UNIFIED CHANCERY COURT PRACTICE
JULY 2011 BAR EXAMINATION
MISSISSIPPI BOARD OF BAR ADMISSIONS
Total Points: 100

QUESTION ONE (60 points total)

Bob was traveling to his logging job at approximately 3:30 a.m. when he struck a cow standing in the middle of the road. Bob was killed instantly. The police investigation showed that the cow had escaped from a large cattle farm nearby through a hole in the fence. Bob had a live in girlfriend, Clara. They had one minor together. Bob had three other minor children from a prior marriage. Bob's ex, Betty, comes to you and wants you to represent the kids from the prior marriage to whom she is very close. Because of your excellent reputation, Clara tells you she wants you to represent her child. She wants to know if she can get any of the proceeds from the lawsuit because Bob told her she would be his only heir. Clara also told you she wants her child to get more of the proceeds from the case than the other children because he was fully supporting her financially, while only paying a small amount for the other three. All four of the children are young enough to still be in grade school.

1. Do you have an ethical conflict of interest representing all four children, assuming you are asked by Clara and Betty to represent all of them? Why or why not? **(10 points)**
2. Is Clara entitled to receive any of the proceeds from the case? Explain. **(10 points)**
3. What must you do in order to undertake representation of the minor children? **(15 points)**

4. What steps must be taken in order to file suit on behalf of the widow and the child? **(15 points)**

5. After you file suit, an insurance company is willing to tender its policy limits of $1,000,000.00 to settle the case for all plaintiffs. You believe, under the circumstances, this offer should be accepted. To what share is each child entitled? **(10 points)**

QUESTION TWO (40 points total)

Billy, age 15, and Chad, age 17, were shopping at WalMart when a row of tires fell off of the top shelf, striking them both. After one year of negotiations, you were able to reach an out-of-court settlement with WalMart's insurer in the amounts of $12,000.00 for Billy and $28,000.00 for Chad. Billy and Chad's parents want to get a lap top for each child that cost $750.00 from their settlements.

A. What steps must be taken in order to complete the settlement reached on behalf of Billy? **(15 points)**

B. What steps must be taken in order to complete the settlement reached on behalf of Chad? **(15 points)**

C. How can each child get his lap top? **(10 points)**

UNIFIED CHANCERY COURT PRACTICE
JULY 2011 BAR EXAMINATION
MISSISSIPPI BOARD OF BAR ADMISSIONS
Total Points: 100
ANALYSIS

QUESTION ONE (60 points total)

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1. Do you have an ethical conflict of interest representing all four children, assuming you are asked by Clara and Betty to represent all of them? Why or why not? **(10 points)**
2. Is Clara entitled to receive any of the proceeds from the case? Explain. **(10 points)**
3. What must you do in order to undertake representation of the minor children? **(15 points)**

4. What steps must be taken in order to file suit on behalf of the widow and the child? **(15 points)**

5. After you file suit, an insurance company is willing to tender its policy limits of $1,000,000.00 to settle the case for all plaintiffs. You believe, under the circumstances, this offer should be accepted. To what share is each child entitled? **(10 points)**

ANALYSIS

1. **Do you have an ethical conflict of interest representing all four children, assuming you are asked by Clara and Betty to represent all of them? Why or why not? (10 points)**

No. "Damages for the injury and death of a married man shall be equally distributed to his wife and children." Miss. Code Ann. sec. 11-7-13 (Wrongful Death) At the time of his death Bob wasn't married to either Betty or Clara. "[I]f the deceased has no husband or wife, the damages shall be equally distributed to the children." Id. Because neither Betty nor Clara have an interest in the settlement proceeds, and all the children will take equally, there is no conflict. ***Pannell v. Guess***, 671 So.2d 1310, 1314 Miss. (1996) (All wrongful death beneficiaries take equally).

2. **Clara entitled to receive any of the proceeds from the case? Explain. (10 points)**

Common-law marriage does not exist in Mississippi. Therefore, Clara is not Bob's widow, and is therefore not entitled to any settlement proceeds. Common law marriages contracted after April 5, 1956, are not valid in Mississippi. ***Enis v. State,*** 408 So.2d 486, Miss. (1981). *See also* Miss. Code

Ann. sec. 93-1-15.

3. What must you do in order to undertake representation of the minor children? (15 points)

Because the children are all still in grade school, a guardianship for each child must be opened, and a guardian appointed by the Chancellor for each child. In this case, the most logical choice is the child's mother. You must file the petition to open the guardianship in the county where the children reside, and seek an order appointing either Clara or Betty as the children's guardian.

Along with this petition you should ask the court to approve your representation of the child and attach a contract approved by the prospective guardian under terms and conditions to be scrutinized by the chancellor. You should also seek an order approving your fee. Miss. Code Ann. secs. 93-13-59, 93-13-13

4. What steps must be taken in order to file suit on behalf of the children? (15 points)

You must file a petition for determination of heirship with the Chancery Court. The petition must be signed by you, as the attorney, and by the guardians appointed by the court, who should sign as the duly appointed guardian of the children. Miss. Code Ann. 91-1-27, et seq.

Also, a Rule 81 Summons should be issued commanding any unknown heirs of Bob to appear before the Court for a hearing to determine heirship at a specific place, date, and time. Miss. R. Civ. P. 81 (d) (5).

The petition should state that all of the known heirs of Bob have joined in the petition to determine heirship. The summons should be addressed to any

"heirs at law of Bob, deceased, and must be published in the classified section of a newspaper of general circulation of the county in which the petition is pending. It must run once a week for three consecutive weeks. A determination of heirship is triable 30 days after the date of the first publication, and publication must be complete prior to the date set for the hearing. Miss. R. Civ. P. 81 (d)(1); Miss. Code Ann. secs. 91-1-27, 91-1-29.

If there is no such newspaper in said county, the notice must be posted on the courthouse door of Chancery Court in which the action is pending, and publication as set forth above must proceed in a public newspaper in an adjoin county or the seat of government of the state. Once publication is completed, the newspaper should send you an "official proof of publication," which you must file with the Chancery Clerk. Miss. R. Civ. P. 4; Miss. Code Ann. sec. 13-3-31

5. After you file suit, an insurance company is willing to tender its policy limits of $1,000,000.00 to settle the case for all plaintiffs. You believe, under the circumstances, this offer should be accepted. Each child is entitled to what share? (10 points)

Each of the four children will take an equal share of the settlement proceeds. "Damages for the injury and death of a married man shall be equally distributed to his wife and children." Miss. Code Ann. sec. 11-7-13. As Bob was not married at the time of his death, but left four children, the proceeds will pass to the children. Bob and Clara's son will take an equal share as Bob's other three children. "The provisions of this section shall apply to illegitimate children on account of the death of the natural father" Id.

QUESTION TWO (40 points total)

Billy, age 15, and Chad, age 17, were shopping at WalMart when a row of tires fell off of the top shelf, striking them both. After one year of negotiations, you were able to reach an out-of-court settlement with WalMart's insurer in the amounts of $12,000.00 for Billy and $28,000.00 for Chad. Billy and Chad's parents want to get a lap top for each child that cost $750.00 from their settlements.

A. What steps must be taken in order to complete the settlement reached on behalf of Billy? **(15 points)**

B. What steps must be taken in order to complete the settlement reached on behalf of Chad? **(15 points)**

C. How can each child get his lap top? **(10 points)**

ANALYSIS

A. What steps must be taken in order to complete the settlement reached on behalf of Billy? (15 Points)

1. The settlement amount for Billy's settlement is $12,000.00. Pursuant to Miss Code Ann. sec 93-13-211, no guardianship is required in order for Billy's parent or legal guardian to receive funds on behalf of Billy for a gross settlement of up to $25,000.00. "The sum of Twenty Five Thousand Dollars ($25,000.00)" as it appears in Miss. Code Ann. sec. 93-13-211 refers to the *gross* amount of the settlement of a minor's claim, not the *net* amount". ***Mississippi State Bar Ass'n v. Moyo***, 525 So.2d 1289, 1297-1298 (Miss. 1988).

2. At the time of settlement, Billy had not yet reached the age of 18 years old. Therefore, you, as well as Billy's parent or legal guardian, must petition the Chancery Court for approval to settle the ward's claim because the Court must hold a hearing on the record at which the Court must satisfy itself that the settlement is fair and reasonable, and that it is in the best interest of the ward that the settlement be made.

> [T]he chancery court before ordering the money or personal property paid over or delivered as provided in this section shall fully investigate the matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid . . . is a fair settlement of the claim of the ward, and that it is to the best interest of the ward that the settlement be made, or that the personal property be delivered to the ward. Thereupon the chancery court may authorize and decree that said sum of money or personal property be accepted by the ward.
>
> Miss Code Ann. sec 93-13-211(2).

3. Once the Court is satisfied that the settlement is fair and reasonable, the Court may order that it be accepted by Billy's parent or legal guardian on behalf of Billy with certain restrictions until he reaches the age of 21 years, or until further orders of the court.

4. Once you receive the funds, Billy's parent or legal guardian must execute on Billy's behalf a release of all claims referenced in the petition and order relating to Billy's injuries from the accident. The petition and order should also provide for the funds to be deposited in a federally insured, interest-bearing bank account that must be opened for the sole purpose of securing Billy's settlement funds. The bank will require a certified copy of the court order.

5. You must then obtain an Acknowledgement of Receipt of Minor's Settlement Funds from the bank and file it with the Chancery Court Clerk.

B. What steps must be taken in order to complete the settlement reached on behalf of Chad? (15 Points)

Chad was a minor and under 18 years of age at the time of the accident. However, he has reached the age of 18 since the accident and at the time the settlement was reached. Even though still a minor, he is therefore authorized to accept the settlement on his own behalf and execute a binding release for himself without the necessity of a guardian being appointed, even though the settlement amount is in excess of $25,000.00. ***Garrett v. Gay,*** 394 So.2d 321 (Miss. 1981). Therefore, there is no need to file a Petition to Settle Ward's Claim with the Chancery Court, and a guardianship is not required. You need only insure that Chad is of sound mind and properly executes the release of claims arising from his injuries and you may disburse the funds directly to him.

C. How can each child get his lap top? (10 points)

1. Since Chad is 18 years of age, he may purchase it for himself.

2. Since Billy's settlement proceeds are under the supervision of the court, he must obtain court approval to use the funds to purchase the lap top. The court must be petitioned and the Chancellor has broad discretion to approve this expenditure of the minor's funds. The parents will have to show an inability to pay for it themselves.

STATE AND FEDERAL PRACTICE AND PROCEDURE
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Total Points: 100

Question 1 (50 Points Total)

Gizmo Corporation, a citizen of Tennessee, manufactures blenders. Gizmo's blenders are distributed to retailers throughout the United States by DEALERZ, Inc., a citizen of Mississippi. Plaintiff, a citizen of Mississippi, purchased a Gizmo blender from a retailer in her hometown. Shortly after purchasing the blender, Plaintiff was seriously injured when the blender overheated and exploded.

Plaintiff sued Gizmo in the federal district court located in Mississippi, properly invoking the court's diversity jurisdiction. Plaintiff sought $100,000 in damages on two state-law tort theories: (1) failure to warn, and (2) sale of a dangerously defective product.

Under a newly enacted Mississippi law, a manufacturer's duty to warn is fully discharged if a proper warning is affixed to the product *at the point of delivery to its distributor*. A distributor's duty is fully discharged if the warning is affixed a*t the point of delivery to the retailer.* State law further provides that both manufacturers and distributors may be held separately and strictly liable for selling a "dangerously defective" product, even if they have given adequate warning of the risks.

Plaintiff's complaint alleged both that Gizmo had failed to affix a warning label to the product and that Gizmo's blenders had a dangerous propensity to overheat.

After extensive discovery, Gizmo filed a motion for summary judgment on the failure to warn claim. It attached to its motion the supporting affidavits of employees of both Gizmo and DEALERZ, Inc. attesting that a proper warning label had been affixed to the blender both at the time of delivery to DEALERZ, Inc. and at the time of distribution to the retailer who sold the blender to Plaintiff. While conceding that the warning label usually provided with the product did give adequate notice of the danger of overheating and explosion under certain circumstances, Plaintiff nevertheless contested the motion for summary judgment with her own affidavit, in which she stated that there had been no warning label affixed to her blender when she purchased it from her local retailer.

The federal court granted Gizmo's motion for summary judgment on the failure to warn claim and entered judgment on that claim against Plaintiff. No appeal was taken. Soon afterward, Gizmo and Plaintiff settled the dangerous defect claim for an undisclosed amount.

Plaintiff retained Attorney A in Mississippi to represent her in this action against Gizmo. Plaintiff paid her Mississippi Attorney a $10,000 retainer, which he agreed to bill against until such time as it was depleted. At such time, it was agreed that he would begin sending her monthly bills. Plaintiff paid the $10,000 retainer to the Attorney at the outset. The Attorney, knowing that the case would likely entail accumulation of fees well in excess of $10,000, deposited her check in his operating account and immediately used the money to pay down his firm credit line at his bank. He did this knowing that if, for any reason, he did not bill more than the sum she had put up as a retainer, he could always go to his credit line in order to repay her what she might be owed. Surely enough, at the time settlement was reached, Plaintiff still had a $3300 credit on her retainer. Attorney A promptly withdrew this amount from his credit line and timely returned this sum to Plaintiff. He carried out all other obligations with respect to her representation in a capable manner and the settlement went through. Plaintiff was satisfied with his representation.

Shortly after the conclusion of the federal litigation, Plaintiff filed suit in the state court of Mississippi, asserting against DEALERZ, Inc., the same two claims she had asserted against Gizmo in federal court: failure to warn and sale of a dangerously defective product. DEALERZ, Inc. answered and then moved to dismiss on grounds of claim and issue preclusion.

1. In Plaintiff's suit against Gizmo, did the federal court properly grant Gizmo's motion for summary judgment on the failure to warn claim? Explain. **(15 points)**

2. Should the Mississippi state court give preclusive effect to the federal court judgment and dismiss Plaintiff's claims against DEALERZ, Inc.? Explain. Please include in your discussion the possible effects of the new doctrines of claim preclusion, res judicata and/or issue preclusion. **(25 points)**

3. Has the Attorney for the Plaintiff committed any ethical violations in the handling of the Plaintiff's retainer? **(10 points)**

Question 2: (50 Points Total)

Mr. X. was walking down the sidewalk beside the State Department of Transportation. While doing so, he was struck by a State Department of Transportation vehicle, driven by a State employee. The vehicle driver was texting when the accident occurred. Mr. X. was taken to a nearby private hospital where it was determined that his right foot would have to be amputated. He underwent surgery; however, Dr. D. mistakenly removed his left foot. Ultimately, Mr. X lost both feet due to this error.

Because of his protracted hospitalization, Mr. X's employer, CC Corp., terminated him from his position. CC Corp. had orally represented to Mr. X 6 months prior to the accident that he was to be employed by them for a period of at least one year and would be paid $100,000 annually.

Additionally, Mr. X. sang in a club every weekend. Mr. X. had a written five-year contract with the club that allowed him to take 6 months off at any given time. The contract provided that, cumulatively, Mr. X would be paid $50,000 for the 5 year period—10,000 a year. He had already been paid $20,000. Mr. X. took his 6 months off after the accident to recuperate. But, after the accident, the club fired him after only 2 years had expired.

Discuss the applicable statutes of limitations periods in the scenarios described below.

(a) Discuss the applicable statute of limitations in a negligence cause of action against the state-employed vehicle driver and State Department of Transportation. Your response should address any notice and/or tolling periods that are set forth by the Mississippi Tort Claims Act. **(11 Points)**

(a)(I) Assume for purposes of this subpart only that Mr. X was intentionally run down by an individual who was driving his own car and was not employed by the hospital. Discuss the possible applicable statute of limitations for an action by Mr. X against this individual. **(2 Points)**

(b) Discuss the limitations period applicable to the private physician and hospital for a negligence/malpractice claim. And address any required notice periods and/or statutes of repose that may apply. **(13 Points)**

(c) Discuss the limitations period applicable to an action for breach of Mr. X's employment contract with CC Corp. **(6 Points)**

(d) Discuss the limitations period applicable to an action for breach of Mr. X's employment contract with the club. **(6 Points)**

(e) Assume for purposes of this subpart that Mr. X. had been employed with State Department of Transportation pursuant to a written contract. After the accident, State Department of Transportation terminated him after only one year of his three-year contract. Mr. X. brings a 28 U.S.C. section 1983 action for wrongful termination against the State Department of Transportation. What is the applicable statute of limitations for a 1983 action against a state entity? **(5 Points)**

(f) When the accident occurred, Mr. X. suffered damage to his spine; however, Mr. X did not know it and it was undiagnosed. Five years following the accident, this damage began causing Mr. X problems. It was at this time that Mr. X. discovered that his back problems had been caused by injuries sustained at the time of the accident. How is the limitations period applied to damages or injuries that are not discovered until some later date in a cause of action against both a private and/or a state entity? **(7 points)**

STATE AND FEDERAL PRACTICE AND PROCEDURE
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Plaintiff's complaint alleged both that Gizmo had failed to affix a warning label to the product and that Gizmo's blenders had a dangerous propensity to overheat.

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The federal court granted Gizmo's motion for summary judgment on the failure to warn claim and entered judgment on that claim against Plaintiff. No appeal was taken. Soon afterward, Gizmo and Plaintiff settled the dangerous defect claim for an undisclosed amount.

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Shortly after the conclusion of the federal litigation, Plaintiff filed suit in the state court of Mississippi, asserting against DEALERZ, Inc., the same two claims she had asserted against Gizmo in federal court: failure to warn and sale of a dangerously defective product. DEALERZ, Inc. answered and then moved to dismiss on grounds of claim and issue preclusion.

1. In Plaintiff's suit against Gizmo, did the federal court properly grant Gizmo's motion for summary judgment on the failure to warn claim? Explain. **(15 points)**

ANSWER

Under Fed. R. Civ. P. 56, should summary judgment be granted to a defendant who supports his motion with evidence negating the plaintiff's claim when the plaintiff's response fails to directly controvert that evidence?

In the federal court action, defendant Gizmo's motion for summary judgment was premised on the claim that a proper warning label was attached to its blender at the time the blender was delivered to the distributor. Under the applicable state law, Gizmo's duty to warn was fully discharged if that fact were true. To support its claim, Gizmo provided affidavits of witnesses who said the label was present at the relevant time. In the face of this evidence, Plaintiff had a duty to present evidence of "specific facts" showing that there was a genuine issue for trial. Plaintiff's

affidavit, which asserted only the absence of a label *when she purchased the blender*, did not contradict Gizmo's evidence that a label was present when it delivered the blender to the distributor. Hence, summary judgment was appropriate on that issue.

Because Plaintiff's response to Gizmo's motion for summary judgment failed to demonstrate a genuine issue of material fact as to Gizmo's blenders supported assertion that a warning label was affixed to the product at the time of delivery to the distributor, the court properly granted summary judgment to Gizmo on the failure to warn claim.

A motion for summary judgment should be granted in favor of a party if "there is no genuine issue as to any material fact" and the party is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant on a claim may move for summary judgment by attacking any *necessary* element of the plaintiff's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether there are any genuine issues of material fact, the court should construe all factual matters in the light most favorable to the non-moving party. However, where the moving party presents evidence of facts that would defeat the non-moving party's claim, the non-moving party "may not rest upon the mere allegations" of her pleading. The non-moving party has a responsibility to offer, "by affidavits or as otherwise provided" in Rule 56, evidence of "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

On the facts of this problem, the court properly granted Gizmo's motion for summary judgment on the failure to warn claim. The new law of Mississippi (which the federal court is obliged to apply under the *Erie* doctrine in this diversity case) states that a manufacturer fully discharges its duty to warn if adequate warning labels are affixed to the product *at the time of delivery to its distributor.* Thus, to win on her failure to warn claim, Plaintiff must prove that no proper warning label was affixed to the blender at the time of delivery to the distributor.

Defendant Gizmo's summary judgment motion alleged that adequate warning labels were, in fact, affixed to the product at the relevant time, and that allegation was supported by affidavits attesting to the presence of the warning label at the time of delivery to the distributor. This properly supported motion therefore negates a key element of Plaintiff's claim, thereby discharging Gizmo's duty to support its summary judgment motion under Fed. R. Civ. P. 56(e).

At this point, the burden shifted to Plaintiff to come forward with controverting evidence. Plaintiff responded to the summary judgment motion with her own affidavit, in which she attested that no warning label had been present on her blender when she purchased it. This does not

directly controvert Gizmo's motion, since it does not contend that the warning label was missing at the point of delivery to the distributor, the critical moment for manufacturer liability under applicable state law. Consequently, Plaintiff failed to meet her burden to produce evidence controverting Gizmo's version of the facts. *See* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, CIVIL PROCEDURE 461 (3d ed. 1999). Thus, Gizmo has demonstrated that no genuine issue of material fact exists on a key element of Plaintiff's claim, and that it is, therefore, entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

2. Should the Mississippi state court give preclusive effect to the federal court judgment and dismiss Plaintiff's claims against DEALERZ, Inc.? Explain. Please include in your discussion the possible effects of the new doctrines of claim preclusion, res judicata and/or issue preclusion. **(25 points)**

ANSWER

Does **claim preclusion** or **res judicata** arising from a prior federal suit against a product's manufacturer bar a subsequent suit against the product's distributor? Nothing that happened in the federal court action should preclude Plaintiff from proceeding with the state court action. Res Judicata or Claim preclusion is inappropriate because there is no mutuality of estoppel: the defendant in the state court action was not the same as, or in privity with, the federal defendant and would not have been precluded or otherwise affected by the result in the federal action.

Because DEALERZ, Inc. was not a party to the prior action, it probably cannot bar Plaintiff's action against it on res judicata or claim preclusion grounds. Note: Even though the current suit is in state court, the effect of the Gizmo judgment is governed by federal law because the judgment came from a federal court. A state court is required to give to a federal judgment the same preclusive effect that the judgment would have *in federal court.*

See generally Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS § 24.2 (2d ed. 1992). The preclusive effect of a judgment by a federal court sitting in diversity ordinarily would be determined by the preclusion rules of the state in which the federal court sits. *Semtek Int'l, Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001).

In order to bar a plaintiff's subsequent lawsuit on claim preclusion grounds, a defendant must show (1) that the prior judgment is final, valid, and on the merits (which is true here), (2) that the present claims are within the scope of the prior judgment, as measured by the same transaction test (also true here), and (3) that the same parties are involved

or there is "mutuality of estoppel" (i.e., that the defendant urging preclusion is the same as, or in privity with, the defendant in the prior suit). Although the first two elements of claim preclusion are easily satisfied on the facts of the problem, DEALERZ, Inc.' claim preclusion argument will probably fail on the final prong: mutuality of estoppel. Here, there are no facts to suggest that DEALERZ, Inc. had such a close relationship with Gizmo that DEALERZ, Inc. would have been bound by the prior judgment had that decision gone against Gizmo.

DEALERZ, Inc. apparently did not control or participate in the Gizmo litigation. Nor are DEALERZ, Inc. and Gizmo in any agency or representative relationship that would warrant treating Gizmo's actions as binding on DEALERZ, Inc.. In short, there is nothing to suggest that DEALERZ, Inc. bore such a close relationship to the first suit or to Gizmos that it would be proper to treat the first action as binding on DEALERZ, Inc.. Under the circumstances, the usual rule that a judgment operates only against parties to the first suit seems fully applicable. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4406.

Where, as here, a plaintiff brings separate suits against alleged joint tortfeasors whose liability is joint and several (and not derivative), the courts traditionally hold that the plaintiff is entitled to maintain separate actions and that a judgment in a case involving one tortfeasor does not preclude the bringing of a claim for the same harm against another tortfeasor. *See* Restatement (Second) of Judgments § 49, cmt a. *See, e.g., Drescher v. Hoffman Blenders Corp.* 585 F. Supp. 555, 558 (D.C. Conn. 1984); *U.S. v. Manning Coal Corp.*, 977 F.2d 117, 122 (4th Cir. 1992); *Levy v. Verser, Inc.*, 882 F. Supp. 736, 740 (N.D. Ill. 1995). *But see Meshulam v. General Blenders Corp.*, 995 F.2d 192, 194 (11th Cir. 1993) (under Florida law, the manufacturer, the wholesale distributor, and the retailer of an allegedly defective product are treated as identical parties for *res judicata* purposes and an action against a retailer is a bar to a subsequent action against the manufacturer on product liability grounds).

Note: Although the doctrine of mutuality of estoppel has been widely abandoned in relation to *issue preclusion*, it is still largely operative in the context of *res judicata* or *claim preclusion*. *See, e.g., Sidag A.G. v. Smoked Food Products Co.*, 776 F.2d 1270, 1275 (5th Cir. 1985). The traditional rule requiring mutuality of estoppel for claim preclusion purposes appears to be undergoing some modification in federal courts. Wright, Miller and Cooper report that increasing numbers of federal courts now allow claim preclusion against a party to a prior action by litigants who would not themselves have been bound by the results of the prior case if there are "good reasons why [the new defendant] should have been joined in the first action and the old party cannot show any good reasons to

justify a second chance." Wright, *supra,* § 4464 (2000 Supp.) In the present case, however, there is no evidence of a good reason why Plaintiff ought to be required to sue both Gizmo and DEALERZ, Inc. at the same time.

In this case, may the distributor successfully invoke **issue preclusion** against the plaintiff? DEALERZ, Inc. will not be able to assert issue preclusion against Plaintiff because the issues in Plaintiff's suit against DEALERZ, Inc. are not the same as the issues that were actually litigated in Plaintiff's prior suit against Gizmo. Issue preclusion is inappropriate because the only issue *actually decided* in the federal action (whether a warning label was present when the manufacturer delivered the blender *to the distributor*) is not an issue in the state action, where the question is whether a warning label was present when the blender was delivered *to the retailer.*

DEALERZ, Inc.'s attempt to invoke issue preclusion will also fail. The problem for DEALERZ, Inc. is that none of the issues involved in Plaintiff's suit against it were actually decided in Plaintiff's suit against Gizmo. As to the failure to warn issue, although evidence was presented in Gizmo's suit on whether the required warning was present at the time DEALERZ, Inc. delivered the product to the retailer (in the form of the employee affidavits), the court did not need to use that evidence to decide the summary judgment motion, since the key point there was whether the label was affixed at the point of delivery *to the distributor*, not the retailer. As to the dangerous defect issue, the settlement in Gizmo's case obviated any actual litigation on the point. The settlement also precluded any actual litigation as to the amount of Plaintiff's damages. It is well settled that a judgment entered pursuant to a settlement cannot serve as the basis for issue preclusion in a later case. *See generally* Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, CIVIL PROCEDURE § 14.11 (3d ed. 1999).

Because issue preclusion essentially exports the factual findings of one case into another, any issue to be precluded must be precisely the same one that was actually litigated, decided, and necessary to the judgment in the prior suit. Here, that is not the case.

3. Has the Attorney for the Plaintiff committed any ethical violations in the handling of the Plaintiff's retainer? **(10 points)**

ANSWER

The Plaintiff's lawyer has committed an ethical violation by placing the Plaintiff's funds in his operating account, as opposed to his trust account, at the outset. Rule 1.15 of the Mississippi Rules of Professional Conduct provides: (a) A lawyer shall hold clients' and third persons' property

separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

The Plaintiff's lawyer further committed an ethical violation by using the Plaintiff's funds for his own purposes, when they were, in fact, not yet earned. Rule 1.15(j) of the Rules of Professional Conduct provides "[a] lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursement based upon four..." exceptions [not implicated in this factual scenario]. Monies should only be transferred into an attorney's operating account upon such time as the fee is earned. The fact that the lawyer ensured that he would have the funds available to repay the Plaintiff is no consolation according to the above-cited rule.

Question 2: (50 Points Total)

Mr. X. was walking down the sidewalk beside the State Department of Transportation. While doing so, he was struck by a State Department of Transportation vehicle, driven by a State employee. The vehicle driver was texting when the accident occurred. Mr. X. was taken to a nearby private hospital where it was determined that his right foot would have to be amputated. He underwent surgery; however, Dr. D. mistakenly removed his left foot. Ultimately, Mr. X lost both feet due to this error.

Because of his protracted hospitalization, Mr. X's employer, CC Corp., terminated him from his position. CC Corp. had orally represented to Mr. X 6 months prior to the accident that he was to be employed by them for a period of at least one year and would be paid $100,000 annually.

Additionally, Mr. X. sang in a club every weekend. Mr. X. had a written five-year contract with the club that allowed him to take 6 months off at any given time. The contract provided that, cumulatively, Mr. X would be paid $50,000 for the 5 year period—10,000 a year. He had already been paid $20,000. Mr. X. took his 6 months off after the accident to recuperate. But, after the accident, the club fired him after only 2 years had expired.

Discuss the applicable statutes of limitations periods in the scenarios described below.

(a) Discuss the applicable statute of limitations in a negligence cause of action against the state-employed vehicle driver and State Department of Transportation. Your response should address any

notice and/or tolling periods that are set forth by the Mississippi Tort Claims Act. **(11 Points)**

ANSWER (11 Points Total)

The driver and the Department of Transportation must be sued in accordance with the Mississippi Tort Claims Act.

The act provides that there is a one-year statute of limitations for negligence actions against a state entity. The general state negligence statute provides for a three-year statute of limitations. (See Miss. Code Ann. 15-1-49 below) **(5 Points)**

The act requires that the state entity receive ninety (90) days notice prior to the filing of any suit against it. **(3 Points)**

After notice is given to a state entity, the statute is tolled for a period of 95 days for state agencies and 120 days for municipalities, counties and other political subdivisions. **(1 Point)**

After the respective tolling period expires, one has an additional ninety (90) days to file suit. **(1 Point)**

If one suffers from a disability of infancy or unsoundness of mind the statute is tolled until removal of the disability. **(1 Point)**

§ 11-46-11. Notice of claim requirements; infancy or unsoundness of mind

(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity.....

(3) All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days from the date the chief executive officer of the state agency receives the notice of claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county or other political subdivision receives the notice of claim, during which time no action may be maintained by the claimant unless the claimant has

received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of notice of denial of claim from the governmental entity....

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

(a)(I) Assume for purposes of this subpart only that Mr. X was intentionally run down by an individual who was driving his own car and was not employed by the hospital. Discuss the possible applicable statute of limitations for an action by Mr. X against this individual. **(2 Points)**

ANSWER

A one-year statute of limitations applies to this intentional tort of assault and battery.

§ 15-1-35. Actions for certain torts

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

(b) Discuss the limitations period applicable to the private physician and hospital for a negligence/malpractice claim. And address any required notice periods and/or statutes of repose that may apply. **(13 Points)**

ANSWER (13 Points Total)

The statute of limitations for medical malpractice actions is two years after the alleged act of negligence or "with reasonable diligence might have been first known or discovered."**(7 Points)**

The health care provider must be given "at least sixty (60) days' notice of the intention to begin the action. The serving of notice before the expiration of the statute of limitations will extend the statute 60 days from service of notice. **(3 Points)**

There is an absolute seven year statute of repose applicable to medical malpractice actions. **(3 Points)**

§ 15-1-36. Actions for medical malpractice

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred (15) No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name....

(c) Discuss the limitations period applicable to an action for breach of Mr. X's employment contract with CC Corp. **(6 Points)**

ANSWER (6 Points)

The general rule is that there is a three-year statute of limitations as to unwritten contracts. However, Mississippi Code Ann. Section 15-1-29 provides that unwritten contracts of employment are governed by a one-year statute of limitations.

§ 15-1-29. Actions on an open account or account stated; unwritten contracts

Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

While the statute of limitations would be one year, the applicant may go on to note that unwritten/oral employment agreements not to be performed within 15 months are unenforceable under Mississippi statute of frauds. *Floyd v. Segars* (C.A.5 (Miss.) 1978) 572 F.2d 1018. **(6 Points)**

(d) Discuss the limitations period applicable to an action for breach of Mr. X's employment contract with the club. **(6 Points)**

ANSWER (6 Points)

The limitations period applicable to a written contract of employment is three years. This cause of action would fall under the general catchall three-year statute for unwritten contracts. See Miss. Code Ann. Section 15-1-29, above **(6 Points)**

(e) Assume for purposes of this subpart that Mr. X. had been employed with State Department of Transportation pursuant to a written contract. After the accident, State Department of Transportation terminated him after only one year of his three-year contract. Mr. X. brings a 28 U.S.C. section 1983 action for wrongful termination against the State Department of Transportation. What is the applicable statute of limitations for a 1983 action against a state entity? **(5 Points)**

ANSWER (5 Points)

The Tort Claims Act would not apply to an action brought against the State on a contract. See, Quinn v. Ms. State Univ., 720 So. 2d 843.

In actions brought under 28 U.S.C Section 1983, the "residual statute of limitations" for the state applies. See *Giles v. Stokes*, 988 So. 2d 926 (Miss. App. 2008). The general three-year statute applies in 1983 cases, as opposed to more specific ones, even in a case involving intentional tortious actions. *Id.*

In Mississippi the residual statute is Miss. Code Ann. Section 15-1-49.

§ 15-1-49. Actions without prescribed period of limitation; actions involving latent injury or disease
(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

(f) When the accident occurred, Mr. X. suffered damage to his spine; however, Mr. X did not know it and it was undiagnosed. Five years following the accident, this damage began causing Mr. X problems. It was at this time that Mr. X. discovered that his back problems had been caused by injuries sustained at the time of the accident. How is the limitations period applied to damages or injuries that are not discovered until some later date in a cause of action against both a private and/or a state entity? **(7 points)**

ANSWER (7 points)

Where there was a latent injury that he did not discover, the statute should be tolled as against a private defendant up until the point that Mr. X discovered the injury or reasonably should have discovered the injury. See Miss. Code Ann. Section 15-1-49 above. The same "discovery rule" applies under the Mississippi Tort Claims Act. See *Punzo v. Jackson Coun*ty, 861 So. 2d 340, 345 (Miss. 2003)

TORTS
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Total Points: 100

QUESTIONS 1 and 2 PERTAIN TO THE FOLLOWING FACTS

Fred McAllister (McAllister) owns a home and a construction business in Hot Coffee, Mississippi. He lives there with his wife Michelle and their eight-year old son Steve. Last year, McAllister and Michelle hosted a Fourth of July barbeque at their house. A large number of neighbors, friends and relatives attended, and the festivities lasted well into the night. Several of Steve's friends were there, and they spent most of their time shooting fireworks, which McAllister and other adults had provided. Some of the adults also participated in shooting the fireworks, and the children were always supervised when they were shooting the fireworks themselves.

A few weeks before the party, the Town of Hot Coffee passed an ordinance that allows the shooting of fireworks on private property in the city limits on the Fourth of July and New Year's Eve. The ordinance makes it clear that on all other days, shooting fireworks is illegal. The ordinance imposes a fine for shooting fireworks on any day except the Fourth of July and New Year's Eve.

When McAllister walked out of his front door the morning after the party, he was surprised at what a mess his yard was in. There was trash left over from the cookout; there was also a lot of debris from the fireworks scattered everywhere. At the foot of the front steps there was a paper sack full of unused fireworks. McAllister did not know who had left the fireworks there. McAllister did not want Steve to find them, as he feared that Steve would use them unsupervised. McAllister picked up the bag of fireworks, hid it under the bushes in front of his house and drove to work.

When McAllister arrived at his construction company, he asked Dave, one of his hourly wage laborers, to go to his house and clean up his yard. McAllister could spare Dave's labor at the construction that day, as he was not busy and had ten other workers on the payroll at the time. Dave responded that doing McAllister's personal errands were not part of his job description. McAllister said he understood and offered to pay Dave twice his hourly wage for the time it took to clean McAllister's yard, if Dave would agree to do it. Dave agreed. Dave left the shop at McAllister's construction company and drove straight to McAllister's house to clean up the mess in the yard.

While Dave was cleaning the yard, Steve's best friend Elliot, who lives across the street and had also been at the party the night before, came over and asked Michelle if Steve could come out and play. Michelle said yes and told the boys to stay in the yard.

Michelle asked Dave to keep an eye on the boys for as long as he was there cleaning. Dave politely agreed.

The boys started to play hide-and-seek. Elliot climbed a tree to hide. Steve crawled under the bushes to look for Elliot, and he found the bag of fireworks. Steve asked Dave if Dave had anything to light fireworks with. Dave gave Steve a book of matches and told him to aim the fireworks away from the yard, as Dave did not want more trash to clean up.

Dave paid little attention to Steve after he gave Steve the matches. Steve decided to play a joke on Elliot. Steve called to Elliot and said he had given up looking for him and to come out from his hiding place. When Steve spotted Elliot, he lit a bottle rocket and threw it at Elliot. Elliot could not evade the bottle rocket. It hit him in the face and exploded. Elliot suffered minor burns and permanent blindness in his right eye.

1. What possible theories of recovery does Elliot have, and against whom? What defenses are available against those theories of recovery? **(25 points)**

2. Assume all of the same facts given above, except that Steve throws the bottle rocket at Dave, causing the same injuries. Dave sues McAllister's construction company. What possible theories of recovery does Dave have? What defenses, if any, would be available against Dave's claim(s)? **(25 points)**

PLEASE NOTE - THE REST OF THE QUESTIONS IN THIS SECTION DO NOT PERTAIN TO THE FACTS DESCRIBED ABOVE.

3. What is the limitations period set out in the statute of limitations that governs each of the causes of action? **(5 points each)**

   a. simple negligence

   b. assault

   c. fraud

   d. intentional infliction of emotional distress

   e. claims brought pursuant the Mississippi Tort Claims Act

4. A homeowner's property is damaged by strong winds associated with a severe thunderstorm and by flash flooding that follows the storm. She submits a claim to her insurance carrier. The insurer refuses to pay for any of the damage, relying on a provision in the policy that excludes coverage for "flood". The policy does, however, cover damage "caused by wind". She files a complaint against the insurance carrier, alleging that her insurer "did not have a legitimate or arguable reason for denying the plaintiff's claim for coverage under the insurance policy.

   What cause of action sounding in tort does this allegation describe? **(10 points)**

5. What nature of conduct must a plaintiff allege in order to state a claim for punitive damages under Mississippi Code Annotated Section 11-1-65? According to that statute, what burden of proof must a plaintiff carry at trial in order to receive punitive damages? **(15 points)**

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ANALYSIS

QUESTION 1

What possible theories of recovery does Elliot have, and against whom? What defenses are available against those theories of recovery? (**25 Points**)

Steve's negligence as a minor

Some recognition of Steve's age (eight years old) and its effect on a claim of negligence against him is appropriate. In Mississippi, a child between the ages of seven and fourteen is presumed to be incapable of negligence, but the presumption may be overcome by a showing that the child has "exceptional capacity". Steele v. Holiday Inn, 626 So.2d 593 (Miss. 1993). Here, the fact that Steve and the other children were supervised while shooting fireworks the night before would be relevant in rebutting the presumption, but it is questionable whether that would suffice to show Steve to be of "exceptional capacity" in the absence of other facts.

Premises liability & negligent supervision

Elliot was injured on Fred and Michelle's property; therefore, the primary theory of recovery against them will be based on Mississippi's law of premises liability. Analysis should begin with the categories of plaintiffs in premises liability cases—invitee, licensee and trespasser—and the duties owed by the landowner to each.

An invitee enters the property of another in response to an express or implied invitation of the landowner for the mutual advantage or benefit of both. The landowner owes an invitee the duty to keep the premises reasonably safe, and when not reasonably safe, to warn where there is a hidden danger or peril that is not in plain and open view. Keith v. Peterson, 922 So.2d 4 (Miss.Ct.App.2005).

A licensee enters another's property for his own benefit or pleasure. Although an invitation, as that term is commonly understood, may be extended to a person to come on the premises, a social guest is conserved a licensee, not an invitee. A landowner owes a licensee the duty to refrain from willfully or wantonly injuring him. Such conducts differs in quality, as well as in degree, from ordinary negligence. In a premises liability case, such conduct would include conscious disregard of a known, serious danger. *Id.*

A trespasser is one who enters another's property without invitation, license or other right. The duty owed a trespasser is the same as that owed a licensee; i.e., to refrain from willfully or wantonly injuring him. *Id.*

As a social guest, Elliot is properly considered a licensee. Therefore, he would ordinarily be able to recover only if he could show that Fred or Alice willfully or wantonly injured him. Neither of them acted toward Elliot in that way, so direct liability against them is unlikely. Steve's conduct arguably rises to that level, but parents are not liable for the willful or malicious actions of their child unless they already have notice of the necessity of exercising a level of control over their child in order to prevent some imminently foreseeable harm. Williamson v. Daniels, 748 So.2d 754 (Miss. 1999). The facts state that only Fred was worried that his son might use the fireworks "unsupervised". Nothing in the facts suggests that Fred or Michelle should have been worried that Steve would do something malicious with the fireworks or that the harm that Elliot ultimately suffered was imminent. Therefore, a claim of negligent supervision is relevant to the discussion, but recovery under it seems unlikely insofar as the standard of care owed to Elliot under premises liability is only to protect against willful or wanton acts.

However, the attractive nuisance doctrine would lower the standard of care to require Fred or Michelle to exercise ordinary care to prevent children from playing with a dangerous instrument on the premises, if the instrument is likely to attract a child at play. Keith v. Peterson, 922 So.2d 4 (Miss.Ct.App.2005). Fireworks are considered a dangerous instrument under the doctrine. *Id.* Furthermore, the doctrine applies with equal force whether the child is an invitee, licensee or trespasser. *Id.* The facts here strongly favor application of the doctrine; if it applies, Fred (but not Michelle, who had no knowledge of the fireworks) could be held liable for failing to take reasonable care. Fred probably breached his duty by not removing the attraction of fireworks from his property. At the very least, Fred should have made the fireworks inaccessible to Steve or any other children. In this way, a claim of ordinary negligence against Fred could be viable within the framework of premises liability and the attractive nuisance doctrine.

Negligence per se

The existence of the ordinance outlawing fireworks raises the possibility of recovery under a theory of negligence per se. The doctrine holds that violation of a statute or ordinance may render the offender (here, Steve) liable without further proof of lack of due care. Simpson v. Boyd, 880 So.2d 1047 (Miss.2004). This may be a useful way for Elliot to supercede the presumption that the law imposes against Steve's negligence because of his age. However, in order to recover, Elliot must also show that he was within the class of protected persons contemplated under the ordinance and that he suffered the type of harm sought to be prevented. *Id.* The facts do not speak to whether the intent behind the ordinance was to promote public safety or to prevent the nuisance of fireworks exploding at times other than the Fourth of July and New Year's Eve. If the purpose of the ordinance is the former, then Elliot can probably recover on a claim of negligence per se. Steve could argue the latter as a defense.

Battery

Assuming that Steve's age is no legal impediment, a claim could be made against him for assault and/or battery, both of which are intentional torts. An assault occurs where a person intends to cause harmful or offense contact or imminent apprehension of such contact and such apprehension occurs. Webb v. Jackson, 583 So.2d 946 (Miss.1991). A battery goes one step further, whether the harmful contact actually occurs. *Id.* Here, it is doubtful that Steve intended to do harm to Elliot. On the other hand, the nature of the "joke" was in scaring Elliot—i.e., putting him in imminent apprehension of physical harm. If this intent were proven, and because physical harm resulted, a claim for assault and/or battery may lie against Steve.

Respondeat superior

There is arguably a claim against Fred's construction company through respondeat superior. This would require Elliot to show that Dave was still acting in the course and scope of his duties when he was cleaning the yard ***and*** when he assumed the responsibility of watching the children.

Negligent entrustment

There may be a claim for negligent entrustment against Dave for providing Steve with the book of matches. A negligent entrustment occurs when the defendant supplies and object to a person who, because of the person's youth or inexperience, is likely to use the object in a way that subjects himself and others to an unreasonable risk of physical harm. Sharp v. Odom, 743 So.2d 425 (Miss. 1999). The facts strongly suggest that this claim would succeed here. Dave knew exactly why Steve wanted the matches. Also, he "paid little attention" to the manner in which they were used.

The same conduct that gives Elliot a claim of negligent entrustment against Dave gives Steve and his parents a sound defense of comparative negligence against Dave to reduce their liability. However, this defense is available only against claims of negligence against Steve, Fred or Michelle. Comparative negligence has no application to an intentional tort such as assault or battery. Graves v. Graves, 531 So.2d 817 (Miss. 1988).

QUESTION 2

Assume all of the same facts given above, ***except*** that Steve throws the bottle rocket at Dave, causing the same injuries. Davie sues Fred's construction company. What possible theories of recovery does Dave have? What defenses, if any, would be available against Dave's claim(s)? (**25 Points**)

Some recognition of the applicability of Mississippi's Worker's Compensation Act to Dave's recovery is necessary. The facts indicate that Fred had ten other people on his payroll when he asked Dave to clean his yard; therefore, Fred's construction

company is required under the Act to carry Workers' Compensation insurance. If the company is so insured, a claim for workers' compensation benefits would be Dave's sole remedy *if* he was considered to be acting in the course and scope of his employment at the time he was injured.

The issue of whether Dave was still acting in the course and scope of his employment is thrown into some question by the facts given. Dave's own statement that Fred's personal errands were "not part of his job description" strongly suggests that he was not acting as an employee for the purposes of the Act. The fact that Fred doubled Dave's hourly wage to induce him to agree to clean the yard also suggests a task outside his ordinary duties. On the other hand, personal errands at the direction of an employer have been held to fall within the Act's provisions. National Surety Corp. v. Kemp, 64 So.2d 723 (Miss. 1953).

If Dave successfully argues that he was acting outside the course and scope of his employment, then he may be able to cast himself as an independent contractor. In that case, he would be treated as an invitee who is owed the duty to keep the premises reasonably safe, and when not reasonably safe, to warn where there is hidden danger or peril that is not in plain and open view. Keith v. Peterson, 922 So.2d 4 (Miss.Ct.App.2005). While this opens the possibility of a bigger recovery for Dave, it also opens the possibility of a claim of comparative negligence against Dave for providing Cody with the book of matches. That affirmative defense would not be available under the Workers' Compensation Act, which provides for recovery regardless of fault.

PLEASE NOTE - THE REST OF THE QUESTIONS IN THIS SECTION DO NOT PERTAIN TO THE FACTS DESCRIBED ABOVE.

QUESTION 3

Give the limitations period set in the statute of limitations that governs each of the following causes of action (**5 points each**):

a.	simple negligence:	3 years (MISS. CODE ANN. § 15-1-49)
b.	assault:	1 year (MISS. CODE ANN. § 15-1-35)
c.	fraud:	3 years (MISS. CODE ANN. § 15-1-49)
d.	intentional infliction of emotional distress:	1 year (MISS. CODE ANN. § 15-1-35)
e.	claims brought pursuant to Mississippi Tort Claims Act:	1 year (MISS. CODE ANN. § 11-46-11(3))

QUESTION 4

A homeowner's property is damaged by strong winds associated with a severe thunderstorm and by flash flooding that follows the storm. She submits a claim to her insurance carrier. The insurer refuses to pay for any of the damage, relying on a provision in the policy that excludes for "flood". The policy does, however, cover damage "caused by wind". She files a complaint against the insurance carrier, alleging that her insurer "did not have a legitimate or arguable reason for denying the plaintiff's claim for coverage under the insurance policy."

What cause of action sounding in tort does this allegation describe: (**10 Points**)

The allegation describes a claim for bad faith denial of insurance benefits. Mutual Life Ins. Co. of New York v. Estate of Wesson, 517 So.2d 521 (Miss. 1987).

QUESTION 5

What nature of conduct must a plaintiff allege in order to state a claim for punitive damages under MISSISSIPPI CODE ANNOTATED § 11-1-65? According to that statute, what burden of proof must a plaintiff carry at trial in order to receive punitive damages? (**15 Points**)

The statute states:

> Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

CONTRACTS AND THE UNIFORM COMMERCIAL CODE
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QUESTION # 1 (30 Points)

Owner has been negotiating with Buyer Smith hoping that Smith will purchase her condominium. Owner thinks Smith will purchase the condominium if he is not pressured and is given a little more time. On July 15, 2010, Owner writes and delivers the following to Buyer Smith:

> I, Owner, hereby offer to sell to Smith my condominium at 123 CondoParks, Ourtown, Mississippi for $150,000. This offer will remain open until July 31, 2010. To accept this offer, Buyer Smith must deliver written acceptance to me no later than July 31, 2010 at 5 p.m.

Smith finally decides on July 30, 2010 to purchase the condominium. He calls Owner on that day and immediately says, "I am very happy to tell you that I have decided to purchase your condominium". Owner replies, "I'm sorry, but I received a better offer from Buyer Johnson just yesterday, and I am selling the condominium to her instead." Undeterred, Buyer Smith follows up the same day with a fax to Owner restating that he accepts her offer, but never hears back from Owner, who proceeds with the sale to Buyer Johnson.

Is there a contract between Owner and Buyer Smith which Buyer Smith can enforce? Explain all the reasons that support your conclusion.

QUESTION # 2 (40 Points)

ABC Manufacturing, Inc. ("ABC) decides to enter a new market to produce and sell widgets. ABC purchases new machines to manufacture the widgets, and these machines have a replaceable part which wears out relatively quickly. ABC enters a written contract with Parts Maker, Inc. ("Parts Maker") to purchase one case of replaceable parts per month for 12 months at $2,000.00 per case. Although it is not specified in the contract, both parties understand that Parts Maker does not produce this particular part until it is ordered. Once Parts Maker receives an order, it manufactures and delivers those parts within two weeks.

The contract contains the following provision:

> The price quoted in this contract is dependent upon the Buyer's commitment to purchase the quantity stated herein. If the Buyer breaches and does not purchase the prescribed quantity, Parts Maker, Inc., shall be entitled to damages based on the difference between the amount actually paid by Buyer during the contract term and the amount that Parts Maker would have received had Buyer purchased the prescribed quantity. The parties hereby agree that this provision does not constitute a penalty, but is a genuine attempt to estimate damages and to avoid the uncertainty and difficulties of proof.

Every six months, Parts Maker buys enough raw materials to make all the replaceable parts that it anticipates selling in six months. It pays a rental fee to a third-party warehouse to store this raw material until it is used.

ABC orders and pays for one case of replaceable parts from Parts Maker every month for the first eight months of the contract term. At this point, an ABC supervisor notices that the replaceable parts are not being used as quickly as expected; in fact, the supervisor believes that there are enough replaceable parts to make widgets for the rest of this year and most of next year. ABC does not order or accept any more replaceable parts from Parts Maker for the rest of the year. At the end of the contract term, Parts Maker sends ABC an invoice for the balance of the contract term for $8,000.00. ABC objects to the invoice since it never ordered or received replaceable parts for the last four months of the contract term. Parts Maker points to the provisions in the contract that states that it is entitled to the difference between the amount actually paid by ABC and the amount that ABC should have paid had it performed under the contract. ABC refuses to pay.

Parts Maker brings a breach of contract action against ABC. To the extent it may affect your analysis, both companies are based in Mississippi, and the breach of contract action is filed in a Mississippi circuit court. Should the court find in favor of Parts Maker? If so, tell what proper measure of damages will be. Explain your answer fully.

QUESTION # 3 (15 Points)

George the Forger is accomplished at duplicating masterpieces by famous painters. George uses fraudulent representations to trick John into believing that one of his paintings is actually by the famous artist Claude Colbert. John purchases the painting based on these representations, and in payment, he executes and delivers a negotiable promissory note for $10,000, dated January 2

and payable six months later, as full payment for the painting. On February 1, George endorses the promissory note and delivers to Ringo, who purchases it for $9,000. Ringo does not know that George is a forger and knows nothing about the ruse. On June 1, John discovers that the painting is a worthless fake. John immediately contacts Ringo, the new holder of the note, and tells him about the fraud. On June 5, Ringo negotiates the note to Paul who knows the entire history of the fraud and the note. Six months from the date of the note, Paul presents the note to John for payment. Explain Pau's status and whether John is obligated to pay on the note.

QUESTION # 4 (15 Points total)

Write "yes" if the transaction described would result in a valid negotiation of the instrument. Write "no" if it would not. No further explanation is required.

(a) Jack accidently drops a negotiable check payable to his order. Mary Reeves finds it and endorses the back with "Pay to Sue Smith, [signed] Mary Reeves." **(3 points)**

(b) Jean gives to Renee a negotiable check payable to bearer without endorsing it. **(3 points)**

(c) A negotiable instrument is payable to the order of Jack Jones and Rita Jones. Jack endorses the instrument with "Pay to Rocky Rhodes, [signed] Jack Jones" and delivers it to Rocky. **(3 points)**

(d) Mack endorses a negotiable promissory note payable to his order with "Pay to the order of Ronald Williams and Henry Roberts, [signed] Mack McDonald." **(3 points)**

(e) Calvin endorses with his signature a negotiable promissory note payable to his order and delivers it to Larry. Above Calvin's endorsements, Larry writes, "Pay to Larry Brown". **(3 points)**

CONTRACTS AND THE UNIFORM COMMERCIAL CODE
JULY 2011 BAR EXAMINATION
MISSISSIPPI BOARD OF BAR ADMISSIONS
Total Points: 100
ANALYSIS

QUESTION # 1 (30 Points)

Owner has been negotiating with Buyer Smith hoping that Smith will purchase her condominium. Owner thinks Smith will purchase the condominium if he is not pressured and is given a little more time. On July 15, 2010, Owner writes and delivers the following to Buyer Smith:

> I, Owner, hereby offer to sell to Smith my condominium at 123 CondoParks, Ourtown, Mississippi for $150,000. This offer will remain open until July 31, 2010. To accept this offer, Buyer Smith must deliver written acceptance to me no later than July 31, 2010 at 5 p.m.

Smith finally decides on July 30, 2010 to purchase the condominium. He calls Owner on that day and immediately says, "I am very happy to tell you that I have decided to purchase your condominium". Owner replies, "I'm sorry, but I received a better offer from Buyer Johnson just yesterday, and I am selling the condominium to her instead." Undeterred, Buyer Smith follows up the same day with a fax to Owner restating that he accepts her offer, but never hears back from Owner, who proceeds with the sale to Buyer Johnson.

Is there a contract between Owner and Buyer Smith which Buyer Smith can enforce? Explain all the reasons that support your conclusion.

ANSWER

Owner's written note is clearly an offer to sell the condominium. The location of the property is unspecified, as is the purchase price. The issue here is whether the contract also qualifies as an option contract, requiring Owner to hold the property for Buyer Smith until July 31, 2010. An option contract for the purchase of property must be supported by separate consideration. Nothing in the facts tells us that any consideration was paid by Buyer Smith to keep the option upon until July 31, 2010, and no consideration is recited in the contract. Therefore, Owner had no obligation to hold the option open.

The second issue is whether Buyer Smith accepted the offer prior to its being revoked by Owner. Although Buyer Smith stated on the telephone that he wanted to purchase the property, the offer clearly states that any acceptance on

Buyer Smith's part must be in writing. Buyer Smith attempted to follow up his oral acceptance with a written acceptance, but by this time, Buyer Smith was already aware that the offer had been revoked by the sale of the property to another. Buyer Smith has no recourse.

QUESTION # 2 (40 Points)

ABC Manufacturing, Inc. ("ABC) decides to enter a new market to produce and sell widgets. ABC purchases new machines to manufacture the widgets, and these machines have a replaceable part which wears out relatively quickly. ABC enters a written contract with Parts Maker, Inc. ("Parts Maker") to purchase one case of replaceable parts per month for 12 months at $2,000.00 per case. Although it is not specified in the contract, both parties understand that Parts Maker does not produce this particular part until it is ordered. Once Parts Maker receives an order, it manufactures and delivers those parts within two weeks.

The contract contains the following provision:

> The price quoted in this contract is dependent upon the Buyer's commitment to purchase the quantity stated herein. If the Buyer breaches and does not purchase the prescribed quantity, Parts Maker, Inc., shall be entitled to damages based on the difference between the amount actually paid by Buyer during the contract term and the amount that Parts Maker would have received had Buyer purchased the prescribed quantity. The parties hereby agree that this provision does not constitute a penalty, but is a genuine attempt to estimate damages and to avoid the uncertainty and difficulties of proof.

Every six months, Parts Maker buys enough raw materials to make all the replaceable parts that it anticipates selling in six months. It pays a rental fee to a third-party warehouse to store this raw material until it is used.

ABC orders and pays for one case of replaceable parts from Parts Maker every month for the first eight months of the contract term. At this point, an ABC supervisor notices that the replaceable parts are not being used as quickly as expected; in fact, the supervisor believes that there are enough replaceable parts to make widgets for the rest of this year and most of next year. ABC does not order or accept any more replaceable parts from Parts Maker for the rest of the year. At the end of the contract term, Parts Maker sends ABC an invoice for the balance of the contract term for $8,000.00. ABC objects to the invoice since it never ordered or received replaceable parts for the last four months of the contract term. Parts Maker points to the provisions in the contract that states that

it is entitled to the difference between the amount actually paid by ABC and the amount that ABC should have paid had it performed under the contract. ABC refuses to pay.

Parts Maker brings a breach of contract action against ABC. To the extent it may affect your analysis, both companies are based in Mississippi, and the breach of contract action is filed in a Mississippi circuit court. Should the court find in favor of Parts Maker? If so, tell what proper measure of damages will be. Explain your answer fully.

ANSWER:

This contract is for the sale of goods and is, therefore, governed by the Uniform Commercial Code. There appears to be no questions about whether a contract was formed and whether ABC breached; therefore, the verdict should be for Parts Maker. Points are given for discussion about an offer, acceptance, consideration and the existence of an enforceable contract, but examinees should primarily focus on what remedies are available to Parts Maker as a seller under the Uniform Commercial Code.

As to the damages discussion, excellent answers should:

(1) defines the standard for determining whether a liquidated damages provision should be upheld;

(2) measure the provision in the contract against this standard and find it to clearly be penal in nature;

(3) discuss that another method must be found to determine to damages and discuss different possibilitie4s under the Uniform Commercial Code; and,

(4) pick the best measure (in this case, it is lost profits, since no parts were actually produced).

Parts Maker is asking for liquidated damages specified in the contract. Courts will not enforce liquidated damages if those damages are actually a penalty designed to discourage breach. Liquidated damages are measured by MISS. CODE ANN. § 75-2-718(1):

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

The agreed damages must be a genuine attempt to reasonably estimate possible future loss at the time of contracting and must be reasonable in light of the actual loss following a breach. At the time of contracting, are the liquidated damages reasonably related to the actual losses that occurred, or do they give one party a windfall?

It is clear that this provision does not attempt to reasonably anticipate losses. The provisions is a penalty designed to discourage breach on the part of ABC and it entitles Parts Maker to the gross amount it would have received from ABC had the contract been fully performed by both parties. At the time of contracting, Parts Maker could have determined its losses from a future breach with a fair amount of accuracy. Additionally, in light of the actual losses that occurred form the breach, the provision is also unreasonable. Because the provision is penal in nature and not based on the actual losses that Parts Maker might incur, it should not be enforced.

However, Parts Maker will still be entitled to damages. The Uniform Commercial Code, like common law, attempts to place the aggrieved party in as good a position as if the other party had fully performed ("expectation damages"). Sellers have a number of possible methods for determining damages under the Uniform Commercial Code, although not all methods can be used in all situations. Section 75-2-706 allows the seller to resell the goods and recover the difference between the resale price and the contract. Section 75-2-708(1) allows the seller to recover the difference between the market price and the contract price. These two sections will not apply in light of the fact that the goods were never actually produced and could not be resold. Therefore, the best measure of damages would be Section 75-2-708(2), which allows the seller to recover lost profits, together with the incidental damages under Section 75-2-710. It should be relatively straight forward for Parts maker to calculate the amount of profit that would have been made on the replaceable parts had ABC actually performed. Because Parts Maker was able to avoid the costs associated with actually producing the four cases of replaceable parts, the actual damages will be significantly less than the damages in the liquidated damages provision.

As to incidental damages, examinees should not include any of the costs regularly included in producing parts, but having to pay to store raw material for several extra months could be incidental damages.

QUESTION # 3 (15 Points)

George the Forger is accomplished at duplicating masterpieces by famous painters. George uses fraudulent representations to trick John into believing that one of his paintings is actually by the famous artist Claude Colbert. John purchases the painting based on these representations, and in payment, he executes and delivers a negotiable promissory note for $10,000, dated January 2

and payable six months later, as full payment for the painting. On February 1, George endorses the promissory note and delivers to Ringo, who purchases it for $9,000. Ringo does not know that George is a forger and knows nothing about the ruse. On June 1, John discovers that the painting is a worthless fake. John immediately contacts Ringo, the new holder of the note, and tells him about the fraud. On June 5, Ringo negotiates the note to Paul who knows the entire history of the fraud and the note. Six months from the date of the note, Paul presents the note to John for payment. Explain Pau's status and whether John is obligated to pay on the note.

ANSWER: Ringo took the note from George in good faith, without notice for value and without reason to question its authenticity. Ringo is, therefore, a holder in due course of the promissory note. Paul is a transferee of a holder in due course. Under the shelter theory, MISS. CODE ANN. § 75-3-203(b), the transferee of a holder in due course enjoys the rights of a holder in due course. All personal defenses are cut off. John's defense of fraud in the inducement is a personal defense and is ineffective against Paul. Paul can demand that John pay on the note.

QUESTION # 4 (15 Points total)

Write "yes" if the transaction described would result in a valid negotiation of the instrument. Write "no" if it would not. No further explanation is required.

(a) Jack accidently drops a negotiable check payable to his order. Mary Reeves finds it and endorses the back with "Pay to Sue Smith, [signed] Mary Reeves." **(3 points)**

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(d) Mack endorses a negotiable promissory note payable to his order with "Pay to the order of Ronald Williams and Henry Roberts, [signed] Mack McDonald." **(3 points)**

(e) Calvin endorses with his signature a negotiable promissory note payable to his order and delivers it to Larry. Above Calvin's endorsements, Larry writes, "Pay to Larry Brown". **(3 points)**

ANSWER:

4(a) No. the check must be endorsed by Jack.

4(b) Yes

4(c) No. Rita must negotiate as well.

4(d) Yes. (Also give full credit if the examinee wrote "No" on the basis that the facts do not indicate that the instrument was transferred).

4(e) Yes

CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
JULY 2011 Bar Examination
MISSISSIPPI BOARD OF BAR ADMISSIONS
Total Points: 100

Facts:

Willie B. Ware was a lifetime resident and twenty-three-year deputy for Tallayabusha County. Deputy Ware knew everyone including Roger Foster a/k/a "Danger Man." While at the office one day, Deputy Ware saw an unserved felony arrest warrant for grand larceny against Roger Foster a/k/a "Danger Man."

Deputy Ware decided to drive by Danger Man's last known address to see if he was at home and pick him up on the warrant, but Deputy Ware left the warrant at the office. As he drove by Danger Man's house, Deputy Ware saw Danger Man coming out of his house, shutting the front door of his house, walking to his car with a carpet over his shoulder, putting the carpet into the trunk of his car and shutting the trunk of his car. Deputy Ware then saw Danger Man drive away.

Deputy Ware tried to stop Danger Man but to no avail as Danger Man drove away in his car down the road not yielding to Deputy Ware's lights and sirens. Deputy Ware called on his radio to issue a "Be-on-the-Look-Out (BOLO)" for Danger Man, giving the car description and tag number, and information about the outstanding arrest warrant for grand larceny.

Another Tallayabusha County deputy, Deputy Imonthejob, heard the BOLO and began his search for Danger Man. While patrolling the opposite side of Tallayabusha County, Deputy Imonthejob spotted Danger Man driving his car and stopped Danger Man without incident. Deputy Imonthejob ordered Danger Man out of his car, handcuffed him, and placed him in the deputy's patrol car. Deputy Imonthejob did not give Danger Man any *Miranda* warnings. Unknown to Danger Man in the back of the patrol car there was a working audio/videotape recorder which was running.

Deputy Imonthejob then went back to the car driven by Danger Man and heard a bump-bump-bump and some mumbling noises coming from inside the trunk. Uncertain as to what was making all the noise, but believing in good faith that it sounded human, Deputy Imonthejob looked inside the car for a key to the trunk but only found a screwdriver in the ignition. Deputy Imonthejob took the screwdriver from the ignition and pried open the trunk. Much to his surprise, there was a man, named "Insurance Guy," wrapped up like a burrito in the carpet, with his mouth duct-taped, and semi-unconscious with a hammer stuck in the side of his head.

Deputy Imonthejob then looked back at his patrol car and saw Danger Man talking to himself in disbelief as Danger Man had been watching the discovery of Insurance Guy

by Deputy Imonthejob. Deputy Imonthejob cut the duct tape from the victim's mouth. The victim told Deputy Imonthejob that Danger Man had struck him with the hammer and had tortured him, and his sales associate, "Sell M. All," at Danger Man's house before he had been stuffed in the trunk.

Deputy Imonthejob got back into his patrol car, called for an EMT, and radioed Deputy Ware to be looking for Sell M. All, who was last seen at Danger Man's house. Then Deputy Imonthejob gave Danger Man his *Miranda* warnings. Danger Man responded that he knew the drill, and he "ain't saying nothing til he gets his lawyer."

Meanwhile, Deputy Ware, without a search warrant, returns to the home of Danger Man and knocks on the door. When no one answers, Deputy Ware kicks in the door and finds Sell M. All's body hooked to a car battery and jumper cables. Deputy Ware immediately saw that Sell M. All was deceased and read a note stapled to his forehead that read "Thieves Will Die, signed Danger Man." Thereafter, Deputy Ware continues his search inside Danger Man's home for other possible victims but finds none. During his search for survivors and while opening a closed door to a bedroom, Deputy Ware discovers Danger Man's "grow room" containing 100 marijuana plants. He then secures the scene to go get a search warrant for Danger Man's house.

Deputy Imonthejob receives backup at the scene, and the officers seize and impound Danger Man's car and its contents. The coroner also pronounces Insurance Guy dead at the scene. Deputy Imonthejob drives Danger Man to the jail to be booked and processed. On the way to jail, Danger Man has a meltdown and blurts out that he acted in self defense, that he did not mean to hurt anybody, including Insurance Guy and Sell M. All, and that he hopes everyone is all right.

While Danger Man is being booked and being asked basic booking, procedural questions, he states without solicitation that he is "glad those two punks are dead because they had owed me money for a week." The booking officer also finds Insurance Guy's wallet with money inside Danger Man's pocket.

Meanwhile, Deputy Imonthejob begins reviewing the audio/videotape from inside his patrol car. He discovers that Danger Man has admitted to himself enticing Insurance Guy and Sell M. All to his house for the purpose of robbing them and getting his money back. Danger Man also stated on the tape that he would have gotten away with committing the assaults of and causing the deaths of each of his victims had it not been for that pesky Deputy Ware. Danger Man continued speaking to himself on the tape and commenting that he was worried about the deputies finding the marijuana plants that he had hidden in the house which he was supposed to sell that night to his reliable distributor, Fred Harvey, a/k/a "Trouble."

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the marijuana and discover a kilo of cocaine in a fake wall inside of a closet. The officers also photograph the blood spatters inside the house as evidence to refute any claim of self defense that Danger Man may allege.

Questions:

(1.) Was Deputy Ware's attempted apprehension of Danger Man after Danger Man left his house valid? Explain why or why not. **(10 points)**

(2.) Did Deputy Imonthejob make a legal stop of Danger Man? Explain why or why not. **(10 points)**

(3.) Is the note stapled to Sell M. All's forehead admissible at trial against Danger Man? Explain why or why not. **(10 points)**

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(5.) Could Deputy Imonthejob have continued questioning Danger Man after Imonthejob gave Danger Man his *Miranda* warnings and after Danger Man said that he "ain't saying nothing til he gets his lawyer." Explain why or why not. **(10 points)**

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Short-Answer Constitutional Questions

(9.) To be valid, government regulations on speech and assembly in public places must

posses (3) three characteristics. Name them. **(10 points)**

(10.) Strict scrutiny is applied when a fundamental right is limited.

(a) The law will only be upheld if it promotes what type of interest? **(5 points)**

(b) Name (5) five of a person's 1st Amendment fundamental rights. **(5 points)**

CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
JULY 2011 Bar Examination
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ANALYSIS

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(10.) Strict scrutiny is applied when a fundamental right is limited.

(a) The law will only be upheld if it promotes what type of interest? **(5 points)**

(b) Name (5) five of a person's 1st Amendment fundamental rights. **(5 points)**

Answers:

(1.) Answer: Although Danger Man had not committed a crime in his presence, Deputy Ware was aware of an outstanding felony arrest warrant for Danger Man and was in compliance with Mississippi Code Annotated § 99-3-7 (1972). Section 99-3-7 permits Deputy Ware, a law enforcement officer, to make a felony arrest, which is based upon probable cause, i.e. the valid arrest warrant signed by a judge, despite not having personal knowledge of the felony crime of grand larceny. Deputy Ware did not have to have physical possession of the arrest warrant.

(2.) Answer: Yes. Deputy Imonthejob was acting based upon valid probable cause. The test for probable cause is based upon the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213 (1983). Probable cause is a practical, nontechnical concept, based upon the conventional considerations of every day life on which reasonable and prudent people, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it. *Conerly v. State,* 760 So. 2d 737, 740 (Miss. 2000) (quoting *Strode v. State,* 231 So. 2d 779, 782 (Miss.1970)). In this case Deputy Imonthejob had knowledge from a fellow officer who had been chasing Danger Man and who gave a description of the car being driven. Deputy Imonthejob knew Danger Man by sight when he saw the car matching the description and was aware there was an outstanding felony warrant for Danger Man. Deputy Imonthejob had valid probable cause to make the stop and arrest of Danger Man.

(3.) Answer: Yes. Two exceptions to the warrant requirement under the Fourth Amendment to the United States Constitution and Article 3, Section 23 of the Mississippi Constitution apply. First, Deputy Ware entered Danger Man's home albeit without a search warrant after being contacted by Deputy Imonthejob, under exigent circumstances, in good faith, and with knowledge that it was a specific place to be searched while under the belief that there was an assault victim inside in need of immediate medical assistance. Second, the note was found in plain view during a valid protective sweep of the premises during an emergency. The plain view exception applies. *Graves v. State*, 708 So. 2d 858, 862-863 (Miss. 1997); *Smith v. State,* 419 So.2d 563, 569 (Miss.1982); *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Maryland v. Buie,* 494 U.S. 325, 328, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); *McNeil v. State,* 813 So.2d 767, 770-771 (Miss. 2002)

(4.) Answer: No because the search warrant is invalid. Only a judge, judicial officer, or justice court judge or conservator of the peace, acting within his/her territorial jurisdiction may issue a valid search warrant. A chief of police may not issue a legal search warrant. Miss. Code Ann. § 99-15-1 *et seq.* (1972).

(5.) Answer: No. Because of *Miranda v. Arizona*, 86 S. Ct. 1602 (1966), the prosecution may not use statements, whether exculpatory or incriminating, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Once the accused invokes his or her right against self-incrimination and right to counsel, the police cannot reinitiate interrogation or its functional equivalent. Only if the accused himself or herself initiates further communication, exchanges, or conversations with police may a custodial interrogation resume. *Edwards v. State*, 451 U.S. 477, 484-85 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Sanders v. State*, 835 So. 2d 45, 50 (Miss. 2003). *see also Pannell v. State*, 7 So.3d 277, 288 (2008)

(6.) Answer: Yes. Danger Man had no expectation of privacy inside the deputy's patrol car. Thus, Danger Man had no constitutionally protected privacy interest. It is not a violation of the Fourth Amendment protection because it is not of the type of surroundings where one has a "reasonable expectation of privacy." *Rakas v. Illinois*, 439 U.S. 128 (1978). Furthermore, Danger Man's statements were to himself and NOT in response to any custodial interrogation; thus the fact that he had not yet been given his *Miranda* warnings does not make the statements inadmissible. *U.S. v. McKinnon*, 985 F.2d 525, cert. denied 510 U.S. 843, 114 S.Ct. 130, 126 L.Ed.2d 94 (1993)

(7.) Answer: Yes. This statement is admissible. It was a voluntary, unsolicited statement made by the defendant and not in response to a custodial interrogation. Booking questions are not included under the protections of *Miranda*. *See Wesley v. State*, 521 So. 2d 1283, 1286 (Miss. 1988); *Upshaw v. State,* 350 So. 2d 1358 (Miss. 1977).

(8.) Answer: Yes. The search and seizure of Insurance Guy's wallet from Danger Man is exempted from his Fourth Amendment protection under the "search incident to arrest" exception. *Peters v. State,* 920 So.2d 1050, 1056 (Miss.App. 2006); *Brown v. State,* 920 So.2d 1050, 1056 (1996)

Short-Answer Constitutional Questions

(9.) Answer: (1) Regulations must be content neutral **[3.34pts]**, (2) narrowly tailored to serve a significant government interest **[3.33pts]**, and (3) leave open alternative channels of communication **[3.33pts]**.

(10.) (a) Answer: The law will only be upheld if it is necessary to promote a compelling or overriding interest. **[5pts]**

(b) Answer: The First Amendment rights of 1)religion, 2)speech, 3)press, 4)assembly, and 5)to petition the Government for a redress of grievances. **[1 pt each]**

BUSINESS ORGANIZATION
JULY 2011 Bar Examination
MISSISSIPPI BOARD OF BAR ADMISSIONS
Total Points: 100

QUESTION #1: (50 Points Total)

Rob and Amy were equal partners in R & A, a Mississippi partnership. The partnership's sole asset was an apartment building. The building was in need of remodeling, and R & A was short of cash.

Manny agreed orally with Rob and Amy to pay for the remodeling in return for one-quarter of the gross revenues from the apartment building for each of the next ten (10) years. Payments to Manny were to be made each month beginning with the first month following completion of the repairs. R & A used the money advanced by Manny for the remodeling and began making payments to Manny as agreed. R & A hired a contractor to perform the remodeling. Manny took no part in the remodeling other than to advance the money.

One effect of the completed remodeling was to enhance the value of the apartment building, increasing the property tax assessment for the ensuing year. As a result, Rob and Amy projected that R & A would be short of cash again next year. To cover the anticipated shortage, they orally agreed with Tom to sell Tom a one-third interest in R & A in return for his capital contribution. Tom advanced the money and was accepted as a one-third partner in R & A.

About six months after Tom advanced the money, a number of the tenants, who claimed to have suffered personal injuries from toxic fumes generated by the paint used and carpet installed during the remodeling, sued R & A as a partnership and Rob, Amy, Manny, and Tom individually as partners in R & A.

Rob had performed many hours of work overseeing the remodeling. There was no agreement among the partners that Rob would be paid for any of the work. He

submits a bill to R & A for services rendered. The bill is in an amount that is concededly reasonable and represents the fair value of his services.

1. Assuming the tenants' suit for personal injury is meritorious, can Rob, Amy, Manny and Tom be held personally liable? In each case, explain why or why not. **(30 Points)**

2. Is R & A required to pay Rob's bill for services rendered? Explain your reasoning. **(20 Points)**

QUESTION #2: (15 Points)

Fred Smith is considering an investment in a limited partnership. Before he does, he wants to know whether he will have the same right to management and control as a partner in a general partnership. Explain the reasons for your answer.

QUESTION #3 (20 Points Total)

Small Corp., a close corporation, has a provision in its articles of incorporation that no shareholder may sell or transfer his or her shares without first giving the corporation, and then the other shareholders, a right of first refusal for 30 days. Please explain your answers to the following questions.

a. Is this restriction valid? Why? **(8 Points)**

b. If a shareholder dies, may Small Corp. insist on the right to repurchase from the shareholder's legatee? **(8 Points)**

c. If a shareholder, in violation of the restriction, sells his or her shares to a transferee with notice of the restriction, may Small Corp. refuse to recognize the transfer? **(4 Points)**

QUESTION #4 (15 Points)

Dan Jones goes to the offices of C&M Investments, Inc. and asks to review the books and records of the corporation. Jones is ushered into the office of the secretary

of the corporation and very politely told that he may not review the books and records of the corporation. The secretary shows Jones a copy of C&M's articles of incorporation which contains a specific provision providing that shareholders shall not be entitled to review the books and records of a corporation. Jones comes to you and asks whether he has any recourse. Explain his position to him.

BUSINESS ORGANIZATION
JULY 2011 Bar Examination
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ANALYSIS

QUESTION #1: (50 Points Total)

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submits a bill to R & A for services rendered. The bill is in an amount that is concededly reasonable and represents the fair value of his services.

1. Assuming the tenants' suit for personal injury is meritorious, can Rob, Amy, Manny and Tom be held personally liable? In each case, explain why or why not. **(30 Points)**

ANSWER

Rob and Amy. Each partner of a general partnership is individually, i.e., jointly and severally, liable for all debts and obligations of the partnership. *MCA §79-13-306.* It is worth noting that a partner has the right to contribution from other partners where he or she has paid more than his or her allocable share of a partnership debt. *Williams v. Owen, 613 So.2d 829 (Miss. 1993).* However, this right of contribution has no affect as to claims of third parties; it only applies between or among the partners.

That Amy did not participate in the remodeling and Rob supervised it extensively is likely of no importance to Amy's liability. Each partner is an agent for the partnership for the purpose of its business, and the act of every partner apparently carrying on in the usual way the business of the partnership binds the partnership. This is so even if the act or omission of a partner was wrongful so long as he was acting within the ordinary course of the partnership's business. *MCA §79-13-301.* Thus, a loss or injury caused by an individual partner acting within the scope of the partnership is imputed to the partnership. *Duggins v. Guardianship of Washington, 632 So.2d 420, 427 (Miss. 1993).*

It is true, nevertheless, that an innocent partner is not liable for another partner's actions which occur outside the scope of the partnership. *Idom v. Weeks & Russell, 99 So. 761 (Miss. 1924).* However, remodeling the apartments was clearly within the scope of the partnership, and there is no evidence in the question of any obvious or known wrong-doing of Rob which might invoke this principal.

Rob and Amy and, of course, the partnership itself (R&A) are liable for the tenants' claims, and this is true even if Rob, Amy and/or the partnership have claims against third parties, such as the building materials manufacturers.

Tom. An incoming partner is generally liable to the extent of his interest in the partnership for debts and obligations that existed prior to his admission to the partnership. However, the incoming partner is normally not personally liable for such debts. *§79-13-306.* Unless Tom personally participated in a culpable way in the activities which gave rise to the claim, or unless he assumed the obligation, he cannot be subjected to personal liability beyond his interest in the partnership.

In this case there is no indication that Tom participated in the remodeling or that he assumed the obligations related to it. It would appear that the claims in question arose prior to his admission to the partnership, even if those claims were not asserted until after his admission. While claimants may argue that there was no debt or obligation until the claims were asserted, Tom should not be held personally liable for any obligation related to the toxic fumes arising from the materials used in remodeling.

Manny. Manny made a loan to the partnership. As a creditor of the partnership he has no obligation to be responsible for the debts the partnership may owe others. If Manny is to be held liable to the tenants, he would have to be determined to be a partner. The three primary considerations in determining whether a partnership relationship has been created are a) the intent of the parties; b) control of the undertaking, and c) profit sharing.

Did Rob, Amy and Manny intend that Manny be a partner? No particular formalities are required to determine that a partnership has been created. The parties' intent may be determined from the surrounding circumstances. The partnership agreement need no be written but can be inferred from the actions or conduct of the parties. *Smith v. Redd, 593 So.2d 989 (Miss. 1991).* Here the parties clearly knew how to add new partners, as in the case of the addition of Tom. Moreover, there was no attempt to convey a partnership interest to Manny or other indication that Rob and Amy contemplated any further involvement by Manny in the partnership.

Secondly, Manny did not participate in the renovations that he funded, nor is there any evidence that he participated in the operation or control of the partnership. However, lack of control alone is not enough to disprove a partnership. *Century 21 Deep South Properties, Ltd. v. Keys, 652 So.2d 707 (Miss. 1995).*

Third, and most important, is the issue of profit sharing. "The sharing of profits is an essential element of partnership." *Smith v. Redd, supra; Keppner v. Gulf Shores, Inc., 462 So.2d 719 (Miss. 1985).* It is generally accepted that a person who receives a share of the profits of a business is presumed to be a partner in the business. *MCA §79-13-202.*

While receiving a percentage of rents for a long period would at first appear to trigger this aspect of the test, note that Manny obtained a percentage of the gross rents. There is no intent to share in profit or loss, which are determined after deducting liabilities from gross income. While the arrangement may provide for Manny to receive a profit on his loan well in excess of any normal, reasonable interest rate, and while he will certainly take some risk in that the volume of rentals or the value of rents may go down, he has acquired no interest in the

property itself, and he is not dependent upon the profit or loss of the partnership. He gets paid whether or not the partnership makes or loses money.

2. Is R & A required to pay Rob's bill for services rendered? Explain your reasoning. **(20 Points)**

ANSWER

No. The partnership may decide to pay Rob's bill, but it cannot be required to pay the bill. *MCA § 79-13-401(h)* specifically states that "a partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership."

QUESTION #2: (15 Points)

Fred Smith is considering an investment in a limited partnership. Before he does, he wants to know whether he will have the same right to management and control as a partner in a general partnership. Explain the reasons for your answer.

ANSWER

No. A limited partner, whose financial liability is limited to the amount of his investment, may not participate in the management of the business. *Miss. Code Ann. §79-14-303.* A limited partner has no liability to third parties, except to the extent of payment of the subscription for his limited partnership interest, unless he is also a general partner, or he participates in the control of the business. *§79-14-303(a).* A limited partner can also incur liability by knowingly permitting his name to be used in the name of the limited partnership, at least to the extent of creditors who extend credit to the partnership without actual knowledge that the limited partner is not a general partner. *§79-14-303(d)*

QUESTION #3 (20 Points Total)

Small Corp., a close corporation, has a provision in its articles of incorporation that no shareholder may sell or transfer his or her shares without first giving the corporation, and then the other shareholders, a right of first refusal for 30 days. Please explain your answers to the following questions.

a. Is this restriction valid? Why? **(8 Points)**

b. If a shareholder dies, may Small Corp. insist on the right to repurchase from the shareholder's legatee? **(8 Points)**

c. If a shareholder, in violation of the restriction, sells his or her shares to a transferee with notice of the restriction, may Small Corp. refuse to recognize the transfer? **(4 Points)**

ANSWER:

a. Yes. Most statutes, including Mississippi's Business Corporation Act, authorize restrictions on the transfer of shares if they are reasonable and are not total restraints on alienability. *Miss. Code Ann. § 79-4-6.27.* An examinee may raise the point that the restriction in the Articles would have to existed from the inception of the corporation and not be by subsequent amendment in order to be valid as to all shareholders. Otherwise, those who acquired their shares before the amendment would not be bound by the restriction unless they specifically consented to such change or otherwise agreed to the restriction, such as in a shareholder's agreement. *§ 79-4-6.27(a)*

b. Probably not, depending upon the language of the share restriction in the articles of incorporation. Absent a specific provision providing that the right of repurchase includes transfers by operation of law (or by will, bequest, etc.) restrictions on transfer are generally held not to apply to involuntary transfers or transfers by operation of law. Generally, stock transfer restrictions are narrowly construed, *e.g. Engel v. Teleprompter Corp., 703 F.2d 127 (5th Cir. Tex.)*, but the language in such restrictions is frequently construed to uphold the widest range of choice permissible under the language used. *e.g. Frickert v. Deiter Bros. Fuel Co., 464 Pa. 596, 347 A.2d 701. See also: 18A Am Jur 2d, Corporations §§ 683, 691 and 694.*

c. Yes. A corporation may continue to recognize the transferor as the owner, if the transferee had notice (as here).

QUESTION #4 (15 Points)

Dan Jones goes to the offices of C&M Investments, Inc. and asks to review the books and records of the corporation. Jones is ushered into the office of the secretary

of the corporation and very politely told that he may not review the books and records of the corporation. The secretary shows Jones a copy of C&M's articles of incorporation which contains a specific provision providing that shareholders shall not be entitled to review the books and records of a corporation. Jones comes to you and asks whether he has any recourse. Explain his position to him.

ANSWER:

Under *Miss. Code Ann. §79-4-16.02(d)* a shareholder's right of inspection may not be abolished or limited by a corporation's articles of incorporation or bylaws. As long as the shareholder gives the 5 days notice required by *§79-4-16.02(a)*, he can inspect all records listed in *§79-4-16.01(e)*, and, if his demand is made in good faith and for a proper purpose, the records he desires to inspect and the proper purpose are reasonably described, and the records are directly connected with his purpose, a much wider range of documents (including financial records) are subject to his inspection. *Miss. Code Ann. §79-4-16.02*