



FEBRUARY 2023 EXAMINATION ANSWERS

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 1

Question 1 - Selected Answer 1

***** Question 1 STARTS HERE *****

D

1. Claims by Lucy

A. Lucy v. Deluxe Pedi-Chair

Product Liability

Lucy may be able to bring a claim for product liability against Deluxe Pedi-Chair. A plaintiff may pursue a products liability cause of action under four theories: (1) strict products liability; (2) negligence; (3) breach of warranty; and (4) misrepresentation.

Strict Product Liability

Lucy may be able to bring a claim of strict product liability against Deluxe Pedi-Chair. A commercial supplier may be strictly liable in tort for harm caused by a defective product. To recover for strict products liability, plaintiff must show: (1) defendant is a commercial supplier; (2) product was defective when it left defendant's control; (3) defective product was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages to his person or property.

Commercial supplier

Strict products liability applies to commercial suppliers. A commercial supplier places products in the stream of commerce without substantial alteration. Here, the facts state that Deluxe Pedi Chair is a local commercial supplier, responsible for the chair that Lucy was sitting on the day of her injury.

Defective product

Plaintiff must show that defendant produced or sold a product that was defective when it left defendant's control. Defects include manufacturing defects, design defects, and warning defects.

Manufacturing defect

A manufacturing defect exists when one instance of the product is different and more dangerous than the others because it deviated from its intended design. Courts use the consumer expectation test to establish a manufacturing defect.

Design defect

A design defect exists when all products in a line have a design that is inherently defective and unreasonably dangerous. Courts use the consumer expectation test and risk-utility test to establish a design defect.

Consumer Expectation Test

Under the consumer expectation Test, a product must meet the minimum safety expectations of ordinary users when used in a reasonably foreseeable manner. Here, Lisa was sitting on the chair when she was violently jolted out of the chair and onto the floor by an electric shock, after turning on the chair's massage features. An ordinary consumer would not expect to receive an electric shock from a chair and be violently jolted out onto the floor when sitting on it. Thus, the Deluxe Pedi chair may be defective under the consumer expectation test. If the chair deviated from its intended design, Lisa may be able to establish a manufacturing defect. If the design of the Deluxe Pedi-Chair was inherently defective, Lisa may be able to establish a design defect.

Risk Utility Test

Under the risk-utility test, a product is defective if the risk of danger inherent in the design outweighs its benefits and the risk of danger could have been reduced or avoided by a feasible, cost-effective design. The facts do not indicate whether a feasible, cost effective design of the chair was available to Deluxe Pedi-Chair. But if the danger of electric shock could have

been reduced by such a feasible, cost-effective design, then Lisa may be able to establish that the chair is defective under the risk-utility test.

Causation

Plaintiff must show that but for the defect, she would not have been injured and that the defect existed at the time the product left defendant's control. Plaintiff must also show that her injury was reasonably foreseeable at the time the product left defendant's control.

Here, Lisa was sitting on the Deluxe Pedi chair when she received an electric shock and was violently thrown onto the floor. But for the defect in the chair, she would not have been injured. Lisa can also prove that it is reasonably foreseeable that her injury is a foreseeable result of sitting in a defective chair. Thus, Lisa will likely succeed in proving that the defect in the Deluxe Pedi chair was the actual and proximate cause of her injury.

Damages

Plaintiff must establish that she suffered physical injury or damage to her property. Here, Lisa received an electric shock and was violently jolted out of the chair and onto the floor. Lisa also hurt her ribs from the fall.

Implied Warranty of Merchantability

Lisa may be able to establish that Deluxe Pedi-Chair is liable for breach of an implied warranty of merchantability.

A commercial supplier of a product impliedly represents that the product is safe for its ordinary purpose. If the product is unsafe when used for its ordinary purpose, the seller is liable for any damages caused to the consumer. Here, as stated above, Deluxe Pedi-Chair is a commercial supplier that has placed the massage chair into the stream of commerce. Lisa was using the chair for its ordinary purpose by sitting on it and turning on the chair's massage feature. The product is unsafe for its ordinary purpose, because Lisa received an electric shock and was violently jolted out of the chair onto the floor, causing her to hurt her ribs. Thus, Deluxe Pedi-Chair may be liable for breach of an implied warranty of merchantability.

Defenses

Assumption of the risk may be a defense if plaintiff discovered the defect and unreasonably used the product despite the defect. Here, Lisa did not know that she would receive an electric shock from the chair and that it would violently jolt her onto the floor when she turned on the chair's massage feature. Although she sat on another chair for her pedicure, she was already injured by the first chair by the time she sat on the second chair and she also did not turn on the second chair's massage feature. Thus, she likely assumed no risk when she used the product.

B. Lucy v. Daisy and Beauty Land

Respondeat Superior

Lucy may be able to bring an action against Beauty Land for torts committed by Daisy, Beauty Land's manager. Under the doctrine of respondeat superior, an employer is liable for the torts of its employees that are committed within the scope of the employment. An act is within the scope if the conduct was the kind the employee was hired to perform, the tort occurred on the job, or the employee intended her action to benefit the employer. Here, Lucy's injury occurred while Daisy was working at Beauty Land. Thus, Beauty Land may be liable for any torts committed by Daisy within the scope of her employment.

Negligence

Lucy may be able to bring a negligence cause of action against Beauty Land. Negligence occurs when defendant's conduct imposes an unreasonable risk on another person, resulting in injury to another person. To recover for negligence, plaintiff must show: (1) defendant owed a duty of care to plaintiff; (2) defendant breached that duty; (3) the breach was the actual and proximate cause of plaintiff's harm; and (4) plaintiff sustained damages.

Duty of Care

Generally, a person has a duty to act as a reasonably prudent person under the circumstances, unless a special duty of care applies. Under the majority view, the duty is owed to all foreseeable plaintiffs within the zone of danger. Under the minority view, the duty is owed to anyone who is harmed by defendant's conduct, including unforeseeable plaintiffs.

Here, Daisy had a duty to act as a reasonably prudent person and owed a duty to Lucy, who is a foreseeable plaintiff in the zone of danger. Lucy may also have been injured as a result of Daisy's conduct. Thus, under both the majority and minority view, Daisy owed a duty of reasonable care to Lucy under the circumstances

Breach of Duty

Lucy may be able to establish that Daisy breached her duty of care to act as a reasonably prudent person under the circumstances. A breach of duty occurs when defendant falls below the applicable standard of care. Here, Daisy was working at Beauty Land on the day of Lucy's injury. Daisy noticed a slight spark that morning as she plugged in the first chair Lucy sat in, but thought nothing of it. A reasonably prudent person would likely not allow a customer to sit on the chair if she noticed that it was sparking, however, Daisy thought nothing on it and allowed Lucy to sit on it. Thus, Daisy likely breached her duty of reasonable care.

Causation

See above.

Here, Lucy may be able to prove that but for Daisy's failure to unplug the chair and prevent customers from sitting on it, she would likely not have been injured. Lucy may also be able to prove that her injury is the reasonably foreseeable result of Daisy's failure to prevent customers from sitting on the chair after noticing that it was sparking. Thus Lucy will likely be able to prove both actual and proximate causation.

Damages

Plaintiff must show that she suffered actual harm from defendant's breach of duty.

Here, Lucy will be able to show that she suffered actual harm because she received an electric shock, was violently jolted out of the chair, and hurt her ribs from the fall.

Eggshell skull Plaintiff Rule

Under the eggshell skull plaintiff rule, defendant takes plaintiff as he finds her. Defendant is liable for all additional foreseeable or unforeseeable physical harm suffered by plaintiff caused by plaintiff's weakness, susceptibility, or preexisting mental and physical conditions.

Here, Lucy may be able to attribute more damages to Daisy and Beauty Land because she was diagnosed with brittle bone syndrome years ago and was told by her doctor one week after her fall that she had fractured her ribs. Daisy and Beauty Land may also be liable for Daisy's fractured risk as a result of her preexisting brittle bone syndrome.

Lucy may be able to prove a prima facie case of negligence against Daisy and against Daisy's employer, Beauty Land.

Defenses

Defendant may be able to establish a defense of either comparative fault or assumption of the risk. Nevada follows the comparative fault approach to negligence. Comparative fault applies when plaintiff's own negligence contributed to her injury. If plaintiff's comparative negligence is greater than defendant's negligence, then plaintiff is barred from recovery. Plaintiff will also be barred from recovery if she knew of the risk of harm and voluntarily consented despite the risk.

Here, it is unlikely that Daisy and Beauty Land will be able to establish that Lucy was comparatively negligent. Lucy had no way of knowing that she would be injured by the chair when she used the massage feature. She also was already injured by the time she sat on the second chair and she did not turn on the massage feature. Thus, it is unlikely that Daisy and Beauty Land will be able to establish an affirmative defense to negligence.

2. Claims by Marla

A. Marla v. Beauty Land

Marla may be able to assert a claim of negligence against Beauty Land for torts committed by Roberto.

Independent contractor

An employee is generally not liable for an independent contractor's torts unless the conduct involves an ultrahazardous activity, nondelegable duties, negligent selection of the independent contractor, or if the employer holds the independent contractor out as an employee. A person is more likely to be an independent contractor if he is engaged in his own business, controls the way he performs tasks, is hired to do a particular job, or supplies his own materials.

Here, the facts state that Roberto is an independent contractor. However, it is possible that Roberto could be treated as an employee because he was tattooing at Beauty Land and was handing out a Beauty Land consent form to Marla. If Roberto is an independent contractor, then Beauty Land will not be liable for Roberto's torts. Since the facts state that Roberto is an independent contractor, Marla will likely not be able to assert a claim of negligence against Beauty Land for Roberto's torts.

B. Marla v. Roberto

Marla may be able to assert a claim of negligence against Roberto.

Duty

See above.

Here, Roberto owes a duty of care to act as a reasonably prudent person and owes the duty to Marla.

Breach

See above

Here, Roberto likely breached his duty of care to act as a reasonably prudent person when he tattooed Marla's eyebrows despite never tattooing eyebrows before. He may also have breached his duty of care because he handed Marla a form that told her to wait at least two weeks after receiving Botox before tattooing her eyebrows. Marla handed the form back to Roberto without signing it but told Roberto that she had a Botox injection the day before. Roberto said "no problem" and tattooed Marla's eyebrows anyway even though she told him about the botox injection the day before. A reasonably prudent person would not likely have proceeded with the tattooing after hearing that Marla had a botox injection only the day before. Thus, Roberto likely breached his duty of care to act as a reasonably prudent person.

Causation

See above

Here, Marla will likely be able to prove that but for Roberto's breach of duty, she would not have suffered the harm to her ridiculous looking eyebrows. She will also likely be able to prove that the damage to her eyebrows is a reasonably foreseeable result of Roberto's breach of duty. Thus, Marla will likely be able to prove both actual and proximate causation.

Damages

See above

Here, Marla's eyebrows had migrated up to her forehead and looked ridiculous. Although she does not seem to have been injured, the resulting damage to her eyebrows may count as damages for the purpose of negligence.

Marla may be able to prove a prima facie case of negligence against Roberto.

Defenses

See above

Roberto may be able to show that Marla was comparatively at fault for the damage to her eyebrows. Marla received the consent form and although she didn't sign it, she obviously read it because she told Roberto about her botox injection the day before. A reasonably prudent person likely would not have proceeded with the tattooing after receiving this information, but since Marla proceeded with the tattooing anyway, she may be at least partially at fault for the damage to her eyebrows. If a court finds that she was more negligent than Roberto, then she would be barred from recovery. Roberto may also be able to show that Marla assumed the risk because he handed her the consent form. However, Roberto accepted the consent form unsigned by Marla and she likely relied on Roberto's response of "no problem" when she agreed to proceed with the eyebrow tattooing. Thus, it is not likely that Marla's claim will be barred for assumption of the risk.

3. Claims by Beauty Land

Beauty Land v. Daisy

Indemnity

As stated above, Daisy is likely liable for her negligence and because she is an employee of Beauty Land, Beauty Land is also likely to be jointly liable under respondeat superior. However, indemnity allows a joint tortfeasor to recover damages from the tortfeasor who is most directly responsible for causing the harm. Indemnity allows the defendant to shift the loss to the party most directly responsible for the tort.

Here, Beauty Land may be able to succeed in an indemnity action against Daisy because Daisy, as the negligent employee, is more directly responsible for her negligence.

4. Claims by Daisy

Defamation

Daisy or Beauty Land may be able to bring a claim for defamation against Marla. To recover for defamation, plaintiff must show: (1) a defamatory statement; (2) of or concerning plaintiff; (3) published by defendant to a third party; (4) causing damage to Plaintiff's reputation.

Defamatory Statement

To be defamatory, a statement must be false and contain language that holds plaintiff up to ridicule or contempt.

Here, although Marla was free to post negative online reviews about beauty land, Marla returned to Beauty Land when it was full of customers and screamed, "this place stole my money. they knew they shouldn't have tattooed my eyebrows and then ruined them. They also electrocuted my friend. Get out before it's too late." The statement holds Beauty Land up to ridicule, but it does not directly hold Daisy up to ridicule. The only statement that may be false is that Marla claimed that beauty land stole her money. Thus, there does not seem to be any defamatory statement.

Of or concerning plaintiff

The plaintiff must be an identifiable living person, corporation, or business association. Marla's statement was about "this place" referring to Beauty Land. It was not about Daisy herself.

Published to a third party

The publication must be made to a third party who understood the statement.

Here, Marla made the statement when Beauty land was full of customers. Thus, the publication was made to a third party.

Causing Damage to Plaintiff's reputation

Plaintiff must show that the statement would have caused damage to plaintiff's reputation if it had been believed. Here, the facts do not indicate that Beauty Land suffered any damage to its reputation as a result of Marla's statements but if the statement about Beauty Land stealing her money would have been believed, it might have caused damage to Beauty Land's reputation. However, the facts say that the customers, mostly tourists, ignored Marla's outburst. Although Daisy suffered harm because nobody would hire her, the facts state that nobody would hire her as a result of her negative online reviews, and not because of Marla's statement.

Thus, it is unlikely that either Beauty Land or Daisy would succeed in an action for defamation against Marla.

***** **Question 1 ENDS HERE** *****

Question 1 - Selected Answer 2

***** Question 1 STARTS HERE *****

LUCY (L)

Vicarious Liability

Lucy (L) may seek to hold Beauty Land (BL) liable for the actions of Daisy (D). Under the doctrine of respondeat superior, employers will be vicariously liable for the tortious conduct of their employees committed within the scope of employment. Scope of employment entails acting in furtherance of the employer's business.

Here, D was BL's manager and thus was an employee of BL. D was acting within the scope of her employment when she was plugging in the massage chair. Therefore, BL will be vicariously liable for D's negligence.

Negligence---Daisy (D)

The elements of negligence are (1) duty (2) breach (3) actual cause (4) proximate cause and (4) harm.

Duty

When a person engages in activity she is under a duty to act as a reasonably prudent person under the circumstances. A duty is only owed to foreseeable plaintiffs---those persons within the geographical zone of danger from defendant's negligent conduct.

Here, D owed a duty to act as reasonably prudent manager of the beauty spa. L was a foreseeable plaintiff because she was a customer at the beauty spa and thus could be foreseeably endangered by D's negligence.

Breach

A breach occurs when a defendant's conduct falls below the applicable standard of care.

Here, D noticed a slight spark that when she plugged the pedicure chair in, but thought nothing of it. D failed to act as a reasonably prudent manager of the spa salon by failing to inspect the chair further to determine if it was safe. Therefore, D breached her duty of care.

Actual Cause

A defendant's negligence is the actual cause if plaintiff's injury would not occurred but for defendant's conduct.

Here, but for D failing to inspect the chair further, L would not have been violently jolted out of the chair by an electric shock and fractured her ribs. Therefore, actual cause is established.

Proximate Cause

Proximate cause requires that the manner and type of injury suffered by plaintiff be foreseeable. A defendant is liable for all harmful results that are the normal incidents of, and within the increased risk caused by, defendant's conduct.

Here, it is foreseeable that a person could be electrocuted by placing their feet in a spa chair. It is also foreseeable that a person electrocuted could fall out of the chair and injury themselves. Therefore, proximate cause is established.

Harm

The plaintiff must prove harm to person or property. Under the eggshell doctrine, defendant takes the plaintiff as she finds her and is liable for the full extent of plaintiff's injury, even if plaintiff suffers an unforeseeable high degree of harm due to a preexisting condition.

Here, L was violently jolted out of the chair and fell to the ground and fractured her ribs. Thus, L suffered harm to her person. Although L had might not have fractured her ribs had she not suffered brittle bone syndrome, D is liable for the full extent of L's injuries.

Damages

Plaintiff may recover all damages (past, present, and prospective), both special and general, including economic damages (medical expenses) and non-economic damages (pain and suffering)

L can recover damages for her pain and suffering medical expenses.

Strict Products Liability

L and BL may bring a products liability action against Deluxe-Pedi Chair (Deluxe). To prevail in a strict products liability action, the plaintiff must show (1) defendant is a commercial supplier (2) the production or sale of a product that was defective when it left the defendant's control (3) actual and proximate causation and (4) damages.

Commercial Supplier: Here, the facts state that Deluxe is a commercial supplier.

Manufacturing Defect: A manufacturing defect is one where the product emerges different from and more dangerous than the products made properly. Under the consumer expectation test, defendant will be liable if the product failed to perform as safely as an ordinary consumer would expect.

Here, the massage chair had a manufacturing defect because it failed to operate as an ordinary user would expect since L was electrocuted when she put her feet in the water.

Actual Cause: To show actual cause, plaintiff must show that the defect existed when the product left defendant's control.

Here, the massage chair was "new" and received by BL that morning. Since the product moved through normal channels of distribution, it is presumed the defect existed when it left Deluxe's control.

Proximate Cause: The type of injury must be foreseeable at the time the product was placed in the stream of commerce. An intermediary's negligent failure to discover a dangerous defect does not cut off an upstream supplier's liability. However, when the intermediary's conduct is more than ordinary foreseeable negligence, such as the failure of act after discovering a dangerous defect, it becomes a superseding cause and may cut off the upstream supplier's liability.

Here, D's failure to act after seeing the spark when she plugged in the chair may serve to cut off Deluxe's liability. In

Damages: L suffered damages because she was violently jolted out of the chair and fell to the ground and fractured her ribs.

Negligence---Beauty Land (BL)

See rule above.

Duty

A business that holds its property open to the public has a non-delegable duty to keep its premises safe and prevent injury to customers. An invitee is one who is on the premises for the business purposes of the landowner. An owner has a duty to inspect, warn of or make safe dangerous condition that are non-obvious to the invitee and known to the owner.

Here, BL owed a general duty to act as a reasonable spa and ensure its pedicure chairs were safe. L is an invitee because is a customer of BL. BL owed L a duty to inspect, warn of or make safe, the dangerous condition of the spa, which D was

aware of.

Breach

BL breached its duty although D noticed the spark when she plugged in the chair, D failed to inspect the chair or warn L of the potential to be electricuted.

Actual Cause

But for BL's failure to inspect the chair or warn of the danger, L would not have been violently jolted out of the chair by an electric shock and fractured her ribs.

Proximate Cause

Here, it is foreseeable that a person could be electricuted by placing their feet in a spa chair. It is also foreseeable that a person electricuted could fall out of the chair and injure themselves. Therefore, proximate cause is established.

Harm

Here, L was violently jolted out of the chair and fell to the ground and fractured her ribs. Thus, L suffered harm to her person. Although L had might not have fractured her ribs had she not suffered brittle bone syndrome, D is liable for the full extent of L's injuries.

Damages

Plaintiff may recover all damages (past, present, and prospective), both special and general, including economic damages (medical expenses) and non-economic damages (pain and suffering)

L can recover damages for her pain and suffering medical expenses.

MARLA (M)

Vicarious Liability

Employers are generally not vicariously liable for the tortious conduct of independent contractors. However, employers may be liable if (1) the independent contract is engaged in inherently dangerous activity or (2) the the employer's duty is non-delegable because of policy public reasons.

Here, Roberto (R) is an independent contract. As discussed above, BL owed a non-delegable duty to keep its premises and protect against injury. Therefore, BL can be held vicariously liable for R's tortious conduct.

Negligence---Roberto (R)

See rule above.

Duty

Here, R owed a duty to act as a reasonably prudent tattoo artist. Marla (M) is a foreseeable plaintiff because she was getting tattooed by R.

Breach

Here, R failed to act as a reasonable tattoo artist because he tattooed M despite that she told him that she had Botox injections the day before.

Actual Cause

Here, but for R tattooing M, M's Botox would not have migrated up her forehead. Therefore, actual cause is established.

Proximate Cause

Here, it is foreseeable that tattooing someone who recently received Botox could cause the Botox to migrate. Therefore, proximate cause is established.

Harm

Here, M was harmed because Botox migrated up her forehead, which looked ridiculous. Arguably, M did not suffer actual damages because her Botox looked ridiculous.

Comparative Negligence

NV in a partial comparative negligence jurisdiction. Under a partial comparative negligence system, a plaintiff's contributory negligence is not a complete bar to recovery, but rather the trier of fact weighs plaintiff's negligence against that of defendant's and reduces plaintiff's damages accordingly. To recover, plaintiff's fault must not be greater than defendant's fault.

Here, assuming M suffered sufficient harm, M's recovery may be reduced. R handed M a BL consent form warning that a person must wait at least two weeks after receiving Botox before tattooing eyebrows. M handed the form back to R and told him that she had Botox injections the day before. As such, M acted unreasonably by knowingly encountering a known risk. Therefore, M's recovery will be denied if her fault is deemed to exceed R's fault. Otherwise, M's recovery will be reduced by the extent of her fault.

BEAUTY LAND (BL)

Defamation

BL may bring an action against M for defamation.

Defamation requires (1) a defamatory statement (2) of or concerning plaintiff (3) publication and (4) damage to plaintiff's reputation.

Defamatory Statement

A defamatory statement is one that tends to lower plaintiff's reputation within the community.

Here, M posted negative reviews about BL online and went into BL and said, "this place stole my money. They knew they shouldn't have tattooed my eyebrows and ruined them! They also electrocuted my friend. Get out before it's too late." Such a statement tends to lower BL's reputation in the community because people will not want to go to a beauty spa that doesn't perform services well. Therefore, it is a defamatory statement.

Of or Concerning Plaintiff

A reasonable person must have understood that the statement referred to the plaintiff.

Here, M went into BL when it was full of customers and thus it is clear that she was referring to BL.

Publication

The statement must have been communicated to someone other than the plaintiff.

Here, M posted negative reviews about BL and M went into BL when it was full of customers. Therefore, this element is met.

Damage

Libel is written defamation and general damages are presumed. Slander is oral defamation and special damages must be proved unless it is slander per se. Slander per se is a statement that adversely reflects on plaintiff's business.

Here, M's post is liable and general damages are presumed. M's statements made in BL are slander per se because it adversely affects BL's business, general damages are presumed. However, BL continues to do a thriving business. Therefore, BL cannot recover.

DAISY (D)

Defamation

See rule above.

Here, D can bring a claim for defamation against M. the analysis discussed above is incorporated here. D was damaged because BL terminated her employment. Therefore, D can recover against M for defamation.

***** **Question 1 ENDS HERE** *****



**FEBRUARY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 2

Question 2 - Selected Answer 1

***** Question 2 STARTS HERE *****

Question 2

1) Under what theories of murder can D be prosecuted and 2) What are D's Defenses.

Homicide. Homicide is the killing of another. Murder is the unlawful killing of another human being with malice aforethought. Death would not have occurred but for the conduct of the defendant, and the defendant is responsible for the natural and probable consequence of their conduct. Here, D shot and killed V. But for her actions, V would not have been killed. As a result, it is likely guilty of a homicide crime.

First Degree Murder. In NV, first degree murder includes the deliberate and premeditated killing, which is where the defendant acted with the intent/knowledge to kill. Here, D intentionally got her gun, and shot V. However, this occurred quickly and during a heated argument over her embezzlement. While she was nervous before V came home, she did not plan to kill him beforehand. She did not form the required premeditated intent to kill prior to the argument. However, during the argument she left the room, got her gun and then came back to shot V. D would argue that there was not enough time to form the required intent to kill. However, the state would argue that the time it takes to form the intent can be quickly. Because of the circumstances surrounding the argument, it is unlikely she committed first degree murder.

Second Degree Murder. Second degree murder occurs when there is the unlawful killing that does not meet the requirements for first degree murder. There must be a killing done with reckless indifference to human life, or done with a "depraved heart" which shows that there was recklessness to a high risk of loss of human life. Here, D was arguing with D and she went and got her gun. D would argue that she got her gun to protect herself, and that she was not acting with reckless indifference to human life, instead she was acting to preserve her life (self defense is discussed below). She was also in the middle of an argument. As a result, if there is sufficient showing that there was adequate provocation then she would not be guilty of murder, but instead manslaughter. As a result, it is unlikely that she committed second degree murder.

Voluntary Manslaughter. Voluntary manslaughter is the intentional killing of a human being with adequate provocation. Provocation occurs when there is a sudden and intense passion, the defendant is provoked, there was no time to cool off, and the defendant did not cool off. Here, D and V were arguing about D's embezzlement from the business. V was yelling at D and following her around their home. He was approaching her in a menacing manner. Here, D was in the throws of a heated argument, she would argue that she was provoked, and that there was not any time to cool off, since between the argument and the shooting, there were only moments in time, which was not enough to cool off. As a result, it is likely that D committed voluntary manslaughter.

Felony Murder. Felony murder is any killing committed during the course of an inherently dangerous felony. In NV, even if the court dismisses the underlying felony charge due to insufficient evidence, the defendant may still be able to charge the defendant with felony murder. Here, the state would argue that D robbed V after she shot him by taking her wallet. Robbery is taking the personal property of another from the other person by force or threat of force. However, the theft occurred after the death of V, and there is no indication that it was D's intent to steal anything from v. at the time. As a result there was no threat of force to get V's wallet. Therefore there is no underlying robbery. Felony Larceny in NV requires the theft of more than \$1,200. Here, it is unlikely that the wallet contained that much money, which would not make the theft a felony. And larceny is not an inherently dangerous felony. As a result, the state would be unable to maintain a charge of felony murder against D.

As a result, it is likely that D would be successfully charged with Murder 1, Murder 2 and Manslaughter. Depending on her defenses and the showing of her intent, it is most likely she will be convicted of Manslaughter and that self-defense would be applicable as discussed below.

Voluntary Intoxication Defense. If someone is voluntarily intoxicated, then they will not be guilty of any specific intent crimes. If the person forms the required intent prior to becoming intoxicated, this will not be a defense. Here, first degree murder is a specific intent crime. This means that based on the facts, there was no intent to kill prior to the argument/drinking. As a result, D may raise this as a defense to any first degree murder charges brought before her. However, manslaughter and second degree murder are not specific intent crimes, which means this defense would not be available for them.

Self Defense. In NV, a person may use deadly force in self defense at any time they reasonably believe that deadly force is about to be used against them. In NV there is also a presumption that a person using deadly force against an intruder in

their home has a reasonable fear of death or great bodily harm. Also, NV does not recognize the imperfect self defense doctrine which is the honest but unreasonable belief that there was a need for deadly force as self defense (which would reduce murder to manslaughter). Here, D would argue that they feared for their life during the argument and that they were reasonable in using deadly force. Here, they knew that V owned a gun, and that he typically had it on him. She was in the midst of an argument, he was menacingly following her around the house, and she had never seen him so upset. As a result, she likely reasonably believed that he was armed, and was upset. Then he reached into his pocket which she thought was him pulling out a gun and she shot him. She likely has a good argument for self defense, which would not only negate a murder charge, but also the manslaughter charge. However, if the trier of fact determined that she acted unreasonably, then she would not be able to use this as a defense. Also, because V was not an intruder into the home, she cannot use the presumption that deadly force is reasonable.

3. How should the court rule on D's motion to suppress the gun?

4th Amendment. The 4th Amendment protects persons from unreasonable searches and seizures by the government and is incorporated to be applicable to the states under the Due Process Clause of the 14th Amendment. To pursue a claim under the 4th Amendment, there must be government conduct, and there must be a reasonable expectation of privacy. If evidence is obtained in violation of the 4th Amendment, then the evidence will be excluded and any subsequently gained evidence would also be excluded under the fruit of the poisonous tree doctrine/exclusionary rule.

Government Conduct. Here the search of the house and the seizure of the gun was by police officers, who are government actors. Therefore, this element is met.

Reasonable Expectation of Privacy. Based on the totality of the circumstances, a person must have a reasonable expectation of privacy within the area searched. Here, the location searched was D's home. One has an automatic reasonable expectation of privacy in their home. As a result, this element is met.

Warrant Requirement. Typically, under the 4th Amendment, the government must have a warrant based on probable cause, which describes with reasonable precision on what is to be searched/seized, and issued by a neutral/detached magistrate. The officer submitting the warrant must show probable cause with an affidavit. However, there are several exceptions to this requirement. Here, the facts do not indicate that there was a warrant issued. As a result, there must be an applicable exception to the warrant requirement, otherwise the evidence will be excluded.

Warrant Exception. Plain View. If the officer see incriminating evidence when they observe it from a lawful location, then the evidence is admissible without a warrant under the plain view doctrine. To constitute plain view, the officer must be lawfully at the location, and it must be apparently observant that the item seen is fruit of a crime. Use of sensory enhancing equipment is permissible, so long as it is reasonable, and not extremely intrusive. Here, the officer spotted the gun through the window of the house by using the flashlight. They knew that there was a service call for a potential domestic dispute (since neighbors heard yelling). The observation of the gun through the window with the flashlight was permissible under plain view, and the sight of a gun right after a call for service due to a dispute would be apparent that it could be a fruit of a crime. However, it is difficult for the officers to justify hopping the fence and entering the backyard right after knocking on the front door. As a result, it is unlikely that they were in plain view of the gun, and this would not be a valid exception to the warrant requirement.

Warrant Exception. Community Caretaker. A warrant-less search is justified if the officer faces an emergency that threatens the health/safety of an individual or the public. Here, the officers were on a service call for an argument. The fact that it appeared no one was home was not enough to create an emergency situation which would justify them to break into the house or to hop the fence. As a result, this would not be a valid exception the warrant rule.

As a result, the officers should have gotten a warrant to conduct their search, and D would be successful in her motion to suppress the evidence.

***** Question 2 ENDS HERE *****

Question 2 - Selected Answer 2

***** Question 2 STARTS HERE *****

Theories of Murder

Murder under the common law is the unlawful killing of a human with malice aforethought, which exists when there are no facts reducing the killing to voluntary manslaughter or excusing the killing and committed with either intent to kill, intent to inflict great bodily harm, or reckless indifference to an unjustifiably high risk to human life. Voluntary manslaughter, on the other hand, is a killing that would be murder but for the existence of adequate provocation. In either case the defendant's conduct must be the cause in fact and proximate cause of the victim's death.

Nevada largely adopts this approach for murder, which involves the unlawful killing in either the first or second degree. First degree murder in Nevada is deliberate and premeditated murder made in a cool and dispassionate manner with an actual reflection on the killing. This is committed if by means of willful, deliberate, and premeditated conduct. In Nevada, all other murder are second degree murders, including a killing that is done with adequate prosecution.

Here, Danielle clearly acted intentionally, in that she intended to shoot Victor. However, she does not Danielle does not appear to have the necessary intent necessary for first degree, premeditated murder. The use of a deadly weapon authorizes a permissive inference of an intent to kill; however, she did not have the weapon beforehand despite being aware of and otherwise "preparing" for Victor's arrival, which suggests that she did not contemplate or intend to kill Victor prior to his arrival. Danielle was not in a cool or dispassionate after his arrival, either. She clearly had a brief moment to contemplate the action while running back to her room to get the gun, but does not appear to have obtained the gun for the purpose of killing Victor and did not lie in wait or otherwise take intentional steps.

Furthermore, voluntary intoxication is a defense to intentional murder because it negates the element of intent. This defense is not available when someone drinks to increase the courage necessary to commit the crime or recklessly regarding the risk. However, here it appears that Danielle's intoxication, although intended to increase courage, was merely with regard to facing her boss who she knew would be accusatory. It does not appear she was intoxicated to enable her to commit any violent crimes against Victor. It's possible that her act of drinking could be seen as reckless regarding the risk, but given that she did not know Victor to get as upset as he did on the night in question this is unlikely to negate this defense.

However, it's possible that Danielle may be prosecuted for second degree murder as a depraved heart killing if it's found that Danielle acted with reckless indifference to an unjustifiably high risk of life. Here, Victor was upset and yelled at her, but there was nothing to indicate a risk of deadly force at that time. Nonetheless, Danielle obtained a deadly weapon and came out of the room apparently with it in hand and at the ready. She also immediately shot at Victor, which suggests that she may not have been acting purely in self defense (as discussed below) but rather recklessly with regard to Victor's life.

Defenses Available to Danielle

There are two main defenses that Danielle may raise in defense of a murder charge here. The first is self defense or justified killing. This happens when there has been an intentional killing, but that the killing should not be punished. The defense requires that the person be (1) without fault; (2) confronted with unlawful force; (3) and reasonably believes they are threatened with imminent death or great bodily harm. There is generally no duty to retreat from an altercation. Moreover, when the incident occurs within a dwelling, there is a lower duty involved when a person reasonably believes deadly force is necessary to prevent a personal attack on themselves in the dwelling.

In Nevada, justifiable homicide occurs in the self defense of a person or occupied habitation against a person who intends or endeavors to commit a crime of violence, or enter the habitation to assault in a violent manner. The incident must be sufficient to excite the fears of a reasonable person, and there is a rebuttable presumption when it was reasonably believed the person was committing or attempting to commit a crime of violence and that person was not provoked.

Here, Danielle will likely be successful in claiming justifiable homicide. The first element is that the person be without fault. Danielle committed some type of theft, which incurred Victor's anger and the event would not have occurred without that act; however, to be at fault in a justifiable homicide the fault needs to be directly related to the physical altercation - i.e. the person must be the aggressor. Here Danielle was not the aggressor and did not initiate the incident.

Danielle also appeared to be confronted with unlawful force. Prior to the shooting Victor was yelling and following her around the room, which is a confrontational act by nature, particularly in someone's dwelling. She also knew that Victor typically carried a gun. The defense does not require the victim to actually have a gun or intend unlawful violence, but rather the reasonable appearance is sufficient. Thus, Danielle likely satisfies the second element.

However, it is unlikely that Danielle will be able to show that she reasonably believed that deadly force was required. Danielle seemed genuinely surprised at Victor's conduct and the aggressive nature of his conduct and words. Given that this was occurring in her dwelling, while they were alone, her fears would have been heightened. And, as mentioned above, she knew that Victor typically carried a gun, so she certainly appears to have been subjectively fearful to the extent required.

However, a reasonable person, even under the circumstances, is unlikely to believe someone merely putting their hand in their pocket was sufficient provocation for the use of deadly force (even if she subjectively believed it to be true). Had Victor pulled his hand back out quickly or taken some other action to suggest a more aggressive move, the defense would have been more reasonable.

Nevada does not recognize the doctrine of imperfect self-defense, where murder is reduced to manslaughter when a defendant honestly but unreasonably believed in the need for deadly self-defense. Thus, Danielle is likely to be guilty of second degree murder in this case.

Motion to Suppress

A warrant is generally required for any search of a home pursuant to the Fourth Amendment to the Constitution. The Amendment prohibits government searches concerning a place in which the defendant had a reasonable expectation of provide, or the physical intrusion of a constitutionally protected area. If the police did not have a warrant when conducting such a search absent exigent circumstances or an exception to the warrant requirement.

The exclusionary rule provides that unconstitutionally obtained evidence is inadmissible at trial together with all fruit of the poisonous tree - i.e. evidence obtained from the exploitation of that evidence. An exception is made when the prosecution can show that the police would have discovered the evidence whether or not they acted unconstitutionally.

Here, the police conducted a search of Danielle's home, in which she had a reasonable expectation of privacy. The police then looked into the home by coming within the curtilage of the home by climbing the fence into her backyard and looking into her windows. The police did not have a warrant for such a search; thus, the search would be unconstitutional unless there is an exception.

An exception to the warrant requirement arises for exigent circumstances where emergency aid is required. Although there is no generally emergency exception to the warrant requirement, when the police have reasonable belief that someone may be in immediate, active danger, they may enter a premises without a warrant.

Here, law enforcement were merely called when they heard yelling. It does not appear that the neighbors reported a gun shot; and, regardless, when the police arrived there was no more yelling and no apparent exigent circumstances. Thus, the search was likely unconstitutional as not within an exception to the warrant requirement, and the court should grant the motion to suppress the introduction of the gun as evidence as fruit arising from an unconstitutional search.

It's possible that the prosecution may be able to show that the evidence would have been obtained anyways, and thus it was a harmless error. However, the prosecution will need to establish facts to that effect, such as the police obtained probable cause to search the property later, the body would have obviously been found at that time, etc. If so, the court should rule that the evidence is admissible even though the search was unconstitutional.

***** Question 2 ENDS HERE *****



**FEBRUARY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 3

Question 3 - Selected Answer 1

***** Question 3 STARTS HERE *****

Billy's dealings with Pam and following the death of his uncle Ray present several ethical issues, each discussed in turn.

Competence

There are two issues presented relative to competence. First, was Billy competent to take over uncle Ray's solo practice after Ray died only two months after Billy began to practice law? An attorney in NV must provide competent representation to all clients. Competence means the legal knowledge, skill, thoroughness, and preparation necessary for representation. Here, the facts show that Billy was not a seasoned attorney when he took over the "large caseload", without the support or supervision of another attorney or adequate time. It would not be an ethical violation if Billy had taken over a caseload he could handle by thoroughly preparing. As an attorney having passed the bar, Billy could likely show he had adequate skill and legal knowledge to take on most civil cases. It does not change this result that Billy had never tried a case. However, he lacked competence because he did not prepare as reasonably necessary. This is evident from his missed deadlines.

Second, was Billy competent to represent Pam? The same competence rules apply to an individual client. Billy knew he was not competent to represent Pam because he did not have time to represent her. He therefore had an ethical obligation to withdraw.

Diligence and Communication

Attorneys must act with reasonable diligence and promptness, meaning a thorough investigation, adequate preparation, compliance with requests for information, returning calls and emails, and keeping a client informed of settlement/plea offers.

Here, Billy did not return Pam's emails after he attempted to withdraw. This was a violation of his duty to return his client's calls and emails. He also failed to adequately prepare for her case because he lacked the time to devote to it, though he attempted to cure this with withdrawal. Billy's demand for a settlement offer after he withdrew is likely not a violation of this duty, though, because Donald did not actually make an offer.

Withdrawal

Billy had a duty to withdraw from Pam's case because he was unable to handle the demands of her case (and was therefore not competent). Withdrawal is mandatory where continued representation would violate an ethical rule, physical or mental condition of the attorney renders him incompetent, the client discharges the attorney, or the client persists in a criminal/fraudulent action. Only the first is presented here, where it would be unethical to represent a client that Billy had no time for.

If the court disagrees that this is an ethical rule, however, Billy must seek permissive withdrawal with court approval. This is granted if the court is convinced it is reasonable and will not have a materially adverse effect on the client or if good cause exists. Good cause is an unreasonable financial burden on the attorney, client acting illegally, the client fails to substantially fulfill an obligation to the attorney, the client insists on an illegal objective, one that the attorney considers repugnant/fundamentally disagrees with, or uses the attorney's services to perpetrate a crime. Withdrawal is accomplished by providing timely notice to the client, promptly returning unspent fees, and all material papers.

Here, Billy has formally served the court with his signed withdrawal, which he served on Donald's attorney and Pam, his client. Serving his client and all parties is proper notice and an attempt to get permissive withdrawal approval. But it is not enough because the facts show Billy has not returned the retainer or the material papers to his client. This will not make the withdrawal ineffective if good cause exists and the client wishes to discharge Billy, but because she doesn't the withdrawal is not yet effective without court order. The court may order that Billy can withdraw because Pam has a new attorney (according to the facts), and there will be no materially adverse affect on Pam. Pam objects to the withdrawal, but the facts suggest she did hire another attorney.

On the other hand, no facts suggest good cause exists. The representation of many clients is difficult, but nothing suggests an unreasonable financial burden or that Pam failed to substantially fulfill an obligation to Billy. Nothing suggests an illegal or improper goal, or fundamental disagreement that would relieve Billy.

Billy must convince the court that his withdrawal is reasonable in that it will allow him to meet his ethical duties to adequately prepare, and that there will be no materially adverse affect on his client -- so long as she does in fact have another attorney. But until he returns her property and fee and Pam has another attorney (and discharges Billy), the withdrawal is ineffective.

Confidentiality

An attorney has a duty not to reveal information learned during the scope of the attorney-client relationship, applying to all information regardless of privilege. The only exceptions include consent (which may be implied to render effective legal services), legal advice, defending the lawyer, legal compulsion, and crime/fraud.

Here, Billy revealed to Donald that Pam might lose her house. This is information learned during the course of the attorney-client relationship and no facts indicate that she consented to him sharing this information. However, consent can be implied from representation and the context suggests that Billy was advocating for Pam when he shared this information. Since his withdrawal was ineffective until court order, he was trying to assist her in reaching settlement. While the preferred action would have been to seek her permission to share this, it is likely allowed under the rules of professional conduct because it was in service of settlement and aligned with Pam's concern with losing her house.

Billy also revealed to Donald's lawyer that the case has no evidence. This was not a 408 protected settlement communication, and would likely be unethical besides. The lack of evidence is a matter of confidentiality and implicates the duty of loyalty as well. While candor is encouraged in settlement discussions to the extent it is protected from admissibility at trial (Rule 408), this disclosure was adverse to Pam. It was therefore unethical.

Loyalty

An attorney must exercise professional judgment solely for the benefit of his client, free of compromising influences and loyalties. Billy has a conflict in that he could be sued by Pam if the case does not settle or resolve in her favor. This conflict is heightened by his attempted withdrawal from the case. Therefore, it was ethically improper for Billy to negotiate a settlement with Donald when Billy had not discussed the settlement with Pam to receive her consent and was motivated by his self-interest. Namely, he wanted to make sure Pam didn't lose her house so that she wouldn't come after Billy for malpractice. Ordinarily, an attorney's self-interest aligns with his client, but not in this case because Billy withdrew and was under threat of reprisal. Even so, Billy's actions do not conflict with Pam's interests. Therefore this conflict could be de minimis and would not be grounds for discipline.

Fiduciary Duties

Billy failed to maintain the retainer in a separate account, provide an accounting of that retainer, or at all segregate his client accounts from firm operating expenses. All client funds received must be held in a trust account and attorneys must not commingle fees with personal funds. The trust account should be an individual interest bearing account. (Had it been a short term holding of funds, the lawyer's IOLTA account would suffice). Client property must be kept in an office safe or safe deposit box, including the promissory note. Finally, Billy had a duty to keep records of the funds and return any unspent fees.

Billy violated his fiduciary duty by commingling his client funds with his firm expenses, by failing to keep an accounting of funds, by failing to return the unspent retainer, and by failing to keep the promissory note in a safe.

Supervising Staff

It is irrelevant that Billy's assistant accidentally shredded the promissory note rather than Billy. Billy, as the attorney, has the fiduciary duty to keep his client's files and papers secure. He is responsible for the actions of his staff. Therefore, Billy is to blame for the destruction of the promissory note and has violated his ethical duty to keep records for 7 years. In fact, given this specific time-based duty, it was unethical to cause his assistant to get rid of Ray's files at all.

Fairness to Adversary

When Billy encountered Donald, he violated his ethical duty to treat his adversary fairly. Every attorney has the duty not to lie to adversaries or third parties and must not use means of representation that have no other purpose but to delay, burden, or embarrass. Furthermore, an attorney cannot talk to a party that he knows is represented by an attorney without that attorney's consent. In fact, an attorney must not engage in any conduct that is dishonest, fraudulent, deceitful, or misrepresents the facts.

In the grocery store, it was Donald who approached Billy and asked about the case. Billy knew that Donald was represented because he had previously sent a withdrawal notice to Donald's attorney. When he did so, he told that attorney that the case was unsupported by the facts. But when Billy spoke to Donald in the store, he represented that his client did have strong evidence in the form of a "smoking gun" email, which he referenced in an attempt to get Donald to accept a settlement. Based on the facts provided, this statement was a lie or at least a misrepresentation. When Donald protested Billy's claim, Billy did not let him talk and told him that Pam could lose her house, which would make the claim worse for Donald. Billy does not explain how this is the case.

Speaking to Donald at all was unethical because Billy knew Donald was represented and had not received permission from Donald's attorney to speak with Donald. Although Donald initiated the conversation about the case, it was unethical to answer without permission from Donald's attorney.

It was also unethical to misrepresent the evidence in this case. An attorney is privileged to advocate for his client and need not disclose all facts to an adversary in this context, where nothing suggests non-disclosure or discovery abuse. But Billy made an affirmative misstatement of fact about a specific piece of evidence that presumably does not exist (based on Billy's claim that Ray shouldn't have taken the case). Using this lie, Billy leveraged a true statement: that Pam could lose her house. This statement is true and would be relevant if the breach of contract claim allowed for consequential damages such as the loss of Pam's home. However, the causation of that loss is unclear from the facts, other than Pam needs to win the case to keep her house. Assuming the house is relevant to the case, Billy would have been ethically permitted to raise it in

settlement discussions. Yet without Donald's attorney present and considering Billy's forceful language and behavior, this statement is most likely unethical.

Finally, assuming that Billy's withdrawal is complete, he is no longer representing Pam. If that is the case, then his conversation was unethical because it was a fraudulent attempt to mitigate Billy's own damages to Pam, not to represent Pam. Pam could not benefit from Billy's negotiations because he did not represent her when they happened, so the only interest Billy represents is his own.

Duty to follow valid procedural rules

Billy missed a few discovery deadlines after Uncle Ray died, but does this violate his duty to follow procedural rules? All attorneys have a duty to follow valid procedural rules and court orders, including those rules governing discovery deadlines and case management orders further setting forth discovery deadlines. Additionally, all attorneys have a discovery duty to make a diligent effort to comply with another party's discovery requests. This means that Billy had to file and/or respond to any discovery requests before the deadline. The facts do not state how many deadlines were missed, how egregiously, or what effect the failure had on the case and Billy's clients. It can be assumed without contradiction in the facts that Billy did not seek an extension of time from the court that would have made his non-disclosure or non-compliance acceptable. Had he done so timely (before the deadline passed), there would be no ethical issue whatsoever.

As it is, Billy failed to follow valid procedural rules and court orders, failed to comply with discovery requests, and thereby violated Nevada legal ethics. The prejudice to his client may be minimal, however, as many courts do not sanction discovery errors and non-compliance if the error is substantially justified or harmless. If the error was prejudicial to the other party, however, Billy's client could be sanctioned with attorney fees or up to dismissal of the claims.

***** **Question 3 ENDS HERE** *****

Question 3 - Selected Answer 2

***** Question 3 STARTS HERE *****

As an initial matter, Billy is a licensed attorney in Nevada. Therefore, he is subject to the Nevada Rules of Professional Conduct (NRPC) and must conduct his practice according to the NRPC.

Duty of Competence

A lawyer has a duty to use the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, and prior to accepting cases, Billy has a duty to be competent to perform the work, or become competent to perform such work without undue cost or delay to the client. Here, Billy is a newly licensed attorney that has never tried a case, and he assumed Ray's entire case load upon Ray's death. Prior to assuming all of Ray's cases, Billy should have reviewed the cases to determine that he was competent to assume the cases. In addition, Billy would be required to notify all of Ray's clients that Ray has passed and permitted the clients to seek alternative representation if they wanted.

Duty of loyalty

Billy has a duty of loyalty to all of his clients, which he has violated herein when he told Donald's attorney that Ray should not have taken Pam's case due to a lack of evidence. It does not matter that Billy attempted to withdraw from the case. Billy also impermissibly withdrew from the representation of Pam, because it was an ongoing matter, and he would have been required to seek leave of the court to get permission to withdraw. Furthermore, upon his withdrawal, he would have been required to return, within a reasonable time, any unspent fee/expense advances, and all of the client's property and material papers needed to pursue the case. Here, Billy stated he would forward the money and the note to Pam's new attorney, and not Pam. He should have returned such items and money to Pam directly, he could have given the materials to Pam's new lawyer upon Pam's request, but that was not the case herein. Billy has breached his duty of competence by accepting the large case load.

Duty of Diligence

Nevada attorneys have a duty to diligently, promptly, and zealously pursue the case to completion. Here, Billy and potentially Ray prior to his untimely demise violated this duty due to the large case load. Billy was unable to keep up with Ray's case load and he missed discovery deadlines as a result of his inability to diligently prepare the cases. It is unclear if Ray was able to keep up with his workload, but the fact pattern does not state that he missed deadlines prior to his death. Billy has therefore breached his duty of diligence.

Duty to communicate

A common complaint of client's is a lawyer's failure to keep the client updated with respect to the case status. A lawyer must keep the client informed about the case, answer client communications in a timely manner, and convey settlement and plea offers to clients. Here, Billy never replied to Pam's emails regarding his withdrawal in violation of his duty to communicate with his clients. In addition, Billy did not notify other clients regarding the death of Ray, and did not update client's on their cases as evidenced by the missed discovery dates. Therefore, Billy has breached his duty to communicate with clients.

Financial Duties - Client Property

In Nevada, a lawyer has a duty to safeguard client property. If the attorney has client money (in the form of a retainer or otherwise) the lawyer has an obligation to keep such money separate from the law firm or lawyer's operating fund in a trust account bearing interest. Here, while it appears as though Ray did this previously, Billy moved all of the money from the client funds to the firm's operating account to cover overhead, which was an impermissible use of the funds. In addition, Billy did not have an accounting of Pam's retainer, which is also a violation of his obligation to track the client funds.

It is also unclear from the fact pattern whether the client's were clear about the fees to be charged, which may violate the duty to explain the amount and basis or rate of the fee within a reasonable amount of time of taking on a client, which should preferably be in writing.

Duty to supervise

A lawyer has a duty to supervise staff that is owed to clients. In Nevada, lawyer's have a duty to supervise non-lawyer staff in the operations. Here, Billy has breached this duty when Billy's assistant shredded the original promissory note when she was cleaning out Ray's office. Billy should have supervised the assistant's cleaning of the office more closely and should have confirmed that the assistant knew the importance of retaining client files and documents that were likely to be in there. As Billy failed to oversee the assistant's clearing out of Ray's office, he has breached his duty to supervise.

Duty of confidentiality

A lawyer has a duty of confidentiality that is owed to his clients. Nevada lawyers cannot reveal any information that is protected by the attorney-client privilege or any information gained through the professional relationship that either would harm or embarrass the client; or the client has requested be kept confidential. Here, Billy breached this duty of confidentiality when he spoke with Donald's attorney and stated that there was a lack of evidence (which would certainly harm Pam). He also violated this duty of confidentiality when he mentioned to Donald at the grocery store that Pam was going to lose her house, a statement that Pam made to Billy to let Billy know the significance of the case to Pam and her livelihood.

Duty of fairness

A lawyer has a duty of fairness that is owed to the court and the opposite parties. A lawyer must not engage in conduct involving dishonesty, fraud, or misrepresentation. Here Billy has been blatantly dishonest with Donald, a party he knows to be represented (separately discussed below), by a) not notifying Donald he no longer represented Pam and was unable to say anything more, and b) stating there was a smoking gun email - which from the fact pattern, and Billy's previous claim to Donald's attorney regarding the lack of evidence does not exist. Here, Billy's action's violate his duty of fairness and candor.

Speaking with parties known to be represented

A lawyer in Nevada has a duty of decorum that is owed to opposite parties. As a result, a lawyer may not speak directly with a person opposite them in a case if they know such person is represented by counsel. Here, Billy clearly knew that Donald was represented by Donald's attorney, as he previously communicated with Donald's attorney. However, notwithstanding this knowledge, Billy spoke with Donald directly in a grocery store without Donald's attorney present. Therefore, Billy breached his duty to not discuss an ongoing legal matter with a party he knew to be represented.

Ray's Death

Ray may have breached his duty of loyalty owed to client's by failing to plan for his death. More facts would be needed to determine this, but Ray was a solo practitioner in Nevada, and it does not appear that he properly planned for his death by creating a contingency plan for continuing representation of his clients.

Ray may have also failed to supervise Billy during the month's preceding Ray's death as Billy was a newly licensed attorney and the fact pattern states that Billy and Ray "partnered" together which may have suggested to outsiders that Billy and Ray were equals.

As a self-regulated profession, Billy also has a duty to report violations of the NRPC to the Nevada State Bar. Based on the multiple violations, Billy has committed above, he will be required to report himself for the violations he has committed.

***** **Question 3 ENDS HERE** *****



**FEBRUARY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 4

Question 4 - Selected Answer 1

***** Question 4 STARTS HERE *****

1. Bill's Former Lawyer's Testimony:

This testimony is likely inadmissible. Evidence is admissible if it is relevant, there is a proper foundation for the evidence, and there is no basis for exclusion of the evidence. Evidence is relevant if it tends to prove a fact in consequence. Bill's former lawyer's testimony is relevant because it tends to prove that Bill committed the robbery because it establishes that Bill buried the gun used in the backyard in his backyard. There is a proper foundation for the evidence because Bill's former lawyer has personal knowledge that he notified the sheriff's office that they could find the gun. Note that this is likely not hearsay, which is generally admissible, because it does not appear that it is an out of court statement used for the truth of the matter asserted, because the former lawyer is not testifying to what Bill told him, rather simply that he notified the sheriff's office that they could find the gun. However, if he does testify about a conversation with Bill, this would be an out of court statement used for the truth of the matter asserted (statement with Bill during consultation, used to show where the gun is). That being said, an opposing party's statement is not hearsay under the rules, and because Bill is a party opponent as the defendant, this is not hearsay. However, there is likely a basis for exclusion of this testimony. A privilege can only be asserted by the holder. To be privileged, a communication must be shown or presumed to have been made in confidence. An attorney-client privilege exists and applies to confidential communications between the attorney and client made during professional legal consultation. Here, Bill may assert the privilege, as he told his lawyer what had happened during the course of legal consultation, when he retained him immediately after the robbery. Therefore, though this evidence is relevant, it is inadmissible if Bill asserts the attorney-client privilege.

2. Bill's Neighbor's Testimony:

This testimony is likely inadmissible. This evidence is relevant because it tends to prove that Bill was at least thinking about committing a robbery by asking the stepson to help him, and thus tends to make it more likely that Bill committed the robbery. There is proper foundation because Bill's neighbor has personal knowledge of his conversation with this stepson. See hearsay rule statement above re: elements. Hearsay is generally inadmissible unless an exception applies. This conversation would be hearsay. In fact, because there are two statements of hearsay within this testimony, an analysis is required for each conversation. First, the conversation in which Bill asked the stepson to help is hearsay, because it is an out of court statement, offered for the truth of the matter asserted, that is, that Bill asked him to help with a robbery. However, as described above, statements of party opponent's are not hearsay, and thus, this conversation would not be excluded. Second, the conversation between Bill's neighbor and his stepson is also hearsay, because it is an out of court statement, in which the stepson told Bill's neighbor that Bill asked him to help and he refused. However, an exception may apply. When a declarant is unavailable, and the declarant makes a statement against their pecuniary, proprietary, or penal interest (or in NV, social interest as well, the testimony will be admitted. A declarant is unavailable for reasons including if they are absent and beyond the reach of the court's subpoena. Here, the stepson has left the state and his whereabouts are unknown. It is unclear if the court has attempted to subpoena the stepson, but assuming he has, he would likely be considered unavailable under this rule. However, it is not likely that he made a statement against his penal interest because although he has had minor brushes with the law, and Bill had asked him to help with the robbery, he claimed that he had refused to participate. Therefore, although the stepson is likely unavailable under the rule, he did not actually make a statement against his own penal interest, and this exception will not apply and this is inadmissible hearsay. There is a catch all exception under Nevada Law, that states that hearsay statement may be admissible if its nature and the special circumstances under which it was made offer strong assurance of accuracy and the declarant is unavailable. However, though Bill's neighbor's stepson is unavailable, this does not seem to rise to the level of offering strong assurances of accuracy, and thus, will also not be admitted under this catch all exception.

3. Whitney's Testimony and Admission of 911 call:

This testimony is likely admissible for impeachment purposes or an excited utterance for substantive purposes, though it is hearsay. This testimony is relevant because it tends to establish whether Bill was fleeing the scene of the robbery. There is proper foundation because Whitney, as a witness to the scene of the crime, has personal knowledge of what occurred. The prosecution seeks to admit a recording of Whitney's 911 call, which is relevant for the same reasons described immediately above. This evidence is hearsay, because it is an out of court statement offered for the truth of the matter asserted, that Whitney screamed that she saw Bill.

This evidence may potentially be used for impeachment purposes or substantive purposes. If it is used for impeachment purposes, though under traditional rules prior inconsistent statements must be made under oath, in Nevada, a testifying witness' prior inconsistent statement is not hearsay even if it wasn't made under oath. Therefore, because the statement made to the 911 operator was inconsistent with her testimony, and though not made while under oath, it may be used to impeach her (even though it was not made under oath).

If it is used for substantive purposes, another hearsay exception may apply as a present sense impression or an excited utterance. Statements made concurrently with the perception of the event described are present sense impressions. Here, it appears that Whitney's testimony happened immediately after the robbery, thus it did not happen concurrently and will not be admitted under the present sense impression exception. However, it may be admitted under an excited utterance exception. An excited utterance is a statement made while under the stress of excitement of a startling event. Here, witnessing a robbery after being knocked down and immediately calling 911 after would likely qualify as still being under the stress of excitement of the robbery, and therefore, Whitney's 911 call may be able to be used for substantive evidence purposes as well as impeachment purposes.

4. Bill's Former Neighbor's Testimony:

This testimony is relevant because it tends to establish that Bill has a propensity for being violent and committing robbery because Bill allegedly pulled a gun on him and took his speaker tending to prove that it is more likely that Bill committed the robbery. Evidence of any crime, wrong, or act is generally not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. However, this evidence may be admissible for

another purpose, such as proving motive opportunity intent preparation plan knowledge identity absence of mistake or lack of accident. For this type of evidence, the court must hold what its known as a "petrocelli" hearing outside of the presence of the jury to determine whether it is relevant for a non propensity purpose and that the probative value is not substantially outweighed by the danger of unfair prejudice. Here, the prosecution could argue that the fact that Bill committed a robbery in the past establishes identity because he has committed it in the past. However, this is a weak argument as Bill did not have any type of signature that would tend to prove this robbery in particular, and therefore, this character evidence would likely be inadmissible as substantive evidence.

Moreover, the prosecution could try to argue that the testimony could be offered for impeachment (not substantive evidence), as a witness may be interrogated upon cross examination with respect to an act of misconduct. However, the act of misconduct must be probative of truthfulness, which is not the case here, since it was a robbery, which is not probative of truthfulness such as fraud.

5. Hospital Worker's Testimony:

This testimony is relevant because it tends to establish that Bill slammed into Tom after he committed the robbery, ultimately killing him. There is proper foundation because the hospital worker has personal knowledge that this is what Tom said. This testimony is hearsay because it was made at the hospital and is being offered for the truth of the matter asserted, that Tom died after committing the robbery.

The prosecution could try to argue that this is a dying declaration and an exception to hearsay. In all criminal or civil cases (in Nevada), a statement made while an unavailable declarant believed death was imminent (which, in Nevada, does not need to concern the cause of circumstances of the impending death) can be admitted as an exception to hearsay. Here, Tom died so he is unavailable. However, it is unclear that this was made while Tom believed death was imminent, so the court would need more information as to Tom's state of mind when he made the statement, and whether he believed death was imminent, to determine whether this is admissible.

The prosecution could also try to argue that this was a statement of medical diagnosis or treatment and an exception to hearsay. Under this exception, statements of past or present physical condition, or cause of the condition, made for the purpose of diagnosis or treatment are admissible even though hearsay. Here, it is again unclear whether this statement was made while the hospital worker was rendering diagnosis or treatment to Tom, so the court would need more information to determine whether this is admissible.

6. Expert Testimony:

This evidence is relevant because it tends to establish that the gun found in Bill's backyard was not used in the robbery and that Bill may not have committed the robbery. The question is whether there is proper foundation. For expert testimony to be admissible, the subject matter must be one where scientific, technical, or other specialized knowledge would assist the trier of fact; the opinion must be based on sufficient facts or data; the opinion must be the product of reliable principles and methods; and the expert must have reliably applied the principles and methods to the facts. The witness must be qualified as an expert, meaning, they possess special knowledge, skill, experience, training, or education. Trial judges in Nevada have wide discretion in deciding what favors are to be considered on a case by case basis. Here, this subject matter would assist the trier of fact in determining how long the gun had been in the back yard. Additionally, it appears that the opinion that the gun had been in the ground for at least a year before the robbery is based on sufficient facts or data, based on the expert's "new" forensic process. However, the opinion must be the product of reliable principles and methods, and it is unclear whether this "new" forensic process is actually reliable, so the court would likely want more information as to what this process actually entails to make this determination. Lastly, it appears that the expert applied the methods and principles to the facts, however, because the expert is using a new process, the court will want more information as to what this entails and if it is based on reliable principles and methods before determining that the expert's testimony is admissible.

***** Question 4 ENDS HERE *****

Question 4 - Selected Answer 2

***** Question 4 STARTS HERE *****

1. Bill's former lawyer's testimony that after talking to Bill about the charges, the lawyer notified the sheriff's office they could find the gun used in the robbery buried in B's backyard.

The issue is whether the lawyer may testify about talking to Bill and about where the gun was buried.

A. The attorney-client privilege

The issue is whether there was an attorney-client relationship that would support the privilege.

Under the attorney-client privilege, privileged communications between a lawyer (and/or his representative/ agent) and a client (and his representative/ agent) are privileged from disclosure, even when requested by the State. That privilege persists even after the termination of the attorney-client relationship. The client holds the privilege.

To establish an attorney-client relationship, the purported client must prove: (1) an attorney-client relationship exists (from the client's perspective, and it may be implied by conduct; (2) there is a communication between the attorney and client (or their agents); (3) that the client intended to keep confidential; and (4) the communication happened where the client had a reasonable expectation of privacy.

Here, B retained a lawyer and told him what happened. The facts also state that the lawyer later terminated the relationship. This suggests that an attorney client relationship was formed, either expressly or impliedly. B told the lawyer what happened after he retained him, and it is assumed that B intended to keep that communication between him and his attorney confidential. Finally, it is assumed, based on the absence of facts to suggest otherwise, that B communicated this information in a place in which he held a reasonable expectation of privacy.

Therefore, there is an attorney-client relationship. Thus, even if the lawyer terminated the relationship, B can still invoke the privilege to prevent his former attorney from testifying about the confidential information.

B. Exceptions

The next issue is whether an exception applies that would allow the attorney to provide the desired testimony.

(1) Furtherance of Criminal Activity

Under this exception, if the client asks the attorney for advice on how to commit a crime or to evade detection, then the communication is no longer privileged.

Here, B told the attorney what happened only after the crime had occurred.

Therefore, this exception does not apply and the attorney is barred by the privilege from so testifying, unless the second exception applies.

(2) Dispute between Client and Attorney

Under this exception, if a dispute between a client and an attorney arises, and the client puts that at issue in the current case, or if there is a later lawsuit regarding the attorney's representation of the client, then evidence relevant to that dispute would be admissible (not privileged).

Here, there was a dispute between B and the attorney. The dispute was about the attorney's retainer--not the attorney's services or representation of B.

Therefore, this exception does not apply, and the communication is privileged.

C. Conclusion

Under the privilege, the attorney's testimony is inadmissible because there was an attorney-client relationship and no exception applies.

2. Bill's neighbor's testimony that his stepson told him that B asked him to help with the robbery but that the stepson refused.

The issue is whether this statement is hearsay, and if so, whether an exception applies.

A. Hearsay

Generally, hearsay is inadmissible. Hearsay is an out of court statement offered to prove the truth of the matter asserted--meaning to prove the content of the statement. A statement is a person's oral assertion, written assertion, or any nonverbal assertive conduct if intended as an assertion.

Here, the neighbor will testify that his stepson had the conversation with B. Thus, the statement is double hearsay. In this instance, the statement is an out of court statement. If the prosecution intends to offer it to prove that B said those words, then it would be hearsay. However, if the State offers the statement to prove that B planned to rob the bank or had the intent to do so, or for any other purpose than to prove the truth of the matter asserted, it is not hearsay. If offered for motive, intent, plan, etc., then the statement would be admissible under the hearsay rule because it is not hearsay. The facts do not state the State's motives for offering the statement.

Therefore, assuming it isn't offered for the truth of the matter asserted, the statement is admissible as non-hearsay. However, for the sake of argument, the below assumes that the statement is hearsay.

B. Exemption/ Exceptions to Hearsay

The next issue is whether an exemption/ exception applies that would admit the presumed hearsay statement.

(1) Double hearsay

As mentioned above, this is double hearsay and an exception must apply to both parties to be admissible.

(2) Opposing Party Statement

Under this exemption, an opposing party's statement may be admissible if offered by the opposing party against the declarant.

Here, B is the original declarant. However, the neighbor is testifying that to what his stepson said, so the stepson is the declarant. The State is offering the statement against B.

Therefore, this exemption may allow admission of the statement, if the neighbor's testimony as to that statement meets an exception or exemption.

(3) Nevada's General Exemption

Under this exemption, if the nature of the statement and the circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available.

Here, B allegedly told the stepson, who then told the neighbor, that B intended to commit the robbery. Given that B did end up robbing the bank, it is likely that some circumstances support that the statement was accurate when made, regardless of whether the stepson or B is called to testify. However, it is also the case that, because it is double hearsay, there are circumstances that cast doubt on its accuracy.

Therefore, it is likely that the statement may be admitted under this exemption.

(4) Exceptions

(a) Then-existing mental, emotional, or physical state of mind

This exceptions allows statements that show intent, motive, or descriptions of physical symptoms to be admissible.

Here, the statement is about B's intent to rob the bank.

Therefore, this exception would apply to admit the statement if the stepson was testifying-but not from the neighbor.

(b) Unavailability Exceptions

To be admissible under one of these exceptions, the declarant must be unavailable. A declarant is unavailable if he is exempted from testifying based on a privilege, refuses to testify despite being subpoenaed to do so, testifies that he has near total memory loss, cannot be present to testify at the trial or hearing because of death, a then-existing infirmity, physical illness, or mental illness, or is absent from the hearing or the declarant has not be located despite the proffering party's reasonable attempts to do so.

Here, the stepson is unavailable--although it is not clear why. It will be assumed that he meets the unavailability requirement. Further, it is unclear whether B will invoke his Fifth Amendment privilege and not testify, so it is assumed that he is unavailable.

(i) Statement Against interest

Under this exception, the declarant must be unavailable, the statement made was against the interest (pecuniary, penal, or proprietary) when made, no reasonable person would have made it unless he or she believed it to be true because it exposed him or her to liability, and the statement is supported by corroborating circumstances that clearly indicates its trustworthiness (in a criminal case).

Here, both the son and B are unavailable. However, when the son made the statement, it was not against his penal interest--the son stated that he refused to participate. Therefore, he could not be liable for the robbery or a conspiracy. When B made the statement it was against his penal interest, because it amounted to an attempted conspiracy or solicitation.

Therefore, the statement is inadmissible under this exception (because the stepson's statement to the neighbor does not meet the exception).

(c) Catch-all Exception

If a statement is trustworthy, material, and should be admitted in the interests of justice, then it may be admitted under the catch all exception.

Here, the statement appears reliable because B's intent to rob the bank came to fruition. However, the stepson is not available to testify, which makes it less reliable.

Therefore, it is likely that the statement is not admissible under this exception.

C. Confrontation clause

The issue is whether the Confrontation clause bars its admission

Even if a hearsay statement is admissible, it must not be admitted if the statement is testimonial and the declarant will not testify. A statement is testimonial if offered to LEOs for the purpose of furthering arrest or criminal prosecution.

The neighbor's statement (containing the son's statement) would not be admissible because the initial declarant, the son, cannot be cross-examined by B, which violates his right to confront witnesses.

Therefore, this Clause bars admission.

Conclusion

The statement may not be hearsay. If it is, it may be admitted as an exemption to hearsay under the Nevada rule--but it is likely that it would not be admitted because the statement violates the confrontation clause.

3. Recording of Whitney's 911 call immediately after the robbery.

The issue is whether this is hearsay, and if so, whether it meets an exception. Also, note that this statement may be admitted as impeachment evidence.

A. Hearsay

[see rules above]

This statement is hearsay because it was made by Whitney (W) who is the declarant, and the State appears to be offering it to prove that W did see B fleeing the scene.

Therefore, it is hearsay and must meet an exemption/ exception to be admitted.

B. Nevada's General Exemption

[see rules above]

It is likely that this statement would be admissible under this exemption as non-hearsay because W was stating the facts as she saw them at the time to the 911 operator and that statement was recorded in her voice.

Therefore, the exemption applies.

C. Present Sense Impression Exception

Under this exception, regardless of W's availability, a statement describing or explaining an event made while or immediately after observing the event is admissible.

Here, W was explaining the events as they were unfolding--that she saw Bill fleeing the scene.

Therefore, this exception applies.

D. Excited Utterance Exception

To be admissible under this exception, the statement must be related to a startling event made while under the stress of excitement.

Here, W called 911 after seeing the bank robbery, which to a reasonable person would be startling to witness. Further, it states that she was screaming, indicating that she was under stress of excitement when she made the call.

Therefore, the statement is admissible under this exception.

E. Confrontation Clause

W is on the stand so there is no issue here--the statement may be admitted.

F. Conclusion

The statement may be admitted for impeachment and substantively under the present sense impression and excited utterance exceptions, and likely through Nevada's general exemption.

4. B's neighbor's testimony that 3 years earlier, B pulled a gun on him and took his wireless speaker.

The issue is whether this character evidence is admissible.

Generally, character evidence is inadmissible to prove propensity. However, in a criminal case, a D may open the door with evidence of his good character, which the State may rebut. Also, the Mimic Exception allows character evidence that relates to motive, intent, absence of mistake, identification, or common plan/ scheme.

There are no facts to suggest that either exception to the general rule applies.

Therefore, this evidence is inadmissible.

5. Hospital Worker testimony that Tom told her that Bill slammed into him after committing the robbery.

The issue is whether this hearsay statement is admissible.

A. Hearsay

[see rules above]

This statement is hearsay because it is presumably being offered to prove that B slammed into Tom.

Therefore, it must meet an exemption or exception.

B. Nevada's general exemption & Confrontation clause

[see rules above]

Even if this statement is sufficiently reliable, it will be barred by the Confrontation Clause because Tom died and he was the declarant.

Therefore, this exemption may apply but the confrontation clause will bar its admission.

C. Statements made for medical care exception

Under this exception, to be admissible, the statement must be made for and reasonably pertinent to medical treatment or diagnosis and describe medical history, past, present symptoms, or the onset of past or present symptoms or their general cause.

Here, the statement being offered does not relate to medical treatment because it includes an identification of the assailant. However, the court may issue a limiting instruction, but that's unlikely here.

Therefore, this exception will apply.

D. Dying Declaration Exception

Under this exception, the declarant must be unavailable [see rules above]. Also, the case must be a homicide case, and the statement must be made by the declarant while he believes his death is imminent and it concerns the cause of death.

Here, Tom told the nurse that B slammed into him, which may be admissible if he believed that his death was imminent. The facts are absent.

Therefore, this exception will apply, subject to a limiting instruction.

E. Confrontation Clause

The confrontation clause will not be triggered by a limiting instruction that removes the identification of B.

F. Conclusion

This statement may be admissible under the dying declaration exception, only if a limiting instruction is issued.

6. Expert testimony about new forensic process to show that B's backyard gun is not the robbery gun because the gun was in the ground for a year.

The issue is whether the expert is qualified.

All experts must be qualified to testify, which may happen after an attorney lays the foundation of relevant qualifications. Here, the facts do not state this was done, and if not, the testimony would be inadmissible. It will be assumed it was done.

In Nevada, an expert must be qualified in the area of scientific, technical, or other knowledge, the knowledge must assist the trier of fact, the testimony must be limited to that scope. This is subject to the judge's discretion.

Here, it is likely that with enough foundation, the expert's testimony will be admissible.

***** **Question 4 ENDS HERE** *****



**FEBRUARY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 5

Question 5 - Selected Answer 1

***** Question 5 STARTS HERE *****

(1) The Contract and Its Terms:

Yes, Paulie and DI have an enforceable contract. A contract requires an offer, an acceptance, and consideration. Moreover, this is a contract governed by UCC Article 2 because it involves the sale of goods (property that is movable at the time it is identified to the contract).

The offer occurred when Paulie sent his March 1, 2022 email to DI requesting 5,000 tomatoes at a price of \$100 per bushel.

The acceptance occurred when DI responded to Paulie's email agreeing to all of Paulie's terms.

Under traditional common law principles, an acceptance is ineffective unless it exactly matches the offer. In other words, if an attempted acceptance governed under common law principles contains different or additional terms, it is actually not an acceptance at all but a rejection and counteroffer.

The case is different under UCC Article 2, however. Under Article 2, an acceptance that adds additional terms is permissible and, as between two merchants (i.e. people in the business of dealing in goods of the kind at issue), additional terms in an acceptance are added into the contract so long as they don't materially alter the original terms of the offer, like by changing a party's risk or remedies.

Paulie appears to be a merchant (a professional pizza chef who probably regularly buys tomatoes) and so does DI (a business that apparently regularly deals in selling and shipping tomatoes). The additional 5% price increase for labor costs probably did not constitute a material change. So since Paulie did not object within a reasonable time after receiving the acceptance with the additional term, the two of them have a contract that includes the 5% price increase term specified by DI.

Consideration is easily satisfied here because Paulie promised to pay money and DI promised to send tomatoes. A promise for a promise is sufficient consideration to support a contract.

(2) Effect of DI's Statement and Paulie's Response:

DI's statement indicated a prospective possibility that DI would be unable to perform in accordance with the terms of the contract it was bound to. When person anticipatorily repudiates a contract--that is, when they give an unequivocal indication that they cannot or will not perform--the other party to the contract can treat the anticipatory repudiation as a breach and may elect to sue immediately, wait to sue until the performance date passes, or rescind the contract and treat it as discharged.

Here, DI's statement was not an anticipatory repudiation because it was equivocal and uncertain. It was possible that DI could perform, but DI was not sure. Under these circumstances, the other party (in this case, Paulie) was entitled to demand "adequate assurances" that performance would be forthcoming. That's what Paulie did when he sent his email saying "I need a firm commitment by July 1[.]" But DI simply responded with "standby" instead of providing adequate assurances that it would perform.

When a party to a contract fails to provide adequate assurances in response to a properly made request (such as here), this situation is treated as an anticipatory repudiation (discussed above). Thus, Paulie had a right to elect to sue, wait until the performance date passes and then sue, or he could rescind the contract and treat it as discharged, which appears to be what he did here.

(3) Paulie v. DI

Paulie will probably bring a breach of contract claim against DI to try to recover some or all of his losses from this whole ordeal. He has a good breach of contract claim due to DI's failure to provide adequate assurances when it was legally required to do so. Moreover, DI never delivered any tomatoes.

DI will probably argue that Paulie was never entitled to seek cover because he failed to notify DI of his intent to do so. Because of this, DI still believed that Paulie wanted the tomatoes and detrimentally relied on that idea by procuring the tomatoes by July 14th, only for them to be destroyed in an accident.

DI may also argue that its performance was excused due to Impracticability. Under contract law principles, a party may be excused from performing under a contract if they encounter extreme and unreasonable difficulty and/or expense, and the non-occurrence of that extreme difficulty was a basic assumption of the contract.

Here, DI's June 2nd email indicated that drought and heavy rain had slowed the tomatoes' ripening. This could be a defense against paying damages to Paulie, but Paulie was still entitled to seek cover (i.e., another contract for replacement tomatoes) under the circumstances.

DI might also try to argue that performance was completely impossible which, if true, could be a valid defense to performance. However, this defense is unlikely to be successful because the defense of impossibility requires that performance is "objectively" impossible--meaning it would be impossible for anyone, not just the specific party who is trying to raise the defense. If the drought and heavy rain was, for example, affecting every tomato farmer in the country, this could be a good defense. But the facts do not indicate that this is the case, so this is probably subjective impossibility (perhaps it is a regional issue) and if so, DI's performance will not be excused on this ground.

(4) DI v. Paulie

DI might also claim breach of contract due to the fact that Paulie failed to notify DI that he was seeking replacement tomatoes, leading DI to still gather the tomatoes by July 14th, only for them to be destroyed.

However, DI is probably not going to succeed if it tries to recover the cost of the lost tomatoes from Paulie. The facts indicate that DI agreed to "deliver the tomatoes to Paulie's facility in Reno[.]" Therefore, this was a delivery contract. Under a delivery contract, the seller bears the risk of loss until the goods are tendered to the buyer at the agreed-upon destination (in this case, Paulie's facility in Reno). Since the goods were destroyed en route to Paulie's facility, and delivery had not yet been tendered, DI still bore the risk of loss and cannot recover the cost of the loss from Paulie.

(5) Damages Analysis

Before analyzing the parties' potential damage claims individually below, it is important to note that in contract disputes, the general type of damages that are permissible are "expectation damages"--those damages necessary to give the the parties the "benefit of the bargain" that agreed to, had everything gone according to plan.

Paulie's Damages:

As noted above, because DI failed to provide adequate assurances when he was legally required to, Paulie was within his rights to treat the contract as breached and discharged, and to seek cover by contracting for the tomatoes from someone else.

When someone breaches a contract (as DI did here) and the other party obtains cover, their typical measure of damages is the cost of cover minus the contract price. Here, Paulie initially agreed to purchase 5,000 bushels at a price of \$100 per bushel (total of \$500,000), but later had to purchase the 5,000 tomatoes from someone else for a cost of \$120 per bushel (total of \$600,000). Thus, Paulie had to spend a total of \$100,000 extra (above and beyond the initial contract price) to obtain cover. That additional \$100,000 would be the damages Paulie is entitled to.

Paulie may also want to argue that he is entitled to receive consequential damages for the lower sales he had at the festival due to the apparent low quality of the replacement tomatoes. However, consequential damages such as these are generally only recoverable if they were foreseeable to a reasonable person at the time the contract was entered. Here, it may have been reasonably foreseeable to DI that failure to deliver tomatoes could result in poor sales if Paulie was unable to obtain

cover, but it was probably not foreseeable that Paulie's only option when seeking cover would be lower quality tomatoes. Therefore, Paulie probably will not be able to recover consequential damages for the lower than normal sales.

DI's Damages:

As discussed above, DI will seek to recover from Paulie to make up for the lost tomatoes. If Paulie had borne the risk of loss (which he did not, as discussed above), he would need to pay the agreed upon contract price of \$500,000 (plus the additional labor charge he agreed to under the contract) even though the tomatoes were destroyed en route, which is what DI would sue him for. But as discussed above, DI still bore the risk of loss so DI cannot recover. Moreover, DI cannot recover the additional labor charge because Paulie properly rescinded the contract after DI failed to provide adequate assurances.

In his own defense, Paulie would point out that DI bore the risk of loss. He might also argue that DI should not be allowed to enforce the contract it breached.

***** **Question 5 ENDS HERE** *****

Question 5 - Selected Answer 2

***** Question 5 STARTS HERE *****

Governing Law:

Two types of law govern contracts (1) the common law; and (2) the uniform commercial code ("UCC"). The UCC covers contracts for "goods." A good is anything that is tangible and moveable. The common law governs all other matters (e.g., services).

Here, the contract was for the delivery of tomatoes. Tomatoes are considered goods. Therefore, the UCC will apply to this transaction.

(1) Enforceable Contract between Paulie and DI

Formation: A contract requires three elements: (1) offer; (2) acceptance; and (3) consideration. An offer is a manifestation of intent to enter into a bargain. An offer requires definite and certain terms and communication to the offeree. Acceptance is the manifestation of assent to the terms of an offer. Consideration is a bargained for exchange of legal detriment. Each is discussed below.

Offer: The UCC has liberalized terms of an offer. An offer is construed as inviting acceptance in any manner and reasonable under the circumstances. Under the UCC an offer must contain two things (1) a quantity terms; and (2) identification of the subject matter. An offer may also be something as simple as a purchase order. Here the facts indicate that Paulie emailed a purchase order form for \$5,000 bushes at \$100 a bushel. The offer also indicated that the items should be delivered to the facility by a date certain. Accordingly, an offer was made.

Acceptance: The UCC has also liberalized the requirements for acceptance. Under the common law acceptance had to be the "mirror image" of the offer. Any different terms were considered a rejection and counter-offer. Under the UCC acceptance is valid even if the acceptance communicates terms which are additional to or difference from the terms offered. Here, there was a valid acceptance. DI responded to the purchase order and agreed to the terms but added a charge for increased labor. Whether these terms became part of the contract does not affect acceptance.

Battle of the Forms: The Battle of the forms rule, will determine what the terms of the contract are. The outcome is dependent on whether the parties are merchants. A merchant is a person who deals in goods of the kind or holds themselves out as having specialized knowledge in the field. If the one party or more is *not* a merchant any additional term is merely a proposal and will not become part of the contract unless the other party assents. If both parties are merchants, the additional terms automatically becomes part of the contract unless (1) the offer expressly limits the terms of acceptance; (2) the term is a material alteration; or (3) the party objects to the additional term. Additionally different terms are treated in different ways. Generally a term which is different cancels the term out in the contract.

Here, the parties were likely both merchants. Paulie is a world renowned pizza chef and appears to regularly submit large orders of tomatoes. DI imports the tomatoes and clearly deals in goods of the kind. Accordingly, both parties are likely merchants. This would likely mean that the 5% increase (to the extent is not argued to be a price term different than that offered) likely becomes part of the contract. If it is determined that Paulie is not a merchant. The 5% does not come in. All other terms would be those included in the offer.

Consideration: Here, both parties gave consideration. Paulie offered to pay the agreed upon price. DI offered or promised to perform. The elements are met.

Here, a valid contract was formed and the terms are those of the offer and acceptance.

(Note: The statute of frauds is not at issue. The facts indicate that the parties entered the agreement in writing. There is no indication of signature, but the exchange of emails likely suffice).

(2) Effect of DI's Statement that Delivery May be Late and Response:

The effect of DI's statement of late delivery may be an anticipatory repudiation. And the response may be a demand for adequate assurances.

Anticipatory Repudiation: An anticipatory repudiation is an unequivocal expression by one party occurring before the time performance is due, that they will not perform under the contract. Once a party has repudiated the responding party may take four courses of action: (1) sue immediately for breach; (2) suspend its own performance; (3) treat the contract as discharged; or (4) urge performance.

Adequate Assurance: Where the conduct of one party is not unequivocal enough to rise to the level of anticipatory repudiation, but does cause reasonable grounds for insecurity, the insecure party can demand adequate assurances of due performance. This must usually be done in writing. A repudiation of the contract will arise where the party does not respond within 30 days.

Here, it is hard to argue that DI's statement was a repudiation. Rather the statement was equivocating and suggested that he "may" not be able to fulfill the order and to "standby." Therefore, it is unclear whether initially this permitted Paulie to take other measures. However, the statement did rise to the level of permitting Paulie to make a demand for adequate assurances. The statements reflected an inability to comply. Paulie had the right to wait and if a change would be made. After the 30 days of lapse (June 2nd to July 2nd.) Paulie was able to treat the contract as breached.

Modification: Is worth noting that there was no modification of contract. There may have been had Paulie accepted the terms, but he did not. There is no evidence that DI should be able to treat the silence as acceptance.

The effect of this conversation was merely that Paulie had the right to demand adequate assurances.

(3) Claims Paulie Can Raise against DI and Defenses Thereto:

Paulie may be able to claim breach of contract against DI. DI may be able to use the defense of impossibility or frustration of purpose, but these will likely fail.

Perfect Tender: The UCC applies the perfect tender rule. This means that the good must not fail to conform to the contract in any respect. If the goods (including delivery) do not conform the non-breaching party may (1) reject the whole; (2) accept the whole; or (3) accept any portion thereof. A party has a right to correct non-conformity if the time for performance had not passed.

Here, Paulie may argue that DI repudiated the contract and therefore he would be able to sue for damages. Paulie may also argue that the contract was breached when the goods were not delivered on the 15th.

Impossibility Defense: This occurs when a supervening event makes performance impossible and thus discharges performance. The event must be that neither party assumed the risk and performance must be impossible. Here, this will likely not be met. Although the goods were destroyed (a usual ability to use the defense of impossibility) DI assumed the risk of transporting the goods. (Discussed below).

Impracticability: This occurs when events that the parties assumed would not occur make the performance extremely unreasonable or difficult. This must be a basic assumption of the contract and the parties must not have assumed the risk. For similar reasons, this defense will not be available to DI.

Frustration of Purpose: This occurs when a party's purpose for entering the contract is totally destroyed. It must not be foreseeable and frustration purpose. Again, this will likely fail.

(4) Claims DI can raise against Paulie and Defenses Thereto:

DI will likely claim a breach of contract for failure of Paulie to remit payment.

Paulie will argue that there is not breach because DI did not deliver the goods and the risk of loss had not yet passed.

Risk of loss: Here, Paulie will likely succeed on a theory of risk of loss. Under the UCC either the buyer or the seller will bear the risk of loss of the goods in transit depending on the terms of the contract. Here, the contract required delivery to Paulie's place of business. Accordingly, the risk of loss stayed with DI until the goods were tendered to Paulie. Because the goods were damaged and lost in transit, Paulie's obligation to pay had not become enforceable.

DI bore the risk of loss and Paulie has a valid defense.

(5) Damages Paulie and DI will Seek & Likelihood of Success:

Paulie Damages:

Cover Damages: Paulie will likely be able to recover cover damages. Under the UCC if a party fails to comply with the contract he or she can seek cover damages (e.g., the cost of reasonable replacement). The replacement must be of a similar type and quantity and must be reasonable. Here, Paulie will likely be entitled to these damages. The facts indicate that he purchased a lesser tomato for more money. Under the circumstances, however, with the little time Paulie had to seek replacement and the shortage of tomatoes cover was likely reasonable.

Incidental Damages: Paulie can also recover incidental damages (e.g., those always accompanying breach). This may include, for example, shipment costs of the new order.

Consequential Damages: Paulie may seek consequential damages for the decreased income based on the lesser quality pizza. These must be a foreseeable consequence of the action. Here, DI had no reason to know what the tomatoes were for. Moreover, the damages will not be proved with certainty. (e.g., how can one prove the number of pizzas bought based on quality).

DI Damages

For reasons discussed above DI has no damages. DI may try and seek expectation damages. E.g., the amount they would have received on contract. This will likely fail.

***** **Question 5 ENDS HERE** *****



**FEBRUARY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 6

Question 6 - Selected Answer 1

***** Question 6 STARTS HERE *****

1. Claims of the transportation contractors

If the transportation providers bring suit in federal court, they will have to show that there is a case or controversy capable of redress as required by Article III of the US Constitution. The White Pine County Commission is a governmental regulatory agency thus there is state action.

Standing. A person has standing only if he can demonstrate a concrete stake in the outcome of the controversy. There must be an injury in fact caused by the government that will be remedied by a decision in his favor. The P's must suffer immediate injury due to the ordinance being passed.

Here, the transportation providers (P's) have an immediate injury in that their transportation costs will go up as a result of the ordinance. They will have standing and can sue as joint plaintiffs.

Ripeness. There must be an immediate threat of harm. There seems clearly to be an injury to the P's because their methods of transporting nuclear materials have been significantly altered by the new ordinance. Ripeness is satisfied.

Eleventh A. Limits on Federal Courts. The 11th Amendment prohibits federal courts from hearing a private party's claims against a state government. However, this prohibition does not extend to actions against local governments, as we have here, a local county governmental commission. The P's can bring their claim in federal court against the WPCC.

Commerce Clause. The dormant commerce clause prohibits state laws that place an undue burden on interstate commerce. A state law that discriminates against interstate commerce in a way that operates as a tariff or trade barrier against out of state interests, is subject to strict review and is virtually per se unconstitutional. A nondiscriminatory state law that imposes an "incidental" burden on interstate commerce will nonetheless be unconstitutional if the burden it imposes is clearly excessive in relation to the putative local benefits.

Discriminatory. The WPCC law does not appear to discriminate against out of state commerce. It applies across the board to all companies that are transporting nuclear waste.

Incidental burden. The WPCC law will most likely be unconstitutional as excessive in relation to local benefits. The changes required by the law prohibit all transportation of nuclear facilities unless it is done by train. As an amendment, it built two transfer facilities where trucks can load their waste onto trains. This is a huge burden on interstate commerce and will be a huge expense for transportation companies that have been able to transport materials by truck prior to the ordinance. This new ordinance constitutes more than an incidental burden on interstate commerce and will be struck down as unduly burdensome on interstate commerce.

Supremacy Clause. Under the Supremacy Clause, federal laws trump conflicting state and local laws. A federal law may expressly provide that the states may not adopt laws concerning the subject matter of federal legislation. Express preemption will be narrowly construed.

Implied preemption. If federal law is silent on preemption, it implicitly preempts state law in three situations: 1) federal and state laws are mutually exclusive, complying with both is impossible; 2) state law impeded a federal objective 3) field preemption, where congress evidenced a clear intent to legislate exclusively and/or preempt state law.

Here, the facts indicate that federal statutes and regulations are silent as to state regulation of nuclear materials. However, the federal law specifically provides that nuclear materials can only be transported in sealed canisters and stored only with permits from the DOE. The facts are silent as to whether the transportation providers, in fact, have permits from the DOE. The P's will argue that the federal and new WPCC law are mutually exclusive. The passage of the nuclear waste legislation at the federal level implies that Congress believes that such transportation methods set forth in the statute are safe. The federal government's legislation evidences a clear intent to regulate the transportation of nuclear materials. Therefore, the state's stricter requirements are in conflict with the federal law and will be preempted.

2. Claims of the dairy farm

If the Dairy Farmers (P's) bring suit in federal court, they will have to show that there is a case or controversy capable of redress as required by Article III of the US Constitution. The White Pine County Commission is a governmental regulatory agency thus there is state action.

Standing. A person has standing only if he can demonstrate a concrete stake in the outcome of the controversy. There must be an injury in fact caused by the government that will be remedied by a decision in his favor. The Dairy Farmers (P's) must suffer immediate injury due to the ordinance being passed.

Here, the dairy farmers are claiming that their business has been decreased by 60% after the passage of the ordinance. They have a concrete interest in the outcome of this claim and have standing to sue.

Ripeness. There must be an immediate threat of harm. The P's are claiming that their orders have decreased by 60% after the announcement of the placement of the White Plain transfer center. Even though the transportation center has not been built, the claim is ripe because the P's actually suffered a loss in business as a result of the announcement.

Fifth Amendment Taking. The Fifth Amendment provides that private property may not be taken for public use without just compensation. This rule is applicable to the states via the Fourteenth Amendment. The Taking Clause is not a source of power for taking, but rather a limitation. "Taking" includes not only physical appropriations but also some government action that damages property or impairs its use. property subject to the Taking Clause includes personal property as well as real property. Here, we have a regulation that the P's will argue is a taking of their property (their business profits and contracts).

"Taking" vs. "Regulation". The crucial issue is whether governmental action is a taking (requiring of just compensation) or merely a regulation (not requiring compensation). If a government regulation denies a landowner of all economic use of his land (e.g., a regulation prohibiting any building on the land), the regulation amounts to a taking unless principles of nuisance or property law make the use prohibitable.

Generally, regulations that merely decrease the value of property do not amount to a taking if they leave an economically viable use for the property. The Court will consider the social goals sought to be promoted, the diminution in value to the owner, and whether the regulation substantially interferes with distinct, investment backed expectations of the owner.

Here, we have a regulation that requires the placement of a nuclear waste facility right next to a dairy farmer's farm. The storage of nuclear waste right next to a dairy farm could potentially cause a decrease in property value but it is not depriving the farmers of all economic use of their property. They could convert the land to some other industry or plant crops instead. The facts indicate that they lost 60% of their orders. Even if they lost ALL of their orders and went out of business as a dairy farm, they could still use the property for something else. Likewise, the WPCC has a strong interest in building the transfer facilities because it is trying to protect the public from the damages that could result from nuclear waste. The ordinance will not constitute a taking under the 5th Amendment because it is not depriving the dairy farmers of all viable use of their property.

***** **Question 6 ENDS HERE** *****

Question 6 - Selected Answer 2

***** Question 6 STARTS HERE *****

TRANSPORTATION CONTRACTORS

Dormant Commerce Clause

State laws that discriminate against interstate commerce will violate the Dormant Commerce Clause (DCC) unless the state can prove that the laws are necessary to achieve an important state interest. State laws that do not discriminate against interstate commerce will be upheld unless they unduly burden interstate commerce.

Discrimination

Laws designed to protect local businesses against interstate competition, laws requiring local operations, and laws limiting access to state products have been held to discriminate against interstate commerce.

Here, the WPCC ordinance requires transportation of nuclear material be by train, but allows trucks to transfer the nuclear material upon entering and leaving county to trains. The WPCC ordinance may be construed as requiring local operations, if so, the ordinance would violate the Dormant Commerce Clause.

Undue Burden

Even if a state law does not discriminate against interstate commerce, it could be found to violate the DCC if it unduly burdens interstate commerce. In determining whether there is an undue burden on interstate commerce, courts will balance the legitimate (nondiscriminatory) state interest against the burden placed on interstate commerce. Courts may consider whether there are less restrictive means to accomplish the state's goals.

Here, WPCC's amendment to the ordinance places a burden on interstate commerce because it requires independent contractors to transfer nuclear materials onto trains when entering White Pine County and then transferred from trains to trucks when leaving White Pine County. The burden may be considered slight because it does not place an outright ban on transportation of nuclear materials by truck, but rather just requires that such transportation within the state be by train. The state's interest might be considered strong given its concern for the health and safety of White Pine County residents. Therefore, a court may find that the ordinance does not violate the Dormant Commerce Clause.

Supremacy Clause

The Supremacy Clause makes federal law the supreme law of the land. Under the Supremacy Clause, state laws can be preempted by federal law expressly or impliedly. There are three ways a federal law may impliedly preempt a state law: conflict preemption (where a state law conflicts with the requirements of a valid federal law); object preemption (where a state law interferes with the objective of a valid federal law); or field preemption (where Congress has evidenced an intent to occupy the entire field).

Under federal law, nuclear materials can only be transported in sealed canisters (which prevent the release of any radiation) and stored only with permits from the Department of Energy (DOE), a federal agency. The WPCC ordinance requires that all transportation of nuclear materials through White Pine County be by train, traveling at no more than 15 miles per hour. The ordinance was later amended to allow the transfer of nuclear materials onto trains when entering White Pine County and then transferred from trains to trucks when leaving White Pine County.

The Commerce Clause grants Congress the power to regulate interstate commerce. This includes the power to regulate the channels of commerce (roads and rails), the instrumentalities of commerce (trucks and trains) and commercial activities that have a substantial effect on interstate commerce. The regulation of transportation of nuclear materials falls within the commerce power. However, Congress's power of interstate commerce is not exclusive--states may regulate local aspects of interstate commerce unless preempted by federal law.

The ordinance is not actually in conflict with the federal law. The ordinance requires nuclear materials to be transported by train, which is in a sealed canister, and requires that such trains travel at a certain speed. The federal objective in requiring nuclear materials to be transported in a sealed canister is to ensure safe transportation and prevent release of radiation. Regulating the train's speed does not inhibit but rather furthers the federal objective of safe transportation of nuclear materials. In addition, in fields traditionally within the power of states, such as health and safety, there is a presumption that preemption was not intended unless there is a clear and manifest purpose of Congress. Since the federal statutes and regulation are silent as to state regulation of nuclear materials, it does not appear that Congress intended to occupy the field. Therefore, the ordinance is likely not preempted. However, the ordinance may prevent achievement of the federal objective as the DOE, a federal agency, is planning on using private contractors to transport the

nuclear material. As such, the ordinance's train and related transfer requirements would inhibit the federal objective of using private contractors and, the transfer of nuclear material at the transfer centers likely poses a risk of releasing radiation. Therefore, the WPCC ordinance may be found to be impliedly preempted by the federal law.

DAIRY FARM

Contracts Clause

The Contracts Clause prohibits state and local governments from enacting laws that substantially impair a party's rights under an existing private contract unless the law serves an important, legitimate state interest and is a reasonable and narrowly tailored means of promoting that interest.

Here, the dairy farm provides milk exclusively to three grocery chains in Salt Lake City, Utah. As a result of the ordinance providing for the construction of the transfer centers, one of which was adjacent to the dairy farm, two of the grocery stores cancelled their milk orders. The ordinance substantially impaired the dairy farm's rights under the contracts because it constituted 60% of the dairy farm's orders. The state will argue that the transfer centers serve an important interest of protecting residents healthy and safety. However, the transfer centers and not a reasonable and narrowly tailored means of promoting that interest.

Taking

The Fifth Amendment, applicable to the states via the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. If a government regulation denies a landowner of all economically viable use of the land, the regulation amounts to a taking. However, a regulation that merely decreases the value of the property (only prohibits the most beneficial use) does not amount to a taking if it leaves an economically viable use of the property.

Here, the ordinance does not deprive the dairy farm of all economically viable use of its property, as only 60% of its orders were cancelled. However, it does deny the dairy farm of all economically viable use. To determine if there is a taking, the court will consider the social goals sought to be promoted, the diminution in value to the landowner, and the extent to which the regulation substantially interferes with the owner's distinct, investment-backed expectations. The court may find that the ordinance is a taking, requiring the state to pay just compensation. Just compensation is measured by the fair market value of the property at the time of the taking, and is based on the loss to the owner.

***** **Question 6 ENDS HERE** *****



FEBRUARY 2023 EXAMINATION ANSWERS

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test – 1

NPT 1 - Selected Answer 1

***** NPT 1 STARTS HERE *****

TO: All Attorneys, Office of the Attorney General

FROM: Attorney # 00138

SUBJECT: Marsy's Law Litigation - Arguments for Summary Judgment - *Smith v. DPP*

DATE: February 23, 2023

III(A). Only persons defined as "victims" are entitled to rights under Marsy's Law.

Under Nev. Const. Art. 1, § 8A, also known as "Marsy's Law", "each person who is the victim of a crime is entitled to [enumerated rights], including reasonable notice to public proceedings (g), to be informed, upon request, of the scheduled release date of the defendant (k), to full and timely restitution (l)."

Marsy's law is meant to protect the rights of those that are "directly and proximately harmed by the commission of a criminal offense under any law of Nevada." Nev. Const. Art. 1, §8A(7). This definition of "victim" is "harmonious" with the NRS 176 definition of victim which reads a victim is "any person or relative of any person against whom a crime has been committed" or "who has been injured or killed as a direct result of the commission of a crime." NRA 176; *Aparicio v. NV*.

The Court in *Aparicio* helps to clarify and bring these two definitions of "victim" in "harmony" by stating that "neither definition includes anyone and everyone impacted by a crime." The Court discusses how the two definitions are similar and how they both recognize that a victim is one who is "legally injured or harmed as a *direct* result of a defendant's criminal conduct" or in other words, "the person who was the target or object of the offense." *Id*.

The Court ruled that the district court had erroneously applied the definition of "victim" to 50 impact letters, which were from friends and families of the two actual deceased victim of the vehicular homicide. Only those persons "directly and proximately harmed" by a crime are afforded victim's rights under Marsy's Law.

III(B). Mr. Smith cannot be defined as a "victim" under Marsy's Law because he was not directly and proximately harmed by Mr. White's Crimes.

As stated *supra*, only victims are entitled to the rights afforded under Marsy's Law and victims are defined as those "directly and proximately" harmed by a criminal act and must be the "target" of the offense. *Aparicio*.

Here, Mr. Smith is attempting to recover restitution for a supposed breach of his right to notice of proceedings of Mr. White, including his release from incarceration.

These are rights only afforded to those defined as victims under Marsy's law. As stated above, to qualify as a victim, one must be the "target" of the offense and be directly and legally injured as a result of that criminal conduct. *Aparicio*. This interpretation of "victim" is controlling precedent here in NV as it came from the NV Supreme Court.

When asked during an official deposition on January 15, 2023 whether Mr. White's criminal theft was aimed at him, Mr. Smith clearly stated "No, he never tried that baloney with me." In fact, Mr. White stole from other people and the only harm Mr. Smith incurred was a supposed drop in the revenue of the restaurant he co-owned with Mr. White. Mr. Smith stated people "didn't want to associate with either [he or Mr. White]." At most, this is an attenuated indirect economic harm loosely related to a loss of reputation of a business partner. This does not rise to the level of direct, legal, proximate, targeted harm that the Court has stated is required to be considered a victim under Marsy's law.

Mr. Smith may reference some persuasive authority out of Ohio where there, a business that was seemingly not the target of a crime was nonetheless allowed to claim victim status and thus restitution under that state's Marsy's law. There, defendant stole her employer's credit card and rented a storage container from a company. The employer was able to have the charges reversed due to the fraudulent purchase, but the rental company suffered economic loss from the forfeited sale. Unlike Mr. Smith's loss in business revenue, which was due to a loss of good reputation within the community as an indirect result of Mr. Smith's business associations with the convicted criminal Mr. White, the rental company suffered direct and proximate financial loss due to the direct actions of the defendant using a stolen credit card to create a fraudulent and unenforceable charge. Thus, even as only a persuasive authority, this Ohio case can be distinguished from the case here.

As such, Mr. Smith, because he was not directly and proximately harmed by Mr. White's theft, was not the target of Mr. White's criminal larceny, and any economic losses he suffered from loss of business were only loosely and indirectly related to his association with Mr. White, Mr. Smith cannot be defined as a victim under controlling Nevada precedent.

III(C). Because there is no genuine dispute to the fact that Mr. Smith does not qualify as a "victim" as defined under Marsy's law, he is not entitled to any of the rights therein, including the ability to recover restitution and notice of parole, thus DPP is entitled to Summary Judgment as a matter of law.

Under Rule 56 of the Nevada Rules of Civil Procedure, the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56.

When a court is reviewing a motion for summary judgment, "...the evidence and any reasonable inferences drawn from it, must be viewed in a light most favorable to the moving party." *Wood v. Safeway* (2005). Summary judgment is not meant to be a "disfavored procedural shortcut", but exists as judgment as a matter of law when there is no "genuine issue of material fact." (see *Celotex*; *Liberty Lobby* SCOTUS). The U.S. Supreme Court went on to state that "some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment." *Id.*

Only factual disputes that might "affect the outcome of the suit under governing law" will properly preclude summary judgment. *Id.*

Here, Mr. Smith must first qualify as a victim under Marsy's law in order to claim any rights afforded under that law. As shown above, there can be no factual dispute to Mr. Smith's status as a nonvictim since he does not qualify under the controlling definition of victim as stated in *Aparicio* because he was not "directly or proximately" harmed by Mr. White's criminal conduct. Even viewing the facts around Mr. Smith's status in a light most favorable to him, Mr. Smith never made a formal request to be notified of Mr. White's parole hearing (which is required under Marsy's law), so there would not even be a violation of the law even if he was considered a victim.

Therefore, because a rational trier of fact could only determine that Mr. Smith cannot be defined as a "victim" under Marsy's law, and one must meet this definition in order to claim any of the rights under that law, which include restitution and notice of any formal public proceedings (like parole), there is no genuine dispute of any material fact and under NRCP 56, DPP is entitled to judgment as a matter of law.

(see also *State of Ohio v. Jones* where the issue of who constitutes a victim or to whom restitution is owed under Marsy's law is a question of law to be reviewed *de novo*.)

***** NPT 1 ENDS HERE *****

NPT 1 - Selected Answer 2

***** NPT 1 STARTS HERE *****

III. Legal Argument

A. This Court Must Grant Summary Judgment Where, As Is The Case Here, There Is No Genuine Dispute As To Any Material Fact And The DPP Is Entitled To Judgment As A Matter of Law

Nevada Rule of Civil Procedure, Rule 56, provides that a District Court "shall" grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In *Wood v. Safeway & Action Cleaning*, XX Nev. XX (2005), the Supreme Court held that after the moving party has met its initial burden of production in a motion for summary judgment demonstrating that there are claims for which the moving party is entitled to summary judgment, the nonmoving party must demonstrate, through "pleadings, depositions, answers to interrogatories, admissions, and affidavits . . . *that are properly before the court*," that there is a disputed issue of fact as to an issue that is material. A nonmoving party "may not defeat a motion for summary judgment by relying 'on the gossamer threads of whimsy, speculation and conjecture.'" Here, as will be shown below, the Nevada Division of Parole and Probation (hereinafter "NPP") is entitled to judgment as a matter of law because Plaintiff Charles Smith (hereinafter "Plaintiff" or "Smith") is not a "victim" as that is defined in N.R.S. Const. Art. 1 §8A (hereinafter "Marsy's Law") and because his claims for damages are speculative and/or unrelated to his legal claims. However, as will be initially shown, Plaintiff's claim is prohibited by the plain language of Marsy's Law warranting immediate dismissal of this matter.

1. Marsy's Law Prohibits Plaintiff's Claim For Damages

Plaintiff's Complaint seeks \$150,000 in economic damages Plaintiff claims to have suffered as a result of the NPP's supposed failure to inform him of Mr. Smith's parole and release. Marsy's Law specifically prohibits lawsuits such as this. N.R.S. Const. Art. 1, §8A(3) reads as follows:

Except as otherwise provided in subsection 4, no person may maintain an action against this State or any public officer or employee for damages or injunctive, declaratory or other legal or equitable relief on behalf of a victim of a crime as a result of a violation of this section or any statute enacted by the Legislature pursuant thereto.

Subsection 4 of Marsy's Law does not save Plaintiff's case, as it only authorizes an action "to compel a public officer or employee to carry out any duty required by this section or any statute enacted by the Legislature pursuant thereto."

Here, regardless of whether Plaintiff is to be considered a "victim" pursuant to subsection 7 of Marsy's Law--he is not--Marsy's Law prohibits any lawsuits against the State of Nevada, including any of its officers or employees, brought by any person on behalf of a victim, based on a purported violation of the terms of Marsy's Law. Indeed, nowhere does Plaintiff allege or seek any relief pursuant to subsection 4, which necessarily applies *only* to future acts which have not yet been taken but which are required to have been taken. As Mr. Smith has already been released on parole, Plaintiff, even if he were to be considered a victim, cannot now maintain an action to compel the NPP to notify him of Mr. Smith's parole hearing or release.

Further support for this argument is found in subsection 2 of Marsy's Law, which provides a "victim" standing to assert the rights enumerated in the law *only* in "the court with jurisdiction over the case." Although "the case" is not defined, it plainly means the criminal proceeding involving the defendant who harmed the victim. Thus, even if a claim for damages were authorized by Marsy's Law--it is not--Plaintiff was required to bring that claim before the District Court judge who presided over the underlying case involving the acts of the Defendant.

Based on the foregoing, this Court need not even consider whether Plaintiff is properly a "victim" pursuant to Marsy's Law and may dismiss this matter because it seeks relief prohibited by the plain text of the law.

2. Even If This Court Found Plaintiff's Claim To Be Properly Alleged, The Undisputed Facts Demonstrate That Plaintiff Is Not A Victim Pursuant To Marsy's Law Because He Did Not Suffer A Direct and Proximate Harm From Mr. Smith's Conduct

At his deposition, under oath, Plaintiff testified as follows:

Question: To be perfectly clear, was Mr. White ever arrested or charged with stealing money from you?

Answer: No. . . .

In fact, Plaintiff admits that his business partner, Mr. Smith, never was the subject of any criminal proceeding regarding any money Plaintiff lost. Subsection 7 of Marsy's Law defines "victim" as follows, for purposes of the duties imposed by the law on the State:

"[V]ictim" means any person directly and proximately harmed by the commission of a criminal offense under any law of this State. . . .

In *Aparicio v. State of Nevada*, XX Nev. XX (2021), the Supreme Court set forth the test of determining whether a person is a "victim" pursuant to the definition found in Marsy's Law. Specifically, the Supreme Court held that the definition of "victim" does *not* include "anyone and everyone who was affected by the crime." Instead, and consistent with the text of Marsy's Law, the Supreme Court held that a "victim" must still be injured or directly and proximately harmed." Indeed, courts in other states have provided further clarification of the "direct" harm requirement.

In *State of Ohio v. Jones*, XX Ohio XX (2020), the Court of Appeals of Ohio, First District, Hamilton County, interpreted a similar provision on the State Constitution of Ohio, which is also called Marsy's Law in that state. In the *Jones* decision, the court there analyzed the definition of "victim" which defines the term as "a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act." Thus, the Ohio version of Marsy's Law contains the same "directly and proximately harmed" language as is contained in the Nevada version. In *Jones*, the defendant stole a credit card from his employer and used the credit card to make an unauthorized charge for the defendant's benefit. Upon learning of the unauthorized purchase, defendant's employer promptly notified the credit card company, who reversed the charge, resulting in a \$90.94 loss to the business entity called Pack Rat. The issue was whether Pack Rat was a "victim" pursuant to the definition contained in the Ohio version of Marsy's Law for purposes of receiving restitution. Certainly, Pack Rat was not the party "against whom the criminal offense (attempted misuse of a credit card) . . . [was] committed." The Ohio Court of Appeals panel held that Pack Rat was, in fact, a "victim" pursuant to the second prong of the definition because it suffered "actual harm; i.e. economic loss, as a proximate result of" the criminal conduct. This Court should apply the same analysis to the facts of this case.

Here, by contrast, the facts clearly show that Plaintiff was not "directly and proximately harmed" by Mr. Smith's criminal conduct directed to numerous other people. At his deposition, Plaintiff admitted that after Mr. Smith was arrested and "the terrible facts of all the sad people Dick stole from became public," the business at Plaintiff's restaurant, which he owned with Mr. Smith, "dropped to an tiny fraction of what it was before." Essentially, Plaintiff's claim that he is a "victim" of Mr. Smith's criminal behavior is based upon Mr. Smith's now sullied reputation in the community which has (purportedly) caused some indefinite economic loss. The losses from the business certainly cannot be considered a "direct and proximate" result of Mr. Smith's criminal behavior because Mr. Smith's criminal conduct was not directed *at all* towards his business with Plaintiff. See *Jones, supra* (Pack Rat properly a victim because the defendant used the unauthorized credit card at Pack Rat's business). Plaintiff has offered no other cognizable theory upon which he could possibly be considered a victim. As such, summary judgment should be granted on this alternate basis that Plaintiff is not, by definition, a victim under Marsy's Law.

***** NPT 1 ENDS HERE *****



FEBRUARY 2023 EXAMINATION ANSWERS

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test – 2

NPT 2 - Selected Answer 1

***** NPT 2 STARTS HERE *****

Issues by Jones

1. The Special Motion to Dismiss was Untimely Filed

According to NRS 41.660(2), a special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

Here, Mr. Jones alleges that the special motion was filed past the deadline. Jones v. Miller was commenced on April 1, 2022 when Jeff Jones served the complaint on the Millers. The Millers filed an anti-SLAPP special motion to dismiss on July 1, 2022.

RECOMMENDATION: REVERSE AND REMAND

Because the special motion was filed more than 60 days after service of the complaint, Mr. Jones is correct that the motion was untimely. Ultimately NRS 41.660(2) allows for the District Court to extend that timeline for good cause shown. Because the District Court did not explain its reasoning for extending the timeline, this Court should reverse and remand this decision to the with orders that the District Court more fully explain its reasoning in order to comply with NRS 41.660(2).

2. The Statements Posted by the Millers Did Not Meet the Criteria for SLAPP

A court must grant an anti-SLAPP special motion to dismiss where (1) the defendant shows, by a preponderance of the evidence, that the claim is based on a "good faith communication in furtherance of ... the right to free speech in direct connection with an issue of public concern" and (2) the plaintiff fails to show, with prima facie evidence, a probability of prevailing on the claim. Smith v. Zilverberg. Smith only contends the District Court's decision regarding the first prong, so therefore the analysis will be restricted to that first prong.

To satisfy the first prong, the defendant must show that (1) the comments at issue fall into one of four categories of protected communications enumerated in NRS 41.637 and (2) the communication is truthful or is made without knowledge of its falsehood.

One of the enumerated categories of protected communications is an issue of public interest. In Shapiro v. Welt, the Nevada Supreme Court expanded on the definition of an issue of public interest. Prior to Shapiro, issues of public interest had not been well defined, so the Court in Shapiro adopted California's principles for guidance. Specifically, one of the main guidelines is that it must be "something of a concern to a substantial number of people." Shapiro.

In Shapiro, the Nevada Supreme Court found that the District Court erred when they found a private conservatorship to be an issue of public interest because it was only a concern to a relatively small specific audience. Unlike Shapiro, the issue at hand is the management of certain wild horses in northern Nevada by the Division of Animal Resources of the Nevada Department of Agriculture. This management of wild animals by a state run agency is a matter of public concern to a large portion of the state who care about wild animals or care about government operations. Additionally, the Court in Smith found that Smith was a public figure due to his status in the community, including being a public figure in the thrifting community. Here, as the Division Administrator who is in charge of the wild horse management program, Jones would likely also be considered a public figure due to his status within the Division of Animal Resources.

Another way that an issue can become an issue of public concern is if the statement is made in direct connection with an issue under consideration by a judicial body. Patin v. Lee. In Patin, the Nevada Supreme Court stated that in order for a statement to be protected under NRS 41.637(3) the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation.

Here, the Millers filed a lawsuit against the Division of Animal Resources of the Nevada Department of Agriculture on March 1, 2022 challenging the legality of the Division's plan with respect to their ownership rights of their horse. After filing this lawsuit, the Millers sent an email about the lawsuit to other members of the Facebook Group who had also lost horses to the wild herds. While this is not an issue of public concern because it does not concern as large of an audience as the Millers' other statements, it does concern an issue under consideration by a judicial body as it is about a currently ongoing lawsuit in the court system. Likewise, by emailing other horse owners who had similarly lost horses to the wild herds, the statements by the Millers were directed to persons having some interest in the litigation.

The second analysis required to satisfy the first prong is that the communication is truthful or is made without knowledge of its falsehood. In Smith the Nevada Supreme Court found that generally "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." Smith. Additionally, statements of opinion cannot be false. Smith.

Here, the Millers have provided affidavits that they have only posted true facts and opinions to the best of their knowledge and belief. Declaration of James Miller.

RECOMMENDATION: AFFIRM

Because the issue in question is an issue of public concern, and because the Millers have provided affidavits affirming that they believe the communications to be truthful to the best of their knowledge, the Millers have satisfied both prongs of the SLAPP test. Therefore, the District Court correctly ruled in granting the Millers' anti-SLAPP special motion and the District Court's decision should be affirmed.

Issues by the Millers

1. Amount of Attorney's Fees and Costs

Mr. and Mrs. Miller contest the amount of attorney's fees and costs awarded to them because only the fees related to the anti-SLAPP special motion were included.

Under NRS 41.670(1)(a), provides that if a court grants a special motion to dismiss filed pursuant to NRS 41.660, the court shall award reasonable costs and attorney's fees to the person against whom the action was brought.

In Smith v. Zilverberg, the District Court held that parties are entitled to all reasonable attorney's fees and costs they incurred from the inception of the litigation rather than only those attorney fees and costs related to their anti-SLAPP motion. Upon review, the Nevada Supreme Court upheld the decision concluding the Legislature intended prevailing defendants to recover all costs, rather than just those associated with the special motion. Smith.

Whenever a District Court awards attorney's fees and costs, it must consider the factors set forth in Brunzell v. Golden Gate National Bank. Smith. These factors include: (1) the qualities of the attorney, (2) the character of the work done, (3) the actual work performed by the attorney, and (4) the result achieved. Smith.

Here, the District Court awarded Mr. and Mrs. Miller only those attorney's fees and costs related to their legal representation for the anti-SLAPP special motion, but not for any of their attorney's prior work on the defamation lawsuit. Jones. Pursuant to Smith, this is an error on the part of the District Court. Additionally, the District Court erred by not analyzing the Brunzell factors when determining the attorney's fees awarded to the Millers. Instead, the District Court merely calculated the amount of the attorney's fees based on the average billable hour for attorneys statewide set forth in the most recent annual survey published by the State Bar of Nevada.

RECOMMENDATION: REVERSE AND REMAND

Because the District Court erred in their award of attorney's fees and costs by only awarding fees and costs related to the special motion, rather than the entire lawsuit, the award should be reversed and remanded to the District Court for an award consistent with the standard set forth in Smith. Additionally, the District Court should clearly analyze the factors set forth in Brunzell when awarding the attorney's fees and costs.

2. Additional Statutory Damages

Mr. and Mrs. Miller contest the amount of their additional statutory damage award of \$10,000.

NRS 41.670(1)(b) states that "[t]he court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to \$10,000 to the person against whom the action was brought. In Smith v. Zilverberg, Smith brought a defamation lawsuit against two individuals, Zilverberg and Eagan. Zilverberg and Eagan filed an anti-SLAPP motion to dismiss, which was granted. The District Court awarded Zilverberg and Eagan attorney's fees and costs, as well as an additional discretionary award of \$10,000 each. This discretionary award was challenged by Smith, and the Nevada Supreme Court upheld the award stating that "The plain language of NRS 14.670(1)(b) does not limit the statutory award to \$10,000 per lawsuit." Instead the Court held that courts may award it to each person.

Here, Mr. and Mrs. Miller are challenging the award of \$10,000 on the basis that the court meant to award \$10,000 to each person (Mr. AND Mrs. Miller). This is evidenced by the Court's description of the award as the "maximum amount for the lawsuit," which per Smith is inaccurate. Jones v. Miller.

RECOMMENDATION: REVERSE AND REMAND

Because the District Court erred in its belief that \$10,000 was the maximum amount that could be awarded for the lawsuit, this Court should reverse and remand the statutory damage award to allow the District Court to enter an order of the appropriate amount.

***** NPT 2 ENDS HERE *****

NPT 2 - Selected Answer 2

***** NPT 2 STARTS HERE *****

NEVADA SUPREME COURT

BENCH MEMORANDUM

FROM: Chief Justice Adams

TO: Applicant

RE: Bench Memo for *Jones v. Miller*

Mr. Jones's Appeal:

I. Was Mr. Jones defamation complaint improperly dismissed due to the Millers filing the dismissal outside of the 60 day period from the date of service?

Analysis:

Mr. Jones served the lawsuit on the Millers on April 1, 2022. The Millers filed their ANTI-SLAPP motion to dismiss on July 1, 2022. This is outside the 60 day period that is required for a special motion to dismiss under NRS 41.660 (2). However, this section allow the period to be extended for good cause shown or under NRS 41.660(6), if an extension "would serve the interests of justice". This is what occurred in *Patin v. Lee* where the Nevada Supreme court heard an untimely anti-SLAPP motion even in the absence of an explicit finding of "good cause" or in the "interests of justice". Such finding was implicit in the district court's order and the court acted in it's discretion in hearing the motion. *Lee*.

Recommendation:

The court may decide to grant Mr. Jones appeal as the defamation claim was dismissed due to an untimely anti-SLAPP motion. However, if the Supreme Court finds that it is interest of justice for the Millers or that Millers had good cause then they may affirm the dismissal. Due to the merits of Jones' claim and therefore in the interest of justice the court should not have dismissed the defamation claim.

II. Was Miller's communication to the Facebook Group page for the Northern Nevada Wild Horse Advocates and email not a good faith communication?

Analysis:

If a statement was a "Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" under NRS 41.637 then NRS 41.650 explicitly limits the liability from the statements for any civil action based upon the communication. NRS 41.637 defines "good faith communication" as "communication of information or a complaint to a Legislator, officer or employee of the Federal government, this state, or a political subdivision of this state regarding a matter reasonably of concern to the respective government entity" as well as "Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum". Notably the statements must be truth or made without knowledge of its falsehood. Here the division of Animal Resources of the Nevada Department of Agriculture (the "Division") is a political subdivision under NRS 41.640. ("Political Subdivision" includes...any special district that performs a governmental function, even though it does not exercise governmental powers"). Here the Division governmental function is the management of animal resources, and in this case, wild horses. Mr. Jones is the Division Administrator and therefore is an employee of the federal government. Therefore NRS 41.637 and NRS 41.650 would apply if it can be classified as a "good faith communication".

The Millers must show by a preponderance of the evidence that the claim was a good faith communication. NRS 41.660(3) (a). If the Millers achieve this then the burden shifts to Jones to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

Mr. Miller made two statements regarding Jeff Jones and the Division, (1) the February 5, 2022 Facebook post, (2) the March 5, 2022 email to the members of the Facebook group, both of these must be good faith communications in order to

avoid potential liability. The February 5, 2022 statement that "Jeff Jones at NDA is lazy and incompetent and should be charged with animal cruelty. If he did his job, wild horses wouldn't be killed on our highways or starving to death. He belongs in jail!" The March 5, 2022 email states "Jeff Jones' plan regarding the transfer of ownership of wild horses under the Division's jurisdiction is a blatant violation of state law and will result in the sale or extermination of the wild horses by a private party that is not accountable to anybody. Jeff Jones is probably getting a financial kickback from this illegal deal. I'm enforcing my legal rights to my horse - how about you?".

Miller's argument will be that the statements constituted a good faith communication in furtherance of the right to free speech because this is a matter of public concern pursuant to NRS 41.637. Under NRS 41.637(3) and (4), Mr. Miller will argue that the Facebook group, Northern Nevada Wild Horses Advocate, is a public forum and Jeff Jones potentially selling wild horses, some of which are owned by people who have had mares run away, is a matter of public concern. In *Shapiro v. Welt* there was a similar situation where the defendant's had stated allegation of illegal acts committed by plaintiff on a website that was solely used to make statements against plaintiff. In order for a matter to be of public interest it must be communication made in direct connection of public interest in a place open to the public which is truth or made without knowledge of falsehood. NRS 41.637(4).

Notably, Nevada courts have yet to determine what is "an issue of public interest" in the anti-SLAPP context, but the court in *Welt* relied on California courts interpretation in order to serve as guiding principles. Under this principle a "public interest" does not equate with (a) mere curiosity, (b) show be something of concern to a substantial number of people, a relatively small specific audience is not a matter of public interest, (c) should be some degrees of closeness between the challenged statements and the public interest, (d) the conduct should be the public interest rather than ammunition for private controversy and (e) a person cannot turn a private matter into a public matter by communicating it to a large number of people. *Welt*. Here Miller will argue that the principles are satisfied because (a) the conduct is taking the private property of citizens (the privately-owned mares that have escaped) and transferring ownership to another private property. Additionally it was (b) communicated to a Facebook group of over 1,000 members which is a substantial number of people and that in *Smith v. Zilverberg* the court stated that the statements on Facebook for that case constitute a public forum. For (c) the degree of closeness is that his email shows advocacy for protecting his legal rights to his horse and encouraging others to do so. For (d) Miller would state that the conduct is in the public interest and he is not doing it in order to increase his private controversy with Jones. Finally for (e) he would state that his communication was not of a private matter as it deals with the potential ownership of horses of the other members as well. In response, Jones would argue that (a) the primary impetus was not to encourage the legal right of the horse owners but to harass Jones as the February 5th post does not mention anything of promoting rights and the March email only has the call to action at the end of the email after accusing Jones of illegal acts. Jones for (b) would argue that 1000 people in a Facebook group is a "relatively small specific" Facebook group. For (c) it would hold the same arguments as (a) that the degree of calling Jones a criminal is not "close" to promoting the horse ownership rights. Jones strongest arguments is that for (d) Mr. Miller seems to primarily be concerned with insulting Jones for his job performance and illegal acts rather than protecting wild horse and private citizen rights. Mr. Miller's arguments here are weaker than Jones and notably his Facebook post does not concern a matter of public concern due to the lack of call to action for the fellow members.

The Millers may argue that Jones is a public figure as the Division director and therefore there is a heightened interest in him and therefore the scale should tip to his statements being protected. The Court in *Smith v. Zilverberg* found that while someones status as a public figure may give rise to a heightened interest, it does not allow statements that are private under the *Shapiro* factors (the above a-e factors) to turn a private matter into a public one by proxy of public figure.

Mr. Miller may also argue then that the communication was made in connection with an issue under consideration by judicial body. In order to succeed in this argument he must show that under NRS 41.637(3) the statement to be "in direct connection with an issue under consideration by a...judicial body". The court in *Patin v. Lee* interpreted this section to mean that the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation. Here Miller would argue that his statements calling for members to exercise their legal rights to their horses and that he has satisfies both prongs. However his lawsuit was filed on March 1, 2022 and therefore the February post could not reference any matter that was under consideration by a judicial body. For his March 5 email he would state that he called for the owners to enforce their legal rights in horses which related to himself challenging the divisions scheme, additionally it was made to a Facebook group that advocated wild horse rights and therefore was done to those likely interested in the proceeding. The court in *Lee* states that simply referencing a jury verdict in a court case is not sufficient to bring it under NRS 41.637(3). Jones would argue that Miller failed to reference a judicial proceeding and that stating that "I'm enforcing my legal right" is too vague and remote a reference, however in this instance Miller is stating he is enforcing his right to his horse and telling others to do so which would likely mean a lawsuit. Therefore Miller's March email likely falls under NRS 41.637(3) as a "good faith communication" but not his February post.

Jones may argue that the Millers have failed to produce any evidence that the statements were not made truthfully or without knowledge of its falsehood. The court in *Zilverberg* held that whether through a preponderance of the evidence that demonstrates the gist of the story or the story that carries the sting of the statement is true. Miller's sting of the communication is calling Jones lazy, he should be in jail, and that he is engaging in an illegal deal. The personal remarks about Jones work ethic and whether he should be in jail could be considered opinion as seen in *Zilverberg* where it was communicated that plaintiff was a misogynist is an opinion incapable of being false. However the illegal deal is not an opinion and therefore would need to be made truthfully or without knowledge of its falsehood. Generally an affidavit of the defendant believing the communications true or made without knowledge of falsehood is enough to satisfy this element, absent contrary evidence. Here there is no evidence that Mr. Miller knew about the statements and considering the low bar to prove truthfulness or without knowledge of falsity (an affidavit by defendant) means that Jones argument is not persuasive.

Recommendation:

The court should find that the February 5, 2022 post was not a "good faith communication" under NRS 41.637 because it fails to communicate a matter of public concern in a public forum (the content mainly is to harass Jeff Jones and not about the Division's plan for the wild horses) or a matter that is under consideration by a judicial body (the lawsuit for Miller was filed on March 5). However the court may find that the March 5, 2022 email is protected because it references a matter under judicial consideration due to the March 1, 2022 lawsuit challenging the Division's plans. The email's protection would likely hinge upon whether Mr. Miller made the statements truthfully or without knowledge of its falsity, under the present facts nothing shows that Mr. Jones is engaging in illegal acts.

Miller's Appeal:

I. Was the award of attorney's fees and costs inadequate?

Analysis:

When reviewing a district court's decision to grant attorney fees and costs for a question of law, including matters of statutory interpretation it is reviewed de novo. *Zilverberg*. In *Zilverberg* the plaintiff contended that the district court erred in awarding all reasonable attorney fees they incurred from the inception of the litigation instead of from when the anti-SLAPP motion was filed and the fees were unreasonable under the factors in *Brunzell v. Golden Gate National Bank*. The court stated that when interpreting the statute that its plain language is silent on who to calculate cost and therefore must turn to the legislative intent. Since NRS 41.670(1)(a) and 41.670(2) have different attorney cost calculation, the court held that the omission was intentional. The court held that the Legislature intended for prevailing defendants to recover reasonable attorney fees and costs incurred from the inception of the litigation rather than those from litigating the anti-SLAPP motion. The court stated that the district court can follow any rational method in calculating the fees so long as it applies the *Brunzell* factors: (1) the qualities of the attorney (2) the character of the work done (3) the actual work done (4) the results achieved. *Zilverberg*.

For the Millers the court awarded the Millers the attorney fees and costs for their legal representation related to the anti-SLAPP motion but not for any prior work done on the defamation suit. The court calculated this cost by the average billable hour for attorneys statewide. Therefore the court did not apply the *Brunzell* factors to Millers attorneys in calculating the cost of representation.

Recommendation:

The court should award the Millers with the attorney costs from the inception of Jones lawsuit should Jones lose the appeal or the defamation case if it is granted. The district court erred in not awarding the attorney costs of defending the defamation suit in addition to the anti-SLAPP motion and calculated costs in opposition to the precedent set forth in *Zilverberg* where a court must apply the *Brunzell* factors.

II. Was the additional statutory damages inadequate because there was both Mr. and Mrs. Miller in the action?

Analysis:

The district court in *Zilverberg* awarded both defendants an additional \$10,000.00 each under NRS 41.670(1)(b). The plaintiff argued that he brought the action against both defendants and can only be awarded \$10,000.00 in total. The Nevada Supreme Court upheld the district court granting \$10,000 to each defendant and cited that pursuant to paragraph (a) of the NRS 41.670 that an amount of up to \$10,000 may be awarded to the person against whom the action was brought. Thus the plain language of the statute allows for courts to award up to \$10,000 to any individual against whom the action was brought. In the current case, Jones filed and served a lawsuit against both Mr. and Mrs. Miller and therefore the facts are identical to *Zilverberg*. However the Supreme Court stated that the district court did not *err* in awarding \$10,000 to each person but notably did not mandate it when attorney fees are awarded. However in the district court's ruling for the Millers it stated that it awarded the statutory damages "maximum amount for the lawsuit" of \$10,000.00 which is an error because the maximum would be \$20,000 in total.

Recommendation:

The court should award the "maximum amount" if it finds the district courts reasoning regarding the case convincing. Therefore if the district courts ruling is persuasive then a total amount of \$10,000 should be awarded to Mr. Miller and Mrs. Miller each.