interest bearing account & will be applied to the value of the property he doesn't actually possess the option money & thus the option isn't valid. This claim is NOT likely to fail because the option contract says that the money is to be used for the value of the home and if not then it will go back to the farmer. This is a question for the court.*

*ESTOPPEL - it is likely that the farmer will be able to use the argument of equitable estoppel because he relied on owner that he at least had a 30 year right to use the property & hopefully longer if he got to purchase it. His reliance is evidenced by him growing crops on the land. He relied on Owner when he planted his crops. Owner will argue that crops are a yearly thing & he didn't rely on him for the whole 30 years in just planting 1 or 2 years of crops. It is likely that the Owner's argument will fail here. Because Farmer did rely to his detriment on Owner's agreement with him that he would be able to farm the land for 30 years or more so it is likely that a court would enforce this agreement on estoppel grounds. Owner will be equitably estopped from selling the land to Buyer even if the agreement didn't meet the Statute of Frauds.*

*However, this whole agreement can be rendered void if it violates the **rule against perpetuities**. The rule against perpetuities (RAP) applies to options to buy land. RAP as stated by John Chipman Grey says that any interest must, vest or fail to vest, within 21 years of some life in being at the creation of the interest. Here in the facts, there is no life in being stated in the creation of the option to buy property so it is measured by the common law time limit which is 21 years. Florida follows the wait and see rule which means that they can wait and see if it vests in the amount of time & the interest will be good if it vests in the amount of time. Florida also has changed the years for RAP to 90 years. Here, the interest was created in 2003 which left 27 years left on the option. Since farmer wanted to exercise his option to buy only 2 years later, the wait and see rule says that his interest vested before RAP made it void. Thus under RAP this interest is good.*

*Thus, for the above reasons, it is likely that farmer will have more than one way to prove that his option to purchase black acre is valid.*

*Will farmer be successful in enforcing the option? This question is answered by the fact that Farmer wants specific performance. He wants the land and Owner no longer has the land so whether farmer gets the land is decided by notice & recording statutes.*

*Farmer's remedy from owner will be damages since specific performance might be tricky since Owner doesn't own the property anymore.*

*Florida is a pure notice state. This means that a buyer who is a good faith purchaser takes good title if they purchase without notice of anyone else having an interest in the property. Florida has a rebuttable presumption that a person doesn't have notice when they buy land.*

*Record notice is when someone records their interest in the property & it gives notice to the whole world that they have interest in the property.*

*It was bad that Farmer didn't record his option to buy the property. He should have also recorded his lease. But he didn't so he didn't **give record notice to the world** of his interest in the land. However, he did raise crops on the land and this gives **inquiry notice** to people who are looking to buy property. When people buy property they are presumed by the law to be on all forms of NOTICE- including actual, inquiry, and record notice.*

*Here in the facts, Buyer was only on actual notice of Farmer's 30-year lease on the land. Since Buyer knew about the lease, a court might hold that inquiry notice doesn't work here. The buyer could see that someone was on the property but didn't know the interest that farmer held.*

*In general, Buyer paid valuable consideration of \$300,000 without knowing any problems on the property so he was a good faith purchaser for value.*

*RELEASE - Buyer should have asked for a release from Farmer who would be his tenant before he bought the property. Buyer should have asked Farmer what type of interest he held & in fact, under Florida law a reasonably prudent buyer should have gone to the tenant (farmer) and asked for a letter stating the farmer's interest in the land and any liabilities that Owner owed to Farmer & any other things that could be in an agreement between Owner & farmer because Buyer is still held to that agreement between the original owner and Farmer. Since Buyer is held to the agreement between the landlord who is now him & the farmer, Buyer is also held to the option that was on the lease.*

*Since buyer is held to the lease & the option as the new landlord, it is likely that Farmer will be relieved to know that he will be able to get specific performance and get his land.*

*In an action by Buyer against Owner, what claims are available to buyer?*

*Buyer has the claim of breach of contract. There was a unilateral mistake on the part of the buyer that went to the heart of the contract. Buyer thought he was buying land where he had a tenant & he could get rent for many years, but he really purchased land that could be purchased away from him.*

*Buyer can claim fraud. Owner knew that the option was on the land but he didn't tell buyer about it.*

*Buyer can claim material misrepresentation- because Owner omitted to tell buyer about the option contract and this omission counts as a lie because it went to the heart of the deal.*

*Buyer can claim fraudulent misrepresentation - If Owner can prove scienter then he can prove that Owner's omission rose to the level of fraud.*

*Buyer can also claim detrimental reliance because owner knew about the option contract and didn't tell buyer about it and caused buyer to rely upon him to his detriment which caused him to enter into the contract.*

*It is likely that buyer will win on all of these claims because owner knew about the option contract and didn't tell buyer about it yet still had Buyer enter into the contract for the sale of land.*

*Owner executed a warranty deed conveying black acre to buyer.*

*The warranty deed gave buyer 6 covenants*

*1-covenant of seizen- which warrants that the title is marketable & good & that there is nothing of record that affects the title.*

*2-covenant of warrant & defend which promises that owner will show up to defend his ownership in the property should any lawsuits arise.*

*3-covenant to convey- which promises that owner had the right to convey the property,*

*4-covenant of quiet enjoyment, which promises that no one has a lawsuit against the property & Buyer can own it in peace without worrying that he will be thrown off it.*

*5-covenant of future assurances, owner promises that he will execute all paper work or do anything in the future he needs to do regarding the property.*

*6- covenant against encumbrances which promises that Owner didn't have encumbrances or liens on the land other than what Owner has told buyer about.*

*Buyer will sue on these warranties and specifically on the covenants to convey and the covenant against encumbrances. Here in the facts, owner didn't have the right to convey ownership in the property because an option contract was on the property. Since he didn't have a right to convey the propriety free & clear of that interest, he breached that warranty & buyer will win on that warranty.*

*Buyer will also argue that owner breached the covenant against encumbrances. Here in the facts, the option contract is an encumbrance on the property that owner knew about but didn't tell buyer about. Since there was an encumbrance on the property that wasn't communicated to buyer it is a breach of the covenant against encumbrances and owner is liable to buyer for that.*

*Buyer didn't have part performance in the land & he didn't live on the land. The land is unique, but Farmer has a greater interest in the land so it is unlikely that Owner can get specific performance. However, Buyer can sue Owner for the purchase price and any reliance damages.*

# **Q**

## **QUESTION NUMBER 3**

### **JULY 2006 BAR EXAMINATION - TORTS**

On a clear, dark night in Alligator County, Florida, Plaintiff was driving his vehicle on a state road at the speed limit. He suddenly came upon a disabled dump truck stopped in his lane. Plaintiff applied his brakes. Although Plaintiff was able to avoid colliding with the dump truck, his vehicle was struck from behind by Driver. Plaintiff's vehicle was equipped with an operational seatbelt but Plaintiff was not wearing it at the time of the collision.

The next car on the scene was driven by Helper, who was able to avoid colliding with any of the other vehicles. Helper observed that Plaintiff was unconscious and Plaintiff's gas tank was leaking. Helper pulled Plaintiff from the wreckage of his car and administered first aid to him.

An ambulance was called and Plaintiff was taken to the hospital. Plaintiff was admitted to the hospital and 10 days later Dr. Surgeon performed surgery to relieve pressure on Plaintiff's brain. Plaintiff is now suffering from loss of equilibrium and partial paralysis, both of which appear to be permanent.

An investigation revealed that the dump truck was owned and operated by Trucker, who was walking to the nearest phone to get help when the accident occurred. A Florida Statute requires the operator of a disabled truck to place certain markers on the roadway to warn approaching drivers. Trucker did not have such markers with him at the time.

Plaintiff states that he recalls seeing Driver's vehicle in his mirror prior to the accident and that Driver was following too closely for the conditions, in Plaintiff's opinion.

Plaintiff's current treating physician is Dr. Practitioner who has given an opinion that Plaintiff's injuries were aggravated when Helper provided first aid to Plaintiff. Dr. Practitioner believes that Dr. Surgeon provided substandard care in performing the operation and that this is also a factor in Plaintiff's injuries.

Your firm has been retained by Plaintiff to bring an action to recover damages for his injuries. Discuss potential causes of action against Trucker, Driver, Helper, and Dr. Surgeon, and the defenses that will likely be asserted. Discuss also the doctrine of joint and several liability in Florida and whether it would apply in this case.





## SELECTED ANSWER TO QUESTION 3

### (July 2006 Bar Examination)

*This memo concerns the causes of action arising from a car accident involving two drivers and a stalled truck. Potential claims against the Trucker, Driver, Helper and the Doctor administering care will be discussed.*

*Plaintiff v. Trucker*

*In order to have a cause of action in negligence there must be a duty, breach of that duty, foreseeable harm (both factual and legal) and damages that result. Drivers on the road have the duty to act as an ordinary reasonably prudent person under the relevant circumstances. This duty does take into account physical aspects of the defendant's character, but not mental abilities, and it is applicable to all foreseeable plaintiff's within the zone of risk of the defendant's conduct. A breach exists where the defendant does not perform as a reasonably prudent person would under the circumstances, and as a result there is a foreseeable injury to a plaintiff in a foreseeable way. Legal causation serves as a foreseeability test and will actually limit the liability of the defendant where the injury that results was unforeseeable. A plaintiff is entitled to recover all compensatory damages (past and future economic and non-economic damages) and at times punitive damages if they are plead as a result of a defendant's misconduct (gross negligence, intentional damages). There may be an issue of multiple causation in this case, since both the driver and the trucker essentially created one harm that may not have been sufficient on its own.*

*According to the investigation, the Trucker (T) was the initial cause of the injuries to the plaintiff. Where there is a statute involved that proscribes the standard of care to be followed by an individual, if a violation of the statute results in harm to a plaintiff of the class intended to be protected from that type of harm, then the plaintiff is able to establish negligence per se. Here, there was a statute that applied to the conduct of T that required him to use markers when his truck is disabled on a roadway. Plaintiff is most likely the type of person intended to be protected by the statute, from this exact type of injury - car accidents. There is no indication that the trucker was working for another, however, if he was, then there would also be a potential claim under respondent superior against his employer for negligence in the scope of his employment. By not placing the markers in the road, Plaintiff (P) may argue that T breached his duty of reasonable care by failing to act as a reasonably prudent person under the circumstances, as a reasonably prudent person would have recognized the potential for an accident and have proceeded accordingly. In defense T will most likely argue against causation on the theory that there was an intervening act - the negligence of the other driver - which absolves T of liability for the injuries to P. P can counter, however, that the accident between the two drivers is a foreseeable intervening cause, since it is foreseeable that two cars would collide after coming upon the stalled truck. T would also have an argument under comparative negligence. In Florida, a driver is comparatively negligent, and his recovery offset, as a result of his failure to wear a seatbelt where one is operational within the vehicle. The facts indicate that the driver*

*failed to wear the seatbelt despite its availability. The conditions otherwise indicate that P was acting with due care in light of the conditions that night. T may also claim that he was being reasonable by leaving the truck to call for help.*

*If the P can successfully argue that T is the cause of his injuries, then T would be responsible for all reasonably foreseeable factors that aggravate the injury and would similarly be liable for any injury that results to a rescuer. This applies also to subsequent medical malpractice, as exists in this case. T would be liable for the paralysis as well as any other aggravation that resulted from the negligence of the rescuer, since it is foreseeable that when someone is placed in danger by another's negligence, that other's will come to the rescue and injure themselves of the Plaintiff.*

#### *Plaintiff v. Driver*

*In order for P to make a claim against Driver (D), the same standard of ordinary negligence, causation, and damages is applied as indicated above. D had a duty to behave as a reasonably prudent person, however, there is testimony to indicate that D was following too closely. P will argue that a reasonably prudent person would not have followed so closely considering the fact that it was dark outside, and as a result the foreseeable harm to the foreseeable plaintiff resulted. D could argue, however, that he was not the cause in fact of the injury, since the cause of P's driver was in fact the truck left on the roadway. D may also argue that the sudden erratic behavior of P on the road in response to the stalled truck was not foreseeable, and D could possibly claim that he was left with no other option than to hit P. In Florida, there is a rebuttable presumption that one who rear-ends another driver is negligent, however, that presumption can be rebutted by proof that the rear driver did not have sufficient time to stop. Here, D may claim that as a defense, and will have to provide proof of the distance between the cars and the distance available to stop at the time that the car was visible.*

*If found liable for the injuries to P, then D would be responsible for the same damages as T, and would potentially be considered a joint tortfeasor, and therefore, not liable for the full damages to the P.*

*In the way of defenses, D has a good claim that P is contributorily negligent due to the fact that he was not wearing an operational seatbelt (see above) and also that P himself was liable for the accident by cutting in front of D, if the facts so indicate.*

#### *Plaintiff v. Helper*

*The original tortfeasor is liable for injuries caused by a rescuer as a result of placing the plaintiff in the original damage. The rescuer, however, is liable for his own negligence. While there is no duty to render aid to an injured person absent some relationship (contractual, familial, business, etc.), once a person makes the choice to render assistance, they must do so as a reasonably prudent person would under the circumstances. While Florida does have a Good Samaritan statute, the statute does not provide relief for a rescuer who is not a doctor in an emergency setting or a health care provider voluntarily providing care to a non-patient in an emergency. Here, it is unlikely that Helper (H) is subject to any standard other than that of a reasonably prudent person. Having made the conscious choice to render assistance, H is now liable for the damages that result from his own negligence.*

*In his defense H may argue that he is not the cause in fact of the injury, but instead the injury is solely the result of the negligence of the doctor subsequent to the accident. Furthermore, H could argue that he did act as a reasonably prudent person due to the fact that there was gas leaking from the tank, and the danger of removing P from the vehicle was far less than the danger of leaving him there to suffer more substantial harm.*

#### *Plaintiff v. Doctor Surgeon*

*Where one sues a doctor for malpractice in Florida, there must first be a pre-suit investigation conducted prior to filing the suit. Before notice to the parties, the plaintiff must have a doctor investigate the cause of action to determine that it is legitimate, then the plaintiff must provide notice to all parties involved, 90 days prior to filing suit. The notice must include the affidavit of the investigator. During the 90 days, the statute of limitations is tolled and the defendant investigates the action and determines whether he will offer settlement, deny, or admit liability and litigate the damages. If the parties determine to litigate the damages, then they may elect to go to arbitration. If arbitration is unsuccessful, then the plaintiff has 60 days or the remainder of the statute of limitations to file suit. In arbitration as well as in court, there is a cap on the damages recoverable in malpractice cases. If the plaintiff decides to go to court on the issue of damages and forego arbitration, then the cap is 350,000 as opposed to 250,000 in arbitration. The cap in court for a disabled person in an emergency setting ranges from 1.5 million to 500,000 depending on the damages.*

*A practitioner must show that he behaved as a practitioner in similar standing according to the similar community standard, and acted accordingly as a prudent practitioner would. Florida also takes into account specialty.*

*Here P would argue that the Doctor Surgeon (DS) did not behave according to the standard, and would probably have to show that similar doctors in the community would have acted in another manner. DS will argue, and provide expert testimony to the effect that doctors conduct the care in a manner similar to DS in this case. It appears that there is information from another practitioner indicating that DS did not provide standard care, and this would be debatable between the parties.*

*Causation issues remain the same as for the other defendants involved.*

#### *Joint and Several Liability*

*The doctrine of joint and several liability was recently abolished in Florida. Each defendant in this case could be joined and the amount of damages for each allocated to that party. If there were joint and several liability, then the court would first deduct any damages attributable to the comparative negligence of the plaintiff. Florida uses a pure comparative negligence, which allows the plaintiff to recover regardless of his amount of fault. With joint and several liability, all defendants would be liable for the entire amount although the plaintiff would be entitled to only one recovery. The paying defendant would then seek contribution from the other tortfeasors.*

*Currently in Florida, without joint and several liability, the damages to each defendant would be apportioned and the plaintiff would be able to recover only that*

*amount from each defendant. If a negligent party is dropped from the case, that party may still be liable as a Fabre defendant, and the damages offset by the amount of that tortfeasor's liability.*

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2007 BAR EXAMINATION - CONTRACTS**

Bea, an amateur art collector, read the following ad in the paper: "Steven's Art and Antiques ~ The Finest in Collectibles - Internationally Recognized Artists!"

Bea went to Steven's store and spotted a large painting signed with the name "Master." Bea asked Steven, "Is this an original Master?" "Sure," Steven responded. When she asked about the price, Steven replied, "Well, considering the status of the artist, I couldn't take less than \$4,000 for it." Knowing that an original painting by Arthur Master was worth at least \$40,000, Bea immediately paid for the painting. Due to its size, however, Bea asked that it be delivered to her home and hung in her living room. Steven agreed and wrote up a dated invoice for "1 Master painting" to be delivered and installed at Bea's address "sometime next week." Steven initialed the invoice and marked it "Paid."

Steven did not deliver the painting the next week, but instead took it to Bea's house the week following. Bea was not at home, so Steven left the painting on Bea's porch. It rained later that day and part of the canvas mildewed. Bea went ahead and hung the painting in her home. She then called an art expert to evaluate the painting for potential resale and get an estimate on fixing the mildew damage.

Weeks later, when the art expert examined the painting, he informed Bea that the mildew could be removed for \$100, but the painting was not by the world renowned artist, Arthur Master. Instead, it was by a local artist, Andrew Master, and was worth approximately \$400.

Discuss the causes of action that Bea could raise against Steven and any defenses available to Steven. Discuss also the remedies available to Bea.

## **SELECTED ANSWER TO QUESTION 1** **(February 2007 Bar Examination)**

*Applicable Law – This question addresses a painting so it falls under the UCC because it is a sale of goods.*

*Contract – To be valid, a contract (K) must contain 1) an offer, 2) an acceptance, 3) consideration, & 4) no defenses. Here, there was an offer – “well, considering...\$4,000 for it” by Steven and a valid acceptance by Bea (she paid for it). An offer is a manifestation of an intent to be bound plus the inclusion of any essential terms. Under the UCC, quantity is the sole essential term. Everything else can be supplied by gap-fillers from the UCC. Acceptance is an intent to be bound. Consideration is a bargain-for-exchange, a benefit to one party or a detriment to the other. Here, Bea paid for the item and Steven sold her the item. It appears that there was a valid offer, acceptance, & consideration.*

*Statute of Frauds – Under the UCC, a sale of goods for a price of \$500 or more must be 1) in writing and 2) signed by the party to be charged, in order to be enforceable. Bea could raise a Statute of Frauds (SoF) defense; however, it appears that it has been met. The writing required does not have to be a formal K. Here, a dated invoice was used. This is sufficient as a writing for the Statute of Frauds. Steven, who is the party to be charged, also signed the invoice so we have a signature. Further, the SoF applies in the first place because we have a sale of goods greater than \$500 (it is for \$4000). This defense by Bea most likely will fail.*

*Delivery – Under the UCC, a buyer has the option to reject the goods if it is not a perfect tender. Here, we are told that instead of rejecting the damaged painting, Bea accepted it by hanging it in her living room. After acceptance, a buyer may revoke the goods if the goods are substantially impaired and there is a good cause (reason) for not rejecting them. Bea could try to revoke the painting but she would need to argue that she had a good reason for not rejecting it. She might argue that she did not believe the damage to be that severe or costly. Or she might argue that because of a unilateral mistake she should be able to revoke the painting. (See below).*

*Bea might also argue that the seller breached the K by delivering the painting late. It was to be delivered “sometime next week” but instead it was delivered the following week. This argument is weak because the K did not specify that time was of the essence. The seller under the UCC has a reasonable time to deliver the goods if not specified. Stevens would argue that. However, Bea could counter-argue that the time was specified as “the next week” and that Steven breached by not delivering on time. Also the painting might not have been damaged by rain if it had been delivered on time.*

*Bea should also argue that the method of delivery was improper. The facts do not state that an independent contractor was used for delivery (if so the Risk of Loss would be on the seller since delivery was specified at Bea's home). Assuming the seller made the delivery himself, as a merchant, risk of loss begins with the seller and passes to the buyer upon the buyer taking physical possession of the goods. Bea did not take possession until after the painting was damaged. Thus, Bea has a good claim that the seller is liable for the damage to the painting. Leaving it on the porch was inadequate delivery.*

*Mistake – Both parties may claim that there was a mistake as to identity of the artist of the painting. If it was a mutual mistake, the K could be rescinded because there was never “a meeting of the minds.” However, Steven would argue that it was only a unilateral mistake on the part of Bea and as such she should bear the cost of that mistake. Bea could counter that Steven, being a dealer/seller of painting knew that Bea might think it was the famous artist. If Steven knew of Bea's mistake on identity of artist the UCC will not hold her to that mistake. Bea probably can get out of the K based on her unilateral mistake. Steven as the seller should have known who the artist was.*

*Misrepresentation – Misrepresentation occurs when one party 1) makes a statement of material fact to the other party; 2) knows the statement was false; 3) intends the other party to rely on it; 4) the other party relies on the statement; 5) the other party is justified in relying on it; and 6) damages result.*

*Here, Steven's comment “Well, considering the status of the artist” could be construed as a misrepresentation. The Artist is a material fact → a basis of the bargain. Stevens intended her to rely on it, she justifiably did so (he is a merchant selling it – he ought to know the artist) and it was the basis of her paying so much for it. The only element that might be difficult to prove is that Steven knew the statement was false. Since he is the seller of painting, he probably did know of its falsity when he made it.*

*Material Breach of K – A material breach of K occurs when one party breaches the K in a material way – changing the economic benefits or risks to one party. Bea might argue that Stevens breached the K materially but his comments were made before the formation of K.*

*Remedies – If the court decides that Steven breached the K, Bea has several remedies available, both legal remedies and equitable.*

*Legal Remedies – Bea can ask for warranty remedies, market damages, incidentals and consequential damages. Cover damages would not likely be available due to the type of goods.*

*Warranty – If Steven had made any express warranties to her, she can claim breach of warranty & recover. The statement discussed previously might have been an express warranty though more likely it was mere puffing. Warranty of Merchantability & Fitness for a particular purpose likely are unavailable.*

*Market Damages – are the price of the K minus the market price of the goods. Here, that would be 4000 – 400 = \$3600.*

*Incidental Damages are those incurred by Bea for storing the goods and possibly, after an expert looked at the painting.*

*Consequential Damages are those that flow from the breach. If Bea had had another K lined up or a showing of her house centered on the painting, she might be able to recover for these damages. The facts do not indicate this so most likely conseq. Damages are not available.*

### *Equitable Remedies*

*Specific Performance usually is available because the painting is unique. SP is used for unique items and is a method whereby the court will order the other party to perform. Since she has the painting this remedy is inappropriate.*

*Rescission – Bea can ask the court to rescind the K because of the unilateral mistake. Rescission puts the parties back in the same position before K was formed. Here, Bea would get her money back & Steven would get the painting back. The court will consider the mistake & the likelihood that Stevens knew of it before K was formed, the sophistication of parties and their unequal bargaining powers. Price → mistake as to the price is not something a court will rescind a K for but a mistake as to the artist is something the court will consider. Bea specifically asked if it was an “original Master.” And was led to believe it was.*

*Repair – Bea might also get the cost (\$100) to repair the painting since the court will likely find Steven liable for the damage.*

*Steven as mentioned above will defend against all the defenses brought up by Bea, including that delivery was adequate so she should bear the cost of rain damage & that there was not a mutual mistake, but a unilateral mistake that he was not aware of at the time of contracting.*

*Conclusion – Bea will likely either succeed in getting the K rescinded or receive market price if she chooses, may keep the painting, and receive repair costs.*



## **Q** QUESTION NUMBER 2

### **FEBRUARY 2007 BAR EXAMINATION – FAMILY LAW/REAL PROPERTY**

Hal and Wanda were married in 1980 and have resided in central Florida for their entire marriage. Hal is an architect and has used his earnings to support the family from the time of marriage to the present. For the majority of the marriage, Wanda assumed the role of a homemaker, caring for and educating their two children who are now adults and no longer live with them.

After getting married, Wanda used her pre-marriage savings to provide a down payment of \$10,000 for the couple's home. When purchased, the home sold for \$100,000, and the couple financed the remaining \$90,000. The couple acquired the property as a tenancy by the entireties. Today, the property is paid for, and its market value has increased to \$200,000.

In 1990, Hal's father died and bequeathed Hal a vacant parcel of real estate in north Florida. In 1990, the land was worth \$100,000, but was subject to a mortgage debt of \$90,000. Since then, Hal has continued to pay off the mortgage debt with his regular earnings. The property value has remained at \$100,000, but the mortgage debt has been reduced to \$40,000. After recent discussions with a financial planner, Hal decided it would be a good idea to place this property in both his and Wanda's name. In that regard, he purchased a computerized legal forms program, prepared a deed, signed it, and then placed it in the drawer of a desk located in their den. He did not tell Wanda about the deed.

Last year, in anticipation of her impending death, Hal's mother gave Hal and Wanda each a check for \$50,000. Wanda deposited her \$50,000 check into the couple's joint bank account in which Hal regularly deposited his paychecks and which the couple regularly used for ordinary living expenses. Her intention was to leave the money in the account and surprise Hal at his next birthday with a new fishing boat and a trip to Europe. Hal, on the other hand, opened a new savings account in his sole name with his \$50,000 check.

Yesterday, Wanda noticed that the joint bank account statement showed a recent depletion of \$30,000, leaving a balance of only \$30,000 in the account. When she questioned Hal about this, he acknowledged to her that he has been having an affair and used the \$30,000 withdrawal to purchase his paramour a new luxury vehicle.

Wanda has come to you seeking your advice. In preparing for her meeting with you, Wanda discovered the deed that Hal had prepared and signed and placed in the desk drawer. Assuming that all property is set forth above and that the court will award Wanda permanent periodic alimony, advise Wanda what and how much property a Florida court would likely distribute.

## SELECTED ANSWER TO QUESTION 2

### (February 2007 Bar Examination)

*This is a Family Law essay dealing with the distribution of marital assets upon dissolution of marriage.*

*The Circuit Court has jurisdiction over this case, unless it qualified for Summary Dissolution of Marriage in which case it could be heard in County Court.*

*Florida follows the theory of Equitable Distribution and favors a presumption of an equal (50/50) split of the marital assets; however, the court can take into account certain factors and deviate from the 50/50 presumption when justice and equity requires it.*

*In determining the division of marital property, the court must first determine what the marital property is. In Florida, marital property is any property acquired during the marriage by either party with the exclusion of gifts or bequests that are kept separate and not commingled. Marital Property typically includes the spousal income and earnings during marriage, appreciation in the assets of the marital property, pension and retirement benefits and any inter-spousal gifts. Non-Marital property remains the property of the individual spouse and consists generally of property owned or received before marriage as well as property received by the individual spouse via an inheritance or gift during the marriage.*

*Based on the aforementioned criteria, Hal's (H) earnings as an architect are considered marital income.*

*Wanda's (W) premarital savings of \$10,000 were non-marital property; however, her use of that money toward the purchase of the marital home may give H a claim that W's pre-marital savings were an inter-spousal gift to the marriage. Florida follows the policy of tracing the assets; consequently, it will be up to W to argue that the \$10k is traceable to her pre-marital savings and she should receive a special equity in the house for that amount. The house itself is titled in both the H and W's name as tenants by the entireties and the fact that the mortgage on the property of \$90k was paid off by marital property, consequently, the home itself will likely be classified as marital property. Again, W should claim a special equity in the home based upon the fact that her money non-marital assets were used in buying the home; however, the presumption will be that the increase in value of the home is marital property.*

*(Special Equity is the courts recognition of one spouse having a special individual interest in the property due to specific acts the spouse performed that were beyond that typical of the normal marital duties. Based on the fact that W took her savings and invested it into the property, her claim for the special equity interest in the property should be attainable.)*

*H's father died and left him a vacant piece of real estate. A bequest of this type made directly to one spouse individually is considered non-marital property; however, W has an argument that the property was gifted by H to H and W via the deed she found. To have a valid transfer of property via a deed, there must be actual delivery and acceptance of the deed as well as the deed must follow the Statute of Frauds, which in Florida requires that the deed instrument be in writing and signed by the party to be charged as well as signed by two witnesses. H may claim that the deed is invalid because there was never any delivery of the deed because although he filled it out and signed it, he never told W about it and stuck it in a drawer and W never knew about it and there was never any acceptance. W will argue that H intended to pass the property to both of them and that delivery of the deed was satisfied because the deed was to transfer the property from H to H and W and that upon execution delivery was met because he himself accepted the delivery of the deed. Although this is a strong argument for demonstrating that the deed has been properly delivered, unfortunately it fails to meet the Statute of Frauds because there is no indication that the deed was properly executed by 2 witnesses. Alternatively, W has a claim against the real property because marital funds in the form of H's income was used to pay down the \$90k mortgage on the property. The court may consider H's special equity in the property in the form of the \$10k value that it had when H received the gift (devise); however, W has a strong claim for including the \$50k of marital earnings that were used to pay down the mortgage as marital property. Under these facts, the court is likely to consider the real property marital property while giving H a special equity in the property in the amount of \$10k, which represents the original value of his gift from his father.*

*H's mother's individual gift of \$50k to W and \$50k to H would be considered non-marital property; however, H will have a claim against W's \$50k because she commingled the funds by putting them into H and W's joint checking account. This is the same checking account H deposited his salary into and which the couple used for ordinary living expenses. Although Florida follows the theory of tracing the assets, when cash becomes commingled it becomes difficult to trace. H's argument would be that the \$50k that was deposited by W into the joint account lost its status as non-marital property and she be considered in the equitable distribution of the marital funds. The money can no longer be traced since the funds were commingled and used in the family's daily living activities. H's alternative argument would also be that the \$50k was an interspousal gift, a gift to the marriage, based on the fact that her intent was to use the money to buy H a fishing boat and a trip to Europe. Based on these facts, it seems that W will have a difficult time claiming that \$50k remains her personal property. It will likely be included in the marital property subject to equitable distribution.*

*W may try to claim H's \$50k gift from his mother; however, because H did not commingle those funds and kept them separate by putting them in a separate bank account in his name, H will be able to keep that property as personal non-marital property.*

*W will have a claim to recover the \$30k withdrawal by H. Although H is entitled to use the marital funds, his withdrawal of the funds for use in an adulterous relationship is something the court will consider in making an equitable determination in dividing the assets. Adulterous affairs are not typically considered in the division unless there is a depletion of marital funds as a result of the adulterous activity. Here, H told W that the \$30k was to buy a new luxury vehicle for his mistress. This is direct evidence of his use of the marital assets for the adulterous affair and the court will consider this in the distribution.*

*In determining equitable distribution of the marital funds the court will consider several factors including: the length of the marriage, the contributions of each spouse to the marriage and the marital property, any special equities earned by one spouse by going above and beyond the call of marriage, as well as adultery (to the extent the relationship depleted marital funds), and anything else that would justify an equitable result in the final distribution.*

*In summation, the court will consider all of these factors and apply them in distributing the marital assets as described above. The court will likely add back the \$30k taken by H for his mistress in performing its calculations. The total assets to be considered as marital assets will likely be the \$200k House (minus W's special equity interest), the \$50k value invested in the real property gifted by H's father, the money in the joint checking and savings and the \$30k that H took out from the account. H's \$50k gift will be excluded as personal non-marital property.*

*Permanent periodic alimony is designed as permanent assistance to the spouse that is less self-sufficient and needs the financial support to maintain himself/herself. The court will typically consider the length of the marriage, the age and physical abilities of the parties, any education, standard of living the parties have become accustomed to as well as the party's ability to be self-sufficient. Here the court has awarded W permanent periodic alimony based upon this criteria. She will be entitled to this alimony until one of the parties dies or she remarries.*

*Problems with deed – no delivery –and not signed by 2 witnesses. W did not know.*

*W's deposit of her gift of \$50k into the joint checking account could be seen as a gift to the marriage and now marital property. W will argue that Florida's policy of tracing the funds was not a gift.*

## **Q** QUESTION NUMBER 3

### **FEBRUARY 2007 BAR EXAMINATION – TORTS**

Donna registered to attend an all-day seminar at Hotel, located in downtown Tampa, Florida. The day of the event, she arrived late and found Hotel parking garage full. Hotel employee directed her to park in another garage next door to Hotel. The garage was owned by Hotel, but had no attendant or ticket gate. Donna hurriedly parked her Sports Utility Vehicle (SUV) in the garage, and rushed into Hotel, forgetting to lock the vehicle.

Later that day, Jimmy, age 15, walked into the parking garage. After trying the doors of several locked vehicles, he entered Donna's unlocked SUV. While searching the glove compartment for any items of value, Jimmy found a set of keys to the vehicle. He started up the engine and exited the parking garage.

While stopped at a light, Jimmy noticed a County Sheriff's police car behind him and took off at high speed. While careening down a residential street at 50 mph, with the police car traveling at the same speed in close pursuit, Jimmy ran into and severely injured Toddler, age 3, who was riding his tricycle in the middle of the roadway. Mother, who heard the screech of tires from inside the house, came rushing out the front door just in time to see the SUV hit Toddler. As a result of witnessing the accident, Mother has experienced occasional anxiety attacks and difficulty sleeping. Jimmy has disappeared and cannot be found.

Mother comes to see you to discuss legal representation. Discuss potential cause(s) of action available to Mother and Toddler, their likelihood of success, and any anticipated defenses by potential defendants.

## SELECTED ANSWER TO QUESTION 3

### (February 2007 Bar Examination)

*I will be discussing the causes of action available to both Mother (M) and Toddler (T) their likelihood of success, and anticipated defenses.*

*I will be discussing the causes of action available to both Mother (M) and Toddler (T) their likelihood of success, and anticipated defenses.*

*First because the facts state that Jimmy has disappeared and can't be found I will assume it is impossible to serve him and he cannot be sued as a  $\Delta$ . However, in FL we have 100% pure comparative negligence where damages are apportioned based upon the amount of fault attributable to a particular  $\Delta$ . The  $\pi$  can also be found at fault but unless 100% at fault the  $\pi$  will be able to recover something (unless the  $\pi$  was over 50% at fault and intoxicated/under the influence). This principle of comparative neg. is important in our fact pattern b/c all  $\Delta$ 's to the cause of action will blame at least partial fault on Jimmy (J). Despite the fact that J will not be a  $\Delta$  in the suit in FL any fault attributable to J will be taken into consideration when damages are awarded.*

*T will bring his causes of action through his mother M b/c T is a minor. The following are T's causes of action. Assuming T is dead, mother still has a cause of action through the survivorship COA.*

*T v. Hotel (H) – T will claim that H was negligent in supervising and securing its parking garage which caused the SUV to be stolen and a police chase to ensue and ultimately T being run over. Negligence requires Duty, breach of that duty, causation (both actual & proximate) and damages. T will argue that H was vicariously liable for the negligent acts of its employees when the ee's directed the SUV to be parked in an unattended parking garage. EE was acting w/in his scope of employment when he directed the SUV to park. The duty to T was that H through its EE's had a duty to make sure the vehicles within its garage were safely supervised so that no theft would occur. T may be able to argue that this duty runs to him b/c he is a foreseeable  $\pi$  in the event that a vehicle was stolen and handled inappropriately. However, H will probably win on the defense that despite its status as a hotel and heightened sense of duty to its patrons T a child riding his bike in the street is not a foreseeable  $\pi$  and should not be owed any duty by the H. This argument is persuasive. Surely there was a breach of a duty when the H allowed the SUV to be stolen and ultimately this caused T to be run over, the essential duty element is missing. Also, H's defense of actual cause is a good one – with all of the superceding actions, it can't be said w/certainty if actual cause would be found by a jury. Furthermore, proximate cause is not strong for T either.*

*A child being hit by a car isn't a very foreseeable result of failing to attend a parking garage. The result T will likely receive very little damages from H.*

*T vs. Donna – T will argue that Donna (D) was negligent in leaving her SUV unlocked and her keys in the glove box. Please see the elements of negligence above. T will make the argument that D by leaving her keys in an unlocked car was essentially entrusting the car to whomever so chose to use it during the day. Although a tough argument to make it may succeed b/c in FL an owner of an automobile is liable up to \$100,000 for any damages caused by his/her vehicle while being used by someone else. This is referred to as a Dangerous Instrumentality. Despite this argument D is likely to prevail by claiming she had no intention of allowing a random person to drive her car. T still has a negligence action against D but again like against H the duty and causation elements are weak. Did D owe a duty to T? T will say yes – he was a foreseeable  $\pi$ , a pedestrian. However, too far removed from the actual negligent act D will counter. The end result T will likely collect nominal damages from D.*

*T v. Sheriff (S) – T will argue that Sheriff was negligent in chasing J through the streets. Again see the elements of neg. above. Here we must first deal w/ whether T can even sue S. S is protected by Sovereign Immunity which protects the govt. from liability for discretionary acts but not ministerial acts. S was pursuing J down the streets of a residential area. I am assuming his lights were on and attempting to pull J over. This is a discretionary act (T will argue) and thus S can be sued. S will argue that he has a duty (ministerial) duty to pull violators of the law over, thus can't be sued. Assuming S can be sued T has a good argument that S owed T a duty as a foreseeable  $\pi$  of a cop chase. He breached this duty by pursuing the SUV at a high speed through a residential area. That this breach caused T to be injured (actual but for) and that T's injuries are a foreseeable result of the breach (proximate foreseeability). T has a good shot at recovering damages.*

*Comparative Negligence – All  $\Delta$ s will argue the mother was at fault in allowing her child T – a 3 year old – to ride a tricycle in the middle of a street unattended. If this is the case any  $\Delta$  that was found liable will have their % of liability reduced by the amount of mother's (M's) negligence. T through M is certainly not going to sue M.*

*Also, as I mentioned earlier J was the real tort feason in this case. He was negligent per se by stealing the SUV. A crime and a tort (conversion in which he would be liable for treble damages to Donna). Also he was neg. per se for driving the SUV. He was under 16 the legal driving age in FL. This  $\S$  is to protect both the driver and pedestrians from the type of harm that occurred – Personal injury. Thus neg. per se and this breach of duty ultimately caused T to be injured. Both Actually and Proximately. Despite the fact that J was under 18 and a minor – he was still held to a duty of care of a reasonable adult because he was driving a car – an adult activity.*

*Damages – Whomever T recovers from will be liable for compensatory damages (past, present, & reasonably foreseeable future), as well as possibly punitive if gross negligence or intentional misconduct is found – 3X compensatory or 500K ← greater of limit.*

*Negligent infliction of E.D.*

*M has a cause of action against J if she can find him for N.I.E.D. although FL generally requires a physical contact there is an exception for someone that witnesses a neg. act that causes injury to a person who  $\pi$  shares a close relationship with.*

*Here however M will have a hard time proving that she has actually suffered physical injuries as required for this cause of action.*



## **PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS**

Part II of this publication contains sample questions of the Florida multiple-choice portion of the examination. Some of the multiple-choice items on the Florida prepared portion of the examination will include a performance component. Applicants will be required to read and apply a portion of actual Florida rules of procedure, statutes and/or court opinions that will be included in the text of the question. Sample items 21 to 23 are examples of multiple-choice items with performance elements included. The questions and answers may not be reprinted without the prior written consent of the Florida Board of Bar Examiners.

The answers appear on page 41.

## **MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS**

These instructions appear on the cover of the test booklet given at the examination.

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet outside the examination room to one of the proctors. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

13. THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.

## 23 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. After the close of the pleadings both plaintiff and defendant duly made motions for summary judgment. Which of the following statements is correct?
  - (A) Summary judgment can be entered only after all discovery has been completed.
  - (B) Motion for summary judgment is the proper motion on the ground that plaintiff's complaint fails to state a cause of action.
  - (C) Since both parties have filed summary judgment motions that assert there are no genuine issues of material fact, summary judgment for plaintiff or defendant will be granted.
  - (D) If plaintiff's proofs submitted in support of his motion for summary judgment are not contradicted and if plaintiff's proofs show that no genuine issue of material fact exists, summary judgment will be granted even if defendant's answer denied plaintiff's complaint.
  
2. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchases 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is
  - (A) Bill can bind the partnership by his act.
  - (B) silent partners are investors only and cannot bind the partnership.
  - (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
  - (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.
  
3. Defendant was seen leaving Neighbor's yard with Neighbor's new \$10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.

Defendant appeared at the scheduled place and time and asked the judge to appoint a lawyer to represent him. The judge found Defendant to be indigent. The judge

- (A) must appoint Defendant a lawyer.
- (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
- (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
- (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.

4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?
- (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
  - (B) Partners share in proportion to their voting percentage.
  - (C) Partners share equally.
  - (D) Partners cannot share until they unanimously agree upon a distribution.
5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was empaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

On appeal, which of the following is Billy's strongest issue for seeking a reversal?

- (A) The fact that the jurors did not begin to consider evidence until several days after they were empaneled.
  - (B) The fact that the jury was allowed to go home after being sworn.
  - (C) The fact that the jury took several days to return a verdict.
  - (D) The fact that the jury was allowed to go home after they began deliberations.
6. Kendall and Thornton agree to form a partnership, but both agree that only Kendall will manage the business and make all business decisions and execute all contracts with third parties. After that time, Thornton then enters into a long-term service contract for the partnership with Clark, who does not know of the internal agreement. The contract of Thornton with Clark is
- (A) enforceable, as the partners' agreement cannot withhold statutory authority of a general partner to bind the partnership.
  - (B) enforceable, as Clark has no knowledge of Thornton's lack of authority.
  - (C) unenforceable, as Thornton is unauthorized to execute the contract by the partner agreement.
  - (D) unenforceable, as Clark had an obligation to confirm Thornton's authority prior to entering into a service contract with the partnership.

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
  - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
  - (C) inadmissible to impeach Sally because she received a suspended sentence.
  - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
  - (B) upon request.
  - (C) upon request and showing of good cause.
  - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
  - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
  - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
  - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
  - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
  - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
  - (D) do nothing because the newspaper is self-authenticating.

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
  - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
  - (C) brought to trial within 90 days of the filing of the motion to discharge.
  - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

Bill met Kathy and married her after she executed a valid prenuptial agreement relinquishing all rights she might otherwise enjoy by marrying Bill. On their Miami honeymoon they drove by the condominium and Kathy declared she'd love to live there. Bill was so happy with Kathy that after the honeymoon he signed and delivered to Kathy a deed conveying the condominium to himself and Kathy as an estate by the entirety and made plans to live in the condominium as soon as the tenant vacated. Bill died the next day. How are the foregoing assets distributed?

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
- (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
- (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
- (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.

13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
  - (B) FBI Consultants, Incorporated
  - (C) Private Eye Partners
  - (D) Child Finder Company
14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
  - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
  - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
  - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?
- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
  - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
  - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
  - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.



16. Bob Wilson borrowed \$20,000 from Ted Lamar to open a hardware store. Ted's only interest in the business was the repayment of his 5-year unsecured loan. Bob was so grateful for the loan that he named his business "Wilson and Lamar Hardware" and purchased signs and advertising displaying this name. He also listed Bob Wilson and Ted Lamar as "partners" on his stationery. When Ted found out, he was flattered to the point that he voluntarily reduced Bob's interest rate from 9 percent to 8 percent per annum.

A few weeks later, Pete Smith, who had assumed that both Wilson and Lamar were operating the hardware store and was not familiar with the true situation, sold goods to Wilson and Lamar Hardware. Pete Smith has been unable to collect for the goods and he seeks your advice. Your advice to Pete is

- (A) only Bob Wilson is liable.
  - (B) Bob Wilson and Ted Lamar are liable jointly.
  - (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
  - (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.
17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

The day after the jury returns its verdict, the court enters judgment for Plaintiff. One week later, Defendant moves to set aside the verdict and have judgment entered in accordance with its motion for directed verdict. In the motion, Defendant raises arguments that were not raised at trial. Plaintiff's counsel objects to the court even hearing the motion to set aside the verdict. Should the court consider the motion?

- (A) Yes, because Defendant has raised new grounds.
  - (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
  - (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
  - (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.
18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
  - (B) can be removed from office at a meeting of the shareholders, with or without cause.
  - (C) can be removed from office at a meeting of the shareholders, but only for cause.
  - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
  - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
  - (C) 50% to Joan and 50% to the Salvation Army.
  - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
  - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
  - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
  - (B) I and II only.
  - (C) II and III only.
  - (D) I, II, and III.

## **SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT**

Assume for Questions 21 - 23 that following statutes and case holding are controlling law in Florida:

Florida Statutes 47.011 Where actions may be begun.

Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties.

Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.

*Gates v. Stucco Corp.*: The appellee contended that because the defendants were residing in Dade County at the time the cause of action accrued, it was immaterial where they resided at the time the suit was filed. The law does not support that contention. It is unimportant that the appellants resided in Dade County at the time of making of the lease or even at the time the cause of action accrued. Their rights under the venue statute are to be determined on the basis of their being residents of Broward County at the time the suit was filed in Dade County. The statute as to venue applies as of the time of the filing of the suit, and not as of the time of the accrual of the cause of action.

21. Payne is a resident of Dade County, Florida and was involved in a car accident in Broward County, Florida. Payne subsequently filed a complaint against Bryant and Davis in Dade County alleging that they negligently operated their cars resulting in permanent injuries to Payne. At the time of the accident, Bryant and Davis were both residents of Broward County. At the time the complaint was filed, Davis had moved and was living in Duval County, Florida. Bryant filed a motion to transfer the action to Broward County. What action should the court take?
- (A) Grant the motion because the cause of action accrued in Broward County.
  - (B) Grant the motion but allow Payne to select either Broward County or Duval County.
  - (C) Deny the motion because Payne resides in Dade County.
  - (D) Deny the motion if Davis consents to venue in Dade County.
22. Assume for this question only that Davis moved to Dade County after the accident and was residing in that county at the time the complaint was filed by Payne. What action should the court take in response to a motion to transfer to Broward County by Bryant?
- (A) Grant the motion because the cause of action accrued in Broward County.
  - (B) Grant the motion but only if Davis consents to the transfer to Broward County.
  - (C) Deny the motion because Payne resides in Dade County.
  - (D) Deny the motion because Davis resides in Dade County.

23. Assume for this question only that the trial court granted the motion to transfer and the action brought by Payne was transferred to Broward County. Who is responsible for payment of the service charge of the clerk of the court to which the action was transferred?
- (A) Bryant only as the party who moved for the transfer.
  - (B) Bryant and Davis as the defendants in the action.
  - (C) Payne only as the party who commenced the action.
  - (D) Clerk of the Court for Dade County as the transferring jurisdiction.

## ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

<u>Question Number</u>	<u>Correct Answer</u>
1	(D)
2	(A)
3	(D)
4	(C)
5	(D)
6	(B)
7	(A)
8	(B)
9	(A)
10	(D)
11	(D)
12	(A)
13	(D)
14	(D)
15	(B)
16	(B)
17	(B)
18	(B)
19	(C)
20	(C)
21	(B)
22	(D)
23	(C)