

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
EVIDENCE
100 POINTS**

QUESTION 1.1 (50 POINTS)

You are retained in a personal injury action. Allegedly, the Plaintiff slipped and fell on a stair case at the Fallen Oaks Restaurant, sustaining severe and disabling injuries. Plaintiff states that they stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. Suit is filed against the owner of the building housing the restaurant, alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the restaurant, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises.

Discovery reveals that several other individuals have fallen on the same step within the past six months, and the building owner paid the medical expenses incurred by each. The owner is refusing to pay expenses associated with the current incident. Further, the owner of the building hired a plumber to repair the busted pipe the day after the most recent incident.

1.1.1 Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses **(25 POINTS)**

1.1.2. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? **(25 POINTS)**

QUESTION 1.2 (50 POINTS)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

Each question is worth a maximum of 10 Points **(50 POINTS TOTAL)**.

1.2.1. What is “Relevant Evidence”?

1.2.2. Is Relevant Evidence always admissible? Why?

1.2.3. Who may impeach a witness?

1.2.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?

1.2.5. How does the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION

EVIDENCE
ANALYSIS

A. (1.1.1) Both the Federal and State Rule of Evidence, 404(b), provide:

Evidence of other crimes, wrongs or acts is not admissible to show the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, *knowledge*, identity or absence of mistake or accident.

See also, Carter v. State, 450 So.2d 67 (Miss. 1984). While the prior accidents are not admissible to show that Defendant acted in conformity therewith (continuing to negligently maintain the premises), prior acts are admissible to show both the restaurant manager and building owner had/should have had knowledge of the condition of the step and busted water pipe.

Rule 409, M.R.E. and F.R.E., provide that evidence of furnishing or offering or promising to pay medical expenses resulting from an injury is not admissible to prove liability for the injury. Here, the owner did not offer or promise to pay for Plaintiff's medical expenses and, therefore, the evidence is not being offered to prove liability for Plaintiff's injury. However, since the oral lease agreement between the owner and the manager has remained the same before and after the previous incidents, evidence that the owner paid the medical expenses of the others would be relevant to show *control*. Likewise, owner's previous payment of medical expenses is relevant and admissible to show that owner had *knowledge* of the dangerous condition

B. (1.1.2) M.R.E. and F.R.E. 407 prohibit the admission of evidence of *subsequent remedial measures*, or "measures which, if taken previously, would

have made the event less likely to occur,” for the purpose of proving negligence or culpable conduct in connection with the subject event. However, the evidence is admissible to show ownership and/or control of the premises, or feasibility of precautionary measures, if controverted, or for impeachment. It is important for the answer to articulate that a court may exclude evidence for one purpose but admit the same evidence for a different purpose, and instruct the jury accordingly. MRE 105. [GRADER’S NOTE: this reference may occur in responding to subsection A or B].

QUESTION 2 (50 Points)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

Each question is worth a maximum of 10 Points (50 Points Total).

ANALYSIS

1.2.1. What is “Relevant Evidence”?

Answer: M.R.E. 401 states “Relevant Evidence” means evidence having any tendency to make the existence of any fact **(3 Points)** that is of consequence **(3 points)** more probable or less probable than it would be without the evidence. **(4 Points)**

1.2.2. Is Relevant Evidence always admissible? Why?

Answer: M.R.E. 403 states that “although relevant, evidence may be excluded **(3 Points)** if it’s probative value is substantially outweighed **(3 Points)** by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by a

consideration of undue delay, waste of time, or needless presentation of cumulative evidence”. **(4 Points)**

1.2.3. Who may impeach a witness?

Answer: M.R.E. 607 states that “the credibility of a witness may be attacked by any party **(5 Points)**, including the party calling [the witness].” **(5 Points)**

1.2.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?

Answer: M.R.E. 611(b) permits cross-examination beyond the scope of direct examination **(5 Points)** (“shall not be limited to the subject matter of the direct examination”) and matters affecting the credibility of the witness. **(5 Points)**. This is commonly referenced to as “wide open cross”. **(5 Points, alternatively)**.

1.2.5. How does the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

Answer: FEDERAL RULES OF EVIDENCE 611(b) limits the scope of cross-examination to matters elicited on direct. **(5 Points)** (“should not go beyond the subject matter of the direct examination”) and matters affecting the witness’ credibility **(5 Points)**.

This is commonly referred to as “limited cross”. **(5 Points)**
alternatively

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
CONTRACTS
100 POINTS**

IMPORTANT Notice to Bar Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

QUESTION 2.1 (50 POINTS)

In 2006, Tenant began operating a dollar store in Landlord's shopping center pursuant to a fully integrated and enforceable Lease Agreement. The Lease Agreement contains the following Exclusive Use provision:

Landlord shall not lease or sell any space in the shopping center to any dollar store or any store substantially similar to Tenant in operation or merchandising. This Exclusive Use provision shall not apply to any existing tenant open for business in the shopping center at the date of this lease. If there is a breach of this Exclusive Use provision by Landlord, Tenant shall have the right at any time thereafter to elect to terminate this lease.

In 2008, a competing dollar store opened in Landlord's shopping center, right next door to Tenant's store. Since that time, the competing dollar store has operated in the shopping center with Tenant's knowledge and without Tenant's objection.

Tenant and Landlord amended their Lease Agreement on January 1, 2009, January 1, 2012 and January 1, 2015. With each amendment, Tenant successfully negotiated a lower rent and agreed to extend the term of the lease. The 2015 amendment extended the term of the Lease to December 31, 2019, and it provided that the term would automatically extend again to December 31, 2024 unless Tenant gave written notice to Landlord cancelling the Lease Agreement at least 180 days before January 1, 2020. Tenant did not give written notice of cancellation as required by the Lease Agreement; therefore, on January 1, 2020, the term of the Lease Agreement was automatically extended to December 31, 2024.

On March 1, 2020, Tenant sent a letter to Landlord saying that Landlord's leasing of space to the competing dollar store violated the Exclusive Use provision of the Lease Agreement and that, as a result, Tenant was terminating and cancelling the Lease Agreement effective March 31, 2020. In response to Tenant's letter, Landlord sent a letter to Tenant saying that Tenant has waived any right to enforce the Exclusive Use provision and is estopped to cancel the Lease Agreement on the basis that a competing dollar store is in the shopping center. Tenant thereafter moved its store to a nearby shopping center and stopped paying rent.

2.1.1. Did Tenant have the right to enforce the Exclusive Use provision in 2020 based on Landlord's leasing of space to the competing dollar store beginning in 2008? **(20 POINTS)**

2.1.2. Explain fully. **(30 POINTS)**

QUESTION 2.2 (25 POINTS)

Anytown, Mississippi is governed by a three-member city council. Seller owns a parcel of land called Whiteacre, and wants to sell it to Anytown for \$25,000. Seller has spoken with all three council members, individually, and each council member told Seller that Anytown would purchase Whiteacre from him for \$25,000. No written contract for the sale of Whiteacre is ever drafted. The next scheduled Council meeting is two weeks away. Before the next Council meeting, Seller receives an offer from a third party to purchase Whiteacre for \$50,000. Seller immediately accepts that offer and sells Whiteacre to the third party. Assume for purposes of your answers that there is no dispute as to the legal description of Whiteacre.

2.2.1. Is there an enforceable contract between the Council and Seller? **(10 POINTS)**

2.2.2. Explain fully. **(15 POINTS)**

QUESTION 2.3 (25 POINTS)

Assume the same facts for this question as in question 2.2, with the following modifications: Seller does not sell to the third party, the Council votes unanimously at its next meeting to purchase Whiteacre for \$25,000, the vote is spread upon the minutes which are signed by the appropriate authority for Anytown, and the Council subsequently decides the purchase would be a bad idea and refuses to follow through with the agreement announced at the Council meeting.

2.3.1 Is there an enforceable contract between the Council and Seller? **(10 POINTS)**

2.3.2 Explain fully. **(15 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2020 Bar Examination
CONTRACTS
100 Points Total

ANALYSIS AND MODEL ANSWER

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Question 2.1 (50 points total)

In 2006, Tenant began operating a dollar store in Landlord's shopping center pursuant to a fully integrated and enforceable Lease Agreement. The Lease Agreement contains the following Exclusive Use provision:

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2.1.1. Did Tenant have the right to enforce the Exclusive Use provision in 2020 based on Landlord's leasing of space to the competing dollar store beginning in 2008? **(20 points)**

2.1.2. Explain fully. **(30 points)**

Answer to Question 2.1:

NO. (20 Points) "[I]t is simple contract law that a party may waive the protections of any provision of a contract." *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 837 (¶ 23) (Miss. 2003). "[A] party to a contract may by words or conduct waive a right to which he would otherwise have been entitled." *Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys.*, 789 So.2d 771, 775 (Miss. 2001) (quoting *Canizaro v. Mobile Communications Corp.*, 655 So.2d 25, 29 (Miss. 1995) (citations omitted)); *Brent Towing Co., Inc. v. Scott Petroleum Corp.*, 735 So.2d 355, 359 (Miss. 1999) ("[W]aiver may be inferred from the actions and conduct of the parties." (quoting *Mariana v. Hennington*, 90 So.2d 356, 362 (Miss. 1956)). **(10 Points)**

The Mississippi Supreme Court has made it clear that the decision to terminate a contract must be made immediately and promptly and that the failure to do so constitutes a waiver. *Brent Towing Co., Inc.*, 735 So. 2d at 359 (quoting 12 Am.Jur., *Contracts*, § 449, at p. 1031) ("A party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contract as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind."); *Gault v. Branton*, 75 So. 2d 439, 445 (Miss. 1954); *see also Gannaway v. Toler*, 84 So. 129, 131 (Miss. 1920) ("the party with the advantage of power in the contract shall act with promptness in deciding whether he will terminate the contract, and must do so at the earliest reasonable time after the default of the helpless party."). "If, after acquiring knowledge of the deviation from a known right articulated in the contract, a party fails to insist on its contractual rights, or acts inconsistently with such rights, then that party waives the right to require such performance." *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n*, 964 So. 2d 1100, 1112 (Miss. 2007) (citing *Brent Towing Co., Inc.*, 735 So.2d at 358); *Sanderson Farms*, 848 So.2d at 837-38); *see also* 3 MS Prac. Encyclopedia MS Law § 21:60. **(10 Points)**

Not only did Tenant fail to invoke the Exclusive Use provision to terminate the Lease Agreement during the 12 years that the competing dollar store operated next to Tenant's store, but Tenant negotiated multiple amendments during that period of time that reduced the amount of rent and extended the term of the Lease Agreement for many years. Under Mississippi law, Tenant waived or otherwise lost the right to enforce the Exclusive Use provision. **(10 Points)**

Question 2.2 (25 points total)

Anytown, Mississippi is governed by a three-member city council. Seller owns a parcel of land called Whiteacre, and wants to sell it to Anytown for \$25,000. Seller has spoken with all three council members, individually, and each council member told Seller that Anytown would purchase Whiteacre from him for \$25,000. No written contract for the sale of Whiteacre is ever drafted. The next scheduled Council meeting is two weeks away. Before the next Council meeting, Seller receives an offer from a third party to purchase Whiteacre for \$50,000. Seller immediately accepts that offer and sells Whiteacre to the third party. Assume for purposes of your answers that there is no dispute as to the legal description of Whiteacre.

Is there an enforceable contract between the Council and Seller? **(10 points)**

Explain fully. **(15 points)**

Answer to Question 2.2:

NO. (10 points) The issue in this question deals with the statute of frauds. Since the verbal agreements were not reduced to writing, no contract exists. Pursuant to the Miss. Code Ann. § 15-3-1(c) states that

An action shall not be brought whereby to charge a defendant or other party: . . . upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for longer than one year . . . unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing. **(15 points)**

Question 2.3 (25 points total)

Assume the same facts for this question as in question 2.2, with the following modifications: Seller does not sell to the third party, the Council votes unanimously at its next meeting to purchase Whiteacre for \$25,000, the vote is spread upon the minutes which are signed by the appropriate authority for Anytown, and the Council subsequently decides the purchase would be a bad idea and refuses to follow through with the agreement announced at the Council meeting.

Is there an enforceable contract between the Council and Seller? **(10 points)**

Explain fully. **(15 points)**

Answer to Question 2.3:

YES. **(10 points)** As noted above, under Mississippi's statute of frauds, a contract for the sale of land must be in writing. Miss. Code Ann. § 15-3-1(c). Under the modified fact pattern, the only writing about the sale is the entry in the minutes of the Council meeting. Although not a formal contract, the minutes could constitute a memorandum sufficient to satisfy the statute of frauds. **(5 points)** The memorandum or note must be in writing and signed either by the party to be charged or someone the party lawfully authorizes in writing to sign on behalf of the party to be charged. **(5 points)** Here, the party to be charged is the Anytown City Council. The minute entry evidenced an intent to buy, identified the land, and set out the purchase price, and as long as the minutes were signed by the appropriately authorized person and approved at a subsequent meeting of the Council, the minutes constitute a memorandum or note sufficient to satisfy the statute of frauds. **(5 points)** See *Putt v. Corinth*, 579 So.2d 534, 538 (Miss. 1991).

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**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 POINTS**

IMPORTANT Notice to Bar Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

QUESTION 3.1 (50 POINTS)

Michael drives a 2020, black Mustang. One night, Michael was driving home on Avenue A. Unbeknownst to him, a concerned citizen called 911 and reported a black, 2020 Mustang driving erratically on Avenue A.

Officer Tom began patrolling the area and it wasn't long before he spotted a 2020 black Mustang. Officer Tom drove behind Michael and activated his emergency lights and sirens. Michael drove to the side of the road and waited. Officer Tom exited his car and ordered Michael to lower the driver side window. Michael complied.

But, as Officer Tom approached the vehicle, he began to get nervous because he could not see inside Michael's car, which had tinted windows. Officer Tom then began to walk back to his patrol car to wait for back up. At that point, Michael drove away.

Officer Tom got into his patrol car and pursued Michael. Once again, he activated his emergency lights and sirens. Michael drove to the side of the road and stopped his car. Officer Tom ordered Michael out of the car and arrested him. Michael was charged with felony fleeing a law enforcement officer.

3.1.1 Officer Tom has charged Michael with felony fleeing a law enforcement officer. Is Michael guilty of felony fleeing a law enforcement officer? **(20 POINTS)**

3.1.2 Please fully explain your answer. **(30 POINTS)**

QUESTION 3.2 (50 POINTS)

The Patriot Building is a multi-story office building. The tenants include law firms, insurance companies and real estate companies. One Friday afternoon, about, 5:00 p.m., Eric could be seen on video security cameras walking around inside the building, attempting to open doors. Judge Tough, an occupant of one of the office suites could see Eric attempting to open door after door. Finally, success, Eric opened Judge Tough's door. Upon entering Judge Tough's office, Eric stated, "I'm looking for work, are you hiring?" Judge Tough responded, "no," and called law enforcement.

3.2.1 The police responded and arrested Eric. He has been charged with burglary of a business. Is Eric guilty of burglary of a business? **(20 POINTS)**

3.2.2 Please fully explain your answer. **(30 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2020 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total

ANALYSIS AND MODEL ANSWER

IMPORTANT Notice to Bar Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

Question 3.1 (50 points total)

Michael drives a 2020, black Mustang. One night, Michael was driving home on Avenue A. Unbeknownst to him, a concerned citizen called 911 and reported a black, 2020 Mustang driving erratically on Avenue A.

Officer Tom began patrolling the area and it wasn't long before he spotted a 2020 black Mustang. Officer Tom drove behind Michael and activated his emergency lights and sirens. Michael drove to the side of the road and waited. Officer Tom exited his car and ordered Michael to lower the driver side window. Michael complied.

But, as Officer Tom approached the vehicle, he began to get nervous because he could not see inside Michael's car, which had tinted windows. Officer Tom then began to walk back to his patrol car to wait for back up. At that point, Michael drove away.

Officer Tom got into his patrol car and pursued Michael. Once again, he activated his emergency lights and sirens. Michael drove to the side of the road and stopped his car. Officer Tom ordered Michael out of the car and arrested him. Michael was charged with felony fleeing a law enforcement officer.

Officer Tom has charged Michael with felony fleeing a law enforcement officer. Is Michael guilty of felony fleeing a law enforcement officer? **(20 points)** Please fully explain your answer. **(30 Points)**

Answer to Question 3.1:

No. Michael is not guilty of fleeing a law enforcement officer. **(20 points)**. Although he was driving on Avenue A, the elements of the crime are not satisfied.

The elements of the crime of felony fleeing or eluding a law enforcement officer in a motor vehicle are set out in Mississippi Code Section 97-9-72 **(10 points)**

(1) The driver of a motor vehicle who is given a visible or audible signal by a law enforcement officer by hand, voice, emergency light or siren directing the driver to

bring his motor vehicle to a stop when such signal is given by a law enforcement officer acting in the lawful performance of duty who has a reasonable suspicion to believe that the driver in question has committed a crime, and who willfully fails to obey such direction shall be guilty of a misdemeanor.... **(5 points)**

(2) Any person who is guilty of violating subsection (1) of this section by operating a motor vehicle in such a manner as to indicate a reckless or willful disregard for the safety of persons or property, or who so operates a motor vehicle in a manner manifesting extreme indifference to the value of human life, shall be guilty of a felony.... **(5 points)**

See also, Watts v. State, 78 So. 3d 901 (Miss. 2012).

There is no indication that Michael was driving in a reckless manner or that he willfully disregarded the safety of persons or property. Moreover, nothing in the factual scenario suggests that Michael is a convicted felon. **(5 points)**

Finally, Michael is certain to argue that he complied with Officer Tom's commands by driving his car to the side of the road and stopping when the emergency lights and sirens were activated. **(5 points)**

Question 3.2 (50 points total)

The Patriot Building is a multistory office building. The tenants include law firms, insurance companies and real estate companies. One Friday afternoon, about, 5:00 p.m., Eric could be seen on video security cameras walking around inside the building, attempting to open doors. Judge Tough, an occupant of one of the office suites could see Eric attempting to open door after door. Finally, success, Eric opened Judge Tough's door. Upon entering Judge Tough's office, Eric stated, "I'm looking for work, are you hiring?" Judge Tough responded, "no," and called law enforcement.

The police responded and arrested Eric. He has been charged with burglary of a business.

Is Eric guilty of burglary of a business? **(20 points)** Please fully explain your answer. **(30 Points)**

Answer to Question 3.2:

Eric, is not guilty of burglary of a business. **(20 points).**

The State has the burden of proving essential elements of burglary of a building. In the case at hand,

Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise,

equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

Miss. Code Ann. 97-17-33. See also, McMillan v. State, 6 So.3d 444 (Miss. App. 2009) **(10 points)**

Eric could be seen walking around the building and attempting to open doors at 5 p.m., the State will likely argue that doing so, at or after traditional business hours, demonstrates Eric intent to steal. **(10points)**.

However, in his defense, once he opened Judge Tough's door, Eric indicated the he was seeking employment and, therefore did not have the requisite intent to steal.**(10 points)**

**MISSISSIPPI BOARD OF BAR ADMISSION
JULY 2020 BAR EXAMINATION
MISSISSIPPI PRACTICE AND PROCEDURE
100 POINTS**

QUESTION 4.1

Mr. P is involved in a motor vehicle accident. While sitting at a red light he is rear-ended by a car driven by Ms. R. Mr. P is seriously injured.

Mr. P files suit against Ms. R and litigation commences.

Mr. P expressly seeks damages to his person due to physical injuries. During discovery Mr. P testifies that he is a self-employed home inspector and has lost income/profits due to the accident. Mr. P also hires an expert who calculates his lost income and profits. This expert is deposed. Ms. R hires an expert to dispute this calculation. In a motion for summary judgment, Ms. R seeks to dismiss Mr. P's claims for lost profit/income arguing that these "special damages" are not supported by the evidence in the case.

Also during discovery, Mr. P learns for the first time that Ms. R was intoxicated at the time of the accident and moves the court to allow amendment of the complaint to add a claim for punitive damages.

- 4.1.1.** Discuss what the Mississippi Rules of Civil Procedure require as to pleading special damages and whether, in this case, Mr. P might be allowed to present them at trial. **(35 POINTS)**
- 4.1.2.** Assume for purposes of this subpart that Ms. R filed a Rule 12 Motion to dismiss Mr. P's complaint for failure to plead *any* damages-claiming them a necessary element of the negligence claim against her. Discuss whether Ms. R's complaint should be dismissed according to the provisions of the Rules. **(25 POINTS)**
- 4.2.1.** Discuss Mr. P's attempt to amend the complaint during discovery to add a claim for punitive damages. Should this amendment be allowed and what facts are relevant to the court's decision? **(40 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
Mississippi Practice and Procedure
Analysis

4.1.1. Discuss what the Mississippi Rules of Civil Procedure require as to pleading special damages and whether, in this case, Mr. P might be allowed to present them at trial. **(35 points)**

The issue here is whether the special damages have been “tried by consent” (“tried by consent” is a term of art used to denote that the issue has been included in the case during litigation. The case does not have to have gone to trial for the doctrine to apply.). See *e.g. Clausell v. Bourque*, 158 So. 3d 384, 388 (Ms. Ct. App. 2015). **(10 points)**. Special damages generally require detailed, “specific” pleading. **(15 points)**. But, when matters have been tried by consent, a court will allow them to be presented to the jury for decision. Here it is arguable that the issue of special damages—although not plead with specificity-- has been tried by consent and the Court would likely allow them to be presented to the jury for decision. **(10 points)**

Rule 9(g) requires a detailed pleading of special damages and only a general pleading of general damages. General damages are damages that are typically caused by, and flow naturally from, the injuries alleged. Special damages are damages that are unusual or atypical for the type of claim asserted. Special damages are required to be pled with specificity so as to give the defendant notice of the nature of the alleged damages. Special damages include, but are not limited to, consequential damages, damages for lost business profit, and punitive damages. See *Puckett Machinery Co. v. Edwards*, 641 So. 2d 29, 37-38 (Miss. 1994) (consequential damages must be plead with specificity); *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 169 (Miss. Ct. App. 2001) (damages for lost business profit caused by defendant's blocking of a road are likely special damages). If claimant fails to plead special damages with specificity, an award for such damages may be reversed. The requirement that special damages must be stated with specificity will be waived if special damages are tried by the express or implied consent of the parties pursuant to Rule 15(b).

Rule 15b provides:

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be

made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

See also *Clausell v. Bourque*, 158 So. 3d 384, 388 (Ms. Ct. App. 2015) (“when a defendant presupposes that a cause of action has been pled by making a motion for summary judgment against it (when it has, in fact, not been pled), that cause of action is before the Court through trial by consent.”) And see *Arcadia Farms Partnership v. Audbon Ins. Co.*, 77 So. 3d 107, 115-116 (Ms. Ct. App. 2011).

4.1.2.(a). Assume for purposes of this subpart that Ms. R filed a Rule 12(b)(6) Motion to dismiss Mr. P’s complaint for failure to plead *any* damages-claiming them a necessary element of the negligence claim against her. Discuss whether Mr. R’s complaint should be dismissed according to the provisions of the Rules.

(25 points)

Generally, a party would be able to amend his or her complaint under these circumstances.

Rule 15a provides:

On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. **(15 points)**. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. **(10 points)**

4.2.1. Discuss Mr. P's attempt to amend the complaint during discovery to add a claim for punitive damages. Should this amendment be allowed and what facts are relevant to the court's decision?

(40 points)

Rule 15 provides:

(a) Amendments. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. **(15 points)**

(b) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. **(25 points)**

Because the amendment is attempted after the responsive pleading was served and it is was a pleading that required a response, the time period for amendment spelled out in Rule 15a does not apply.

However, because the claim for punitive damages does arise out of the conduct, transaction or occurrence set forth in the original complaint, the amendment will likely be allowed to relate back to the date of the original filing.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS**

QUESTION 5.1

Thurston and Lovey married on December 1, 2005, about a year after their child, Ginger was born. At the time of the marriage, Thurston had custody of, Mary Ann, his two-year-old daughter from a former relationship. Lovey was delighted that the girls would live together and grow up together.

Thurston and Lovey had attended the same high school and graduated together in May, 2000. Immediately after graduation, Thurston began working as an agent for Island Financial and continued to work there throughout the marriage. He began investing in his retirement account on day one and had accumulated a large amount over the years. Impressed by Thurston's attention to business details, in November, 2005, Thurston's father gave him the family's failing seafood restaurant. Lovey had no interest in the restaurant although Thurston wanted her to operate it. Lovey aspired to be a fashion model and spent her first five years after graduation attending modeling school.

During the marriage Thurston continued to work at Island Financial during the day and operated the restaurant in the evenings and on weekends. It became quite profitable. Lovey performed all domestic and family duties. She took care of the children and the household. She encouraged the girls to attend the modeling school that she had attended. All three enjoyed it immensely.

All was well until the couple attended their 10-year high school class reunion. After getting reacquainted with his high school sweetheart, Thurston could not stop thinking about her, calling her and visiting her. He even confessed his feelings for her to Lovey, but insisted that he had not been intimate with her. When Lovey and the girls returned one evening from the modeling school, they noticed that Thurston had moved out. He only made a few telephone calls to talk to his children, because Lovey refused to talk to him. However, he continued to deposit his Island Financial payroll check into the joint account, which provided adequate support for the family. He had been gone for more than a year when Lovey decided to file for divorce in Chancery Court in Gulf Stream, Mississippi. In addition to everything, Lovey wanted one half of Thurston's retirement account at Island Financial, one half of Thurston's interest in the seafood restaurant, custody of both children and child support.

- 5.1.1** Discuss two relevant fault ground(s) that Lovey may use in her effort to obtain a divorce. **(20 POINTS)**
- 5.1.2** Would Thurston's retirement account be classified as marital property? Explain. **(20 POINTS)**
- 5.1.3** Would the seafood restaurant be classified as marital property? Explain. **(20 POINTS)**
- 5.1.4** Between Thurston and Lovey, on what legal basis should Lovey rely to gain custody of Mary Ann? **(20 POINTS)**
- 5.1.5** What percentage of Thurston's income can Lovey expect to receive in child support? **(20 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
DOMESTIC RELATIONS
ANALYSIS

- 5.1.1 Lovey could petition for a divorce on the fault grounds of adultery or Desertion for one year.

An innocent spouse may obtain a divorce based on adultery which is voluntary sexual intercourse with a person other than the spouse. Because of the secretive nature of this type of conduct, direct proof of adultery is not required. It may be proven circumstantially by showing (1) a spouse's generally adulterous nature, which may be either infatuation with another or a proclivity to adultery, and (2) a reasonable opportunity to satisfy the infatuation or proclivity. Thurston's infatuation with his high school friend is clear and his visits and absence from the marital residence for more than a year is enough to show opportunity. (10 Points)

Lovey could also obtain a divorce on the ground of desertion. Desertion is a spouse's willful, continuous, and obstinate desertion for one year, without the other spouse's consent. Thurston had been gone from the residence for more than a year, without Lovey's consent. It could be argued that Thurston had some valid reason for being away but was unable to communicate it to Lovey because of her refusal to talk to him, particularly, in light of his continued financial support of the family. (10 Points)

- 5.1.2 In *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994), the Court determined that marital assets subject to equitable distribution are all assets "acquired or accumulated during the marriage. Thurston acquired part of his retirement account prior to the marriage and that part would not be subject to distribution. (20 Points)
- 5.1.3 *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994) holds a presumption that all property accumulated during the marriage is marital property. Gifts are generally separate property. If the value of separate property has appreciated through a spouse's efforts, the appreciated value will be marital. The seafood restaurant was acquired by Thurston as a gift from his father. Thurston may argue that the restaurant was a gift and therefore his separate property. However, Thurston turned the failing restaurant into a profitable one, thereby adding value during the marriage. This value increase during the marriage required active participation. The court would most likely consider

the increased value marital property. *Craft v. Craft*, 825 So.2d 605(Miss. 2002), *Hankins v. Hankins*, 866 So.2d 508 (Miss. Ct. App. 2004) (20 Points)

- 5.1.4 There is a presumption in favor of biological parents that they are the best custodians of their children. *Simpson v. Rast*, 258 So.2d 233 (Miss.1972). Lovey would be considered a third party. For a third party to gain custody over a natural parent, it must be proven that it is in the child's best interest after determining that the parent is unfit, the parent has actually or constructively abandoned the child or the parent has relinquished legal custody of the child. However, recent case law has set aside the natural parent presumption when the third party /spouse acted in loco parentis to the child considered for custody. *Ballard v. Ballard*, 255 So.3d 126 (Miss. 2019)

It could be argued that Thurston abandoned the child when he left her with Lovey. Although he continued to support the family with his Island Financial paycheck, he apparently did not visit with his daughter for a year. The natural parent presumption does not apply when a parent abandons his child. Actual abandonment is "any course of conduct on the part of a parent evincing a settled purpose to forgo all duties and relinquish all parental claims to the child." Constructive abandonment is "voluntary abandonment of parental responsibility" and removal from "active participation in a child's life" for so long that the effect is the same as actual abandonment. It is possible that either of these situations may apply. However, the difficulty would be Thurston's continued financial support and phone calls. Lovey can argue that Thurston abandoned the child to get past the natural parent presumption or rely on current case law in her position as acting in loco parentis to the child. The best interest of the child would then be determined. Given the time that Mary Ann has spent in the care of Lovey, Lovey should prevail.

- 5.1.5 Basic child support is calculated by applying a percentage to adjusted gross income. The statutory percentages are 14% for one child and 20% for two children. Therefore, Lovey can expect to receive 14% if she is awarded custody of Ginger, only. If she gains custody of Mary Ann as well, she is entitled to 20%. These percentages are applicable for adjusted gross income between \$10,000 and \$100,000. M.C.A. 43-19-101

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 EXAMINATION
PROFESSIONAL CONDUCT AND LEGAL ETHICS
100 POINTS**

QUESTION 6.1

Angela Smith previously practiced law with the Gordon Gekowe law firm in Hoka, Mississippi. In years prior while working for that firm, John and Shelia Michaels, a local couple who owned a substantial amount of real estate, hired Angela to perform title work, resolve some property line issues with neighboring landowners, as well as handle a number of real estate sales. Angela was the only attorney in the firm that worked on the Michaels' files and no other attorney in the firm had access to those files.

After leaving the Gordon Gekowe law firm, Angela opened a solo practice in Hoka. Shelia Michaels then decides to seek a divorce from her husband, John, and contacts Angela to represent her. Angela accepts the representation of Shelia and files suit against John for divorce.

After being served with process, John hires Mr. Gekowe, a partner at Gordon Gekowe, to represent him in the divorce. Mr. Gekowe promptly writes Angela a letter demanding that she withdraw from her representation of Shelia "because of the obvious conflict of interest."

- 6.1.1.** What is the relevant Mississippi Rule of Professional Conduct which governs conflicts of interest with a former client? Explain the rule's provisions. **(20 POINTS)**
- 6.1.2.** With respect to the governing rule regarding conflicts of interests with a former client, may Angela represent Shelia in the divorce? Analyze the rule as applied to these facts. In answering this question on conflicts of interest, you should assume that none of the exceptions to client confidentiality under Rule 1.6(b) apply in this situation. **(30 POINTS)**
- 6.1.3.** What is the relevant Mississippi Rule of Professional Conduct which governs imputed disqualification of attorneys for a conflict of interest? Explain the rule's provisions. **(20 POINTS)**
- 6.1.4.** With respect to the governing rule on imputed disqualification, may Mr. Gekowe represent John Michaels in the divorce action? **(30 POINTS)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2020 BAR EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
ANALYSIS**

6.1.1. What is the relevant Mississippi Rule of Professional Conduct which governs the conflicts of interest with a former client? Explain the rule's provisions. (20 points).

Rule 1.9 of the Mississippi Rules of Professional Conduct provides:

**RULE 1.9 CONFLICT OF INTEREST:
FORMER CLIENT**

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; **(10 points);** or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known. **(10 points).**

6.1.2. With respect to the governing rule regarding conflicts of interests with a former client, may Angela represent Shelia in the divorce? Analyze the rule as applied to these facts. In answering this question on conflicts of interest, you should assume that none of the exceptions to client confidentiality under Rule 1.6(b) apply in this situation. (30 points).

The issues that must be addressed are first, whether the former representation has a substantial relationship to the matters involved in the present representation, and second, whether the attorney has information from the prior representation that could be used in the new matter against the former client. If both questions can be answered in the negative, then there is no conflict of interest and the attorney may proceed with the representation.

Here, Angela did in fact previously represent John. The interests of Angela's client Shelia in the divorce action are certainly materially adverse to Angela's former client John and there is no indication that John has consented to Angela's representation of Shelia. The question turns, then, upon whether the matter is "the same or substantially related."

While the divorce action is not "the same" matter, it can be said to be "substantially related" because in a divorce action, the parties financial assets, income and business dealings are at issue. The financial information already possessed by Angela would likely be relevant in the divorce action. As such, representation of Shelia is likely precluded by Rule 1.9(a). **(15 points)**.

Whether representation is also precluded under Rule 1.9(b), however, is also a more difficult question. With the exceptions contained in Rule 1.6(b) not applicable to this case, the first question to address in analyzing Rule 1.9(b) is whether Angela has any information from the prior representation that could be used to the disadvantage of John. If so, the secondary question is whether that information is "generally known."

It may be argued that information obtained by Angela in performing "title work and real estate sales" is not the sort of information that could be used to John's disadvantage. Depending on the nature of the information, which is not provided, it could be. Additionally, Shelia most likely herself already knows that very same information and moreover, John's assets and prior income would be discoverable in the divorce matter even if Shelia was not already aware of them. Further, the fact of real estate ownership and transfers can be arguably "generally known" because they are a matter of recorded public record. In the absence of other facts, it does not appear that Angela would be precluded by Rule 1.9(b) from

representing Shelia in the divorce. **(15 points).**

6.1.3. What is the relevant Mississippi Rule of Professional Conduct which governs imputed disqualification of attorneys for a conflict of interest? Explain the rule's provisions. (30 points).

Rule 1.10 of the Mississippi Rules of Professional Conduct provides:

**RULE 1.10 IMPUTED DISQUALIFICATION:
GENERAL RULE**

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4.
- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(20 points)

6.1.4. With respect to the governing rule on imputed disqualification, may Mr. Gekowe represent John Michaels in the divorce action? (30 points).

Because Angela is a former attorney of the Gordon Gekowe firm and is no longer associated with it, under Rule 1.10(C), the attorneys at Gordon Gecko are not precluded from

representing John adverse to Shelia in the divorce action as long as the divorce representation is not “the same or substantially related” to the prior real estate work and as long as no attorney still with the firm has confidential client information about Shelia or information that could be used to the disadvantage of Shelia within the meaning of Rule 1.9(b).

For the same reasons addressed, the prior answer regarding Angela’s representation of Shelia, the divorce action is likely a “substantially related” matter and Mr. Gekowe would be precluded from representation adverse to Shelia in the divorce action by virtue of Rule 1.10(c)(1). **(15 points).**

If representation were not precluded under Rule 1.9(a), then representation would not be precluded under Rule 1.9(b).

The facts provided state that no other attorney in the firm besides Angela work on the Michaels’ real estate files and that no other attorney in the firm had access to those files. As such, it appears that no other attorney still with the firm would have confidential client information about Shelia that could be potentially used to Shelia’s disadvantage. **(15 points).**