AUGUST 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

Exam Information

Applicant ID: 171

Exam Date: 8/2020

Exam Name: Question 1

Count Specifics

Total word count: 3050

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

The ethical standareds for Nevada attorneys are governed by the Nevada Rules of Professional Conduct.

Addison's conduct

Duty of competence

The first issue is whether Addison was competent to undertake the representation of Stacy and Tracy. The duty of competence requires lawyers to be reasonably competent in order to take a case. This is satisfied by having reasonable knowledge, skill, thoroughness and preparation or by associating with a competent attorney. A lawyer who is not competent to handle a case should either decline the representation, associate with competent counsel, or study and prepare to attain competence.

Here, Addison is a newly licensed attorney who has only done probate law and his undertaking a personal injury case. Addison may not be competent because he is new and only has experience in probate law, which is entirely different from a personal injury auto accident case. However, Addison did discuss this matter with a supervising partner, which may have helped her achieve competence by discussing the issue with a more senior attorney. So she may have achieved competence this way.

Addison may be subject to discipline for not being competent to handle the case.

joint representation

The next issue is whether Addison violated any ethical rules by representing co-parties Stacy ande Tracy.

A lawyer is not strictly prohibited from representing co-parties in a matter. However, when representing co-parties the lawyer must not accept a settlement (or plea in a criminal case) unless the lawyer discloses to each client the nature and extent of all claims and participation in each person in the settlement and the clients give informed consent in writing. The lawyer must also believe that representing each co-party will not adversely affect the lawyer's ability to adequately represent each client.

Here, while it may be fine for Addison to represent both Stacy and Tracy, Addison should have first determined whether she could adequately represent each party without harming the other and then received informed consent of both Stacy and Tracy to the joint representation. It is likely that here Addison could represent them both because their interests are aligned. They were passengers in the same vehicle that got in the same accident and are thus unlikely to be adverse to each other. However, Addison should have recieved informed consent in writing. from each party before undertaking the joint representation.

Therefore, Addison is subject to discipline for not receiving informed consent from each client for the joint representation.

Addison's Fee

The next issue is whether Addison's fee was reasonable.

The Nevada Rules require that attorneys charge a reasonable fee. Rule 1.5(a) sets out a series of factors to determine whether a fee is reasonable. These factors include the time and labor required by the attorney, the difficulty of the legal issues involved, the fee customarily charged in the location for similar cases, and the attorney's reputation and experience.

Here, the 50% contingency fee is likely unreasonably high because Addison is a new attorney with no previous experience dealing with personal injury auto accident cases. Nevada attorneys typically charge something more like a 35 or 40% contingency fee for similar matters. It does not seem that Addison has the requisite experience and skill to justify charging a higher fee than is typical in teh area for this kind of case. Further, this should be a relatively simple case of an auto accident that will likely not involve many novel or complex legal issues that require a high level of expertise or time commtment.

Therefore, Addison is likjely subject to discipline for charging an unreasonably high fee.

Costs

The next issue is whether Addison is subject to discipline for having the firm advance court costs, litigation expenses, and living expenses of the clients.

A contingency fee must be in writing and is permissible in non criminal and non domestic relations cases. It must also explain the method of fee calculation and other costs to be borne by the client and whether expenses are deducted before or after the fee is calculated. An attorney may not give financial assistance to a client, however, other than paying court costs and bank charges in a client trust account.

Here, this is not a criminal or domestic relations case so a contingency fee is permitted. Also, it appears that the fee was in writing based on the reference to the fee agreement. If the fee agreement was not in writing, Addison would be subject to discipline. It is also fine that the firm advanced the court costs and litigation expenses of the clients because the contingency agreement may determine how these fees and costs are to be allocated. Given the high contingency fee of 50%, the fact that the firm paid for these costs upfront may actually make the fee more reasonable. However, Addison violated the rules by also agreeing to pay for the living expenses of the client. Addison

could only pay for couret costs and fees (and bank charges in the client trust account) and cannot provide this kind of personal financial assistance to the client.

Addison is subject to discipline for paying for the living expenses of the clients.

Malpractice limitaiton

Addison will also be subject to discipline for including the limitation of liability for malpractice in her fee agreement.

A lawyer may not prospectively limit liability to a client for malpractice unless the client is independently represented by counsel in making the agreement.

Here, it does not appear that Stacy and Tracy are independently represented. Rather, the malpractice limitaiton is included in Addison's contingency fee agreement.

Therefore, Addison is subjec tto disicpline for having clients sign a malpractice limitation without being represented by independent counsel.

Duty to communicate and settlement

The next issue is whether Addison violated her duty to communicate with her clients.

Lawyers have a duty to communicate with their clients and keep them reasonably informed on the status of their matter. Clients are in charge of the overall objectives of the representation while lawyers may decide the means used to achieve those objectves in consulation with a client. A lawyer must promptly inform clients of any settlement offer, and the decision of whether to accept the settlement offer is up to the clients to make.

Here, several important developments occurred without Addison communicating the matters to the clients. A counterclaim was filed against Stacy, a medical lien was filed against Tracy, and a settlment offer of $100,000 was made. Addison should have immediately notified Stacy of the counterclaim and notified Tracy of the medical lien because she had a duty to keep them reasonably informed about the status of their case and any new developments. She also should have notified them both of the settlement offer and obtained their informed consent before accepting the settlement offer. As mentioned earlier, in any joint representation the lawyer must receive informed consent of BOTH clients before accepting a settlement in a joint representation. Here, Addison not only failed to get the

informed consent of each client before accepting the settlement offer but did not even communicate the offer to either client or get any kind of approval before accepting it.

Therefore, Addison is subject to discipline for failing to communicate with her clients and keep them updated on the status of their case and for accepting a settlement offer without first obtaining the informed consent of each client.

Distribution of Settlement Funds

The next issue is whether Addison acted properly in distributing the settlement funds upon receiving them.

Attorneys have a duty to properly safeguard client property. Client fees should be kept in a separate trust account, and an attorney can never commingle client fees with the attorney's own money. The attorney must also promptly deliver client funds to the client upon receiving a settlement.

Here, it looks like Addison received the funds first based on the language "upon receipt of the funds." It does not appear that Addison placed the funds in the client trust account upon receipt. She should not have had the settlement check made out to her personally - it should have been deposited in the client trust account. Addison did act properly though in promptly disbursing the funds to her clients. However, it is not entirely clear that the funds were disbursed properly with each client receiving the same settlement amount. This problem blends with the previously discussed problem of accepting the settlement offer without both clients giving informed consent. It is not certain that each client should have received the same amount - they may have had different injuries. So Addison should never have agreed to this settlement without client consent anyway. But when she did, it was appropriate of her to distribute the funds promptly to the clients, which she did.

Therefore, Addison is possibly subject to discipline for commingling her funds with client funds by failing to put the settlement money in a trust account before distributing to the clients. But she did act properly in distributing the funds promptly and in keeping the $50,000 as allowed by the retainer agreement. Of course, as previously discussed, she should never have accepted the settlement to begin with without the informed consent of each client.

Addison's supervising partner liability

Partners and supervising attorneys are responsible for putting in place reasonable policies to ensure their firm and subordinates follow the model rules of professional conduct. They are responsible for any violations of the ethical rules that they order or approve of.

Here, Addison discussed the representation of Stacy and Tracy with her supervising partner before agreeing to represent them. It is likely that the supervising partner was aware of some or all of Addison's violatons from these discussions. The supervising partner also sholud have taken care to make sure that Addison, a new attorney, was doing things right and following her ethical obligations.

The supervising partner may be subject to discipline for ratifying or ordering Addison's conduct, but more facts are needed to determine what she and Addison talked about.

Blake's issues

Competence - Please see the duty of competence described previously for Addison. Here, Blake may not be competent to represent TEch Co in an antitrust matter because he primarily practices in employment law, which is very different from Antitrust. However, he can still undetake the representation if he studies enough to learn about anti trust or associates with a competent attorney. However, he probably should not take the case anyway due to the conflicts discussed below. Therefore, Blake may be subject to discipline for undertaking a case that he is not competent to handle.

Conflicts

The next issue is whether Blake violated the ethical rules by agreeing to bring an anti trust case against XYZ when Blake had previously been in house counsel for XYZ.

A lawyer who has formerly reprsesented a client may not represent another client in a matter adverse to the former client if the lawyer has received confidential information from the former client that can now be used against the former client or the issues in the two representations are substantially related. The lawyer may undertake the representaiton if the former client consents in writing.

Here, there is a problem because Blake used to be in house counsel at XYZ and is now suing them for antitrust. As in house counsel, he likely learned substantial confidential information about XYZ and how it runs its business. He could now use that information against XYZ in this lawsuit, which is unethical. An in house attorney knows a lot about its clients business, and much of that knowledge is likely relevant to an anti trust case that looks at how the business operates as a whole. Blake would therefore need XYZ's informed consent to undertake the representaiton, and it doe snot appear he received it.

Blake is subject to discipline for agreeing to take the case suing his former employer.

Calling his friend at XYZ

Blake also called his friend at XYZ to try and receive more information about the antitrust case.

An attorney owes a duty of fairness to opposing parties. An attorney should not speak to a party who the attorney knows to be represented when the party's counsel is not present. An attorney must also be candid to parties who may believe that an attorney-client relationship exists and be clear that no such relationship exists.

Here, Blake knew that XYZ had counsel (in fact he used to be their counsel) yet he called his friend to speak about the case directly. XYZ was now an adverse party to Blake that was likely represented by counsel. It was nor proper for Blake to contact an agent of XYZ (his friend) without XYZ's counsel present. It was also improper for Blake to talk to his friend without revealing that he was now opposing counsel to XYZ brigning a lawsuit. The friend may reasonably have believed that Blake was still working for XYZ and not against XYZ and may have believed that there was still an attorney client relationship between Blake ande XYZ. Blake should not have talked to the friend to begin with without counsel present and shoul dhave made clear that he was an adverse party and no longer represented XYZ.

Therefore, Blake is subject to discipline for contacing the friend at XYZ.

Associating with the Antitrust Attorney

An attorney may associate with other counsel in a matter with a client's permission. Lawyers from the same firm are always allowed to split fees. Lawyers from different firms may split fees if the client agrees in writing and the total fee charged is reasonable.

Here, Blake is associating with outside antitrust counsel. While it is not clear that he is splitting a fee with this attorney, it is doubtful that the outside anti trust counsel is working for free, especially when teh outside counsel was the one who filed the complaint. Blake should have received his client's informed consent in writing before associating with (and likely splitting the fee with) outside counsel.

Therefore, Blake is likely subject to discipline for splitting fees without client consent.

Duty of Confidentiality

Blake also owed the CEO of Tech Co a duty of confidentiality regarding any information he received during the course of his representation. There are several exceptions to this duty including when the client will engage in a criminal act causing death or bodily harm or to secure legal advice about the lawyer's compliance with the rules.

Here, Blake likely breached his duty of confidentiality by discussing the anti trust case with outside counsel. IT would be fine to discuss if the client had given Blake approval to work with outside counsel and approved of the resulitng fee arrangment. But that did not happen here. Other exceptions like death or substantial injury do not apply, and Blake was not consulting outside cousnel regarding ethics rules.

Blake is subject to disicpline for breaching his duty of confidentiality.

The District Attorney and Chad's Conduct

Chad and the DA were oppsoing parties in a highly publicized criminal case. Both parties made statements to the media about the case. The issue is whether either of them violated the ethical rules for their statements.

An attorney may not make extrajudicial statements that the attorney knows or should know will be disemminated to the public and have a substantial likelihood of materially prejudicing the case.

Here, the DA publicly stated that the defendant must be guilty for failing to take a polygraph. This would likely prejudice the public perception of the case and even impact jurors who listened to the statement. Chad's statement that the defendant does not have a record is likely fine because he is just stating facts, and he can also state the client is innocent because the plea of innocence is in the public record.

The DA is likjely subject to discipline while CHad is not because the DA's statement is likely to prejudice the case while Chad is simply stating facts and matters of public record.

Chad's refusal to let defendant testify - An attorney has a duty of candor to the court. The attorney must not put up witnesses who perjure themselves, and they do, the attorney must take reasonable means to correct the record. HOwever, a criminal defendant has the constitutional right to testify that cannot be waived. An attorney wih a criminal defendant who lies on the stand should first attempt to withdraw and then allow the defendant ot proceed with an undirected narrative.

Here, Chad did not allow his client to testify at all, which violates his client's constitutional righ tot testify. If Chad was worried his client would lie, he should have attempted to withdraw from the representaiton if the client did in fact lie. If not allowed to withdraw (he likely

would not be allowed in the middle of the trial because doing so would prejudice the client) he should have allowed the client to testify in the form of an undirected narrative.

Chad is subject to discipline for not allowing his client to testify.

Calling the jury foreman - An attorney is permitted to contact a juror after a trial is over but not during the trial. Here, it was fine for Chad to contact the foreman because the trial was already over. However, his tone was somewhat unprofessional in asking "what were you thinking?" An attorney has a duty to maintain the integrity of the profession and should be respectful and professional in all interractions. While CHad should have been more polite, his conduct likely did not rise to the level of a violaton, and it was okay for him to contact the juror post trial.

Duty of zealous representation - Attorneys have a duty to zealously represent the interests of their clients.

Upon calling the juror, Chad found out that one of the jurors had called her cousin to provide an explanation fo the standard. This is improper conduct by the juror for using an outside source to reach a conclusion. Chad should have immediately brought this matter to the judge's attention to attempt to get a mistrial declared. It seems here that Chad did nothing upon learning of the improper juror activity. Chad should have zealously represented his client by seeking a mistrial declaration.

Therefore, Chad is subject to discipline for failure to zealously represent his client upon finding important information of juror misconduct.

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

AUGUST 2020
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NEVADA BOARD OF BAR EXAMINERS

QUESTION 2

Exam Information

Applicant ID: 153

Exam Date: 8/2020

Exam Name: Question 2

Count Specifics

Total word count: 1112

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

1. Bank's (B's) Rights and Interests

Bank has a perfected security interest in GFS's inventory as of February 1 and acquired thereafter. A security interest attaches under Article 9 of the UCC when there is an authenticated security agreement, the secured party gives value, and the debtor has rights in collateral. Parties may agree to include after-acquired property as collateral, so long as it is stated explicity in the security agreement or the collateral is of a type that is rapidly depleted and replenished, such as inventory. Here, B provided $10,000 to GFS on Jan 1 (secured party provided value). GFS in turn provided a security interest in its current and after-acquired inventory (Debtor had rights in collateral--the inventory it owned). The security agreement was authenticated on Feb 1 when GFS signed the agreement at B's request.

A security interest is perfected when it is attached and the secured party takes control or possession of the property or files a financing statement with the secretary of state. Bank filed a proper financing statement with the Nevada secretary of state on Jan 5. However, because the interest did not attach until Feb 1, the interest perfected at the time of attachment.

2. Finance's (F's) Rights and Interests

Finance has a perfected purchase money security interest (PMSI) in GFS's inventory as of Jan 15 and acquired thereafter. Following the analysis above, F's security interest attached on Jan 15, and was perfected on Jan 20 when it filed a proper financing statement with the NV SoS. However, when a loan to a debtor was made for the purpose of enabling the purchase of specific collateral, the security interest is a financer-financed PMSI. The money must actually be used for the purchase of specific collateral. In this case, F loaned the $7,500 to GFS specifically for the purchase student guitars to fill an order. GFS ultimately used $5,000 of the $7,500 for the purchase of those guitars. Therefore, F has a PMSI in the student guitars GFS purchased from supplier, but a non-purchase money security interest in the rest of GFS's current and after-acquired inventory.

3. Supplier's (S's) Rights and Interests

Supplier has a perfected PMSI in the student guitars GFS purchased on March 1. A seller financed PMSI is formed when a secured party sells the debtor collateral on credit and retains a security interest in the item sold. Here, S extended $5,000 worth of credit to GFS for the purchase of the student guitars and retained a security interest in those guitars. Following the analysis in Section 1 above, the security interest attached on March 1. S filed a financing statement on March 2, perfecting its security interest, and delivered the inventory to GFS on March 3.

4. Priority of B, F, and S's Security Interests

A. Priority in Student Guitars

Between secured creditors, the first creditor to file or perfect (whichever occurs first) takes priority. However, the holder of a PMSI in inventory takes priority even over a party that filed first if, before the debtor receives possession of the inventory, the secured party perfects AND notifies holders of previously filed conflicting security interests. In this case, B has a security interest that was filed on Jan 5. F has a PMSI in the student guitars that was filed on Jan 20. Moreover, F notifed B of the security interest on the same day. Therefore, F has priority over B. S also holds a PMSI in the guitars, which was filed on March 2. However, GFS received the guitars on March 3, and S did not notify B and F of the conflicting security interests until March 5. Because the debtor took possession of the inventory before S notifed the other creditors, S does not take priority over the earlier-filed security interests. Therefore, F has first priority because of it satisfied the special requirements for PMSI; B has second priority because it filed first; S has last priority because it was last to file and did not satisfy the requirements for the PMSI priority exception.

B. Priority in Other Inventory

As a preliminary issue, S only attached a security interest to the student guitars it sold to GFS on credit. Therefore, it does not have any security interest in GFS's other inventory. As discussed above, the first creditor to file or perfect (whichever occurs first) takes priority in the case of conflicting security interests. Here, B filed its security interest earliest on Jan 5. F filed its security interest on Jan 15. Therefore, B has priority over F in the remaining inventory.

C. Priority in $2,000 Account Receivable

As discussed in 4(B) above, S only has a security interest in the student guitars. Unless otherwise agreed, a security interest automatically gives the secured party the right to identifiable proceeds. Here, absent an agreement to the contrary, B and F have rights in the identifiable proceeds of GFS's inventory, including the $2,000 account receivable for non-student guitars sold on credit. As outlined in 4(B) above, B has priority over F in the non-student guitar inventory. This includes identifiable proceeds from that inventory, such as the $2,000 account receivable.

5. Priority in Rare Guitar and $1,000 Account Receivable

GFS has a PMSI in the rare guitar because it sold the guitar to Joe on credit. Trader Bob has a PMSI in the rare guitars as well. As a consignor, Trader Bob retains a PMSI in the consigned goods under article 9. As outlined in 4(A), the first to file or perfect a security interest has priority. However, there is an exception in the cases of PMSIs in inventory. S does not have an security interest any anything

other than the student guitars and the proceeds thereof. Here, GFS did not perfect its security interest, and thus has last priority. Trader Bob filed and notified B, F, and S, before delivering the rare guitars to GFS, and thus has the highest priority. F filed and notifed B of its interest in GFS's inventory before GFS took possession of the rare guitars, and therefore has priority over B. As such, the priority in the account receivable is as follows: (1) Trader Bob, (2) F, (3) B, (4) GFS, and no interest for S.

Generally, a buyer takes goods subject to any security interest on them unless it is an authorized sale. A sale of inventory is implicitly authorized if sold to an ordinary consumer. Because Joe is an ordinary consumer and GFS has implicit authorization to sell its inventory, Joe takes the rare guitar free of the security interests, and thus none of the secured parties can attempt to reclaim the guitar in satisfaction of the debts.

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

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QUESTION 3

Exam Information

Applicant ID:	96
Exam Date:	8/2020
Exam Name:	Question 3

Count Specifics

Total word count: 1606

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

1. Whether the action is removeable to the federal district court

A defendant may remove a case to the federal court that was originally filed in the state court if the federal court would have had subject matter jurisdiction over the original case and it could have been filed there. A defendant may only remove to the federal district embracing the state court in which the case was originall filed and must remove within 30 days of service of the first removable document.

Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and generally have SMJ in three scenarios: federal question, diversity, and supplemental jurisdiction.

Negligence Claim

Diversity Jurisdiction

Federal courts have subject matter jurisdiction over controversies between citizens of different states, even if the claims do not involve federal law. There are two requirements for a court to exercise diversity jurisdiction: (1) complete diversity and (2) the amount in controversy exceeds $75,000.

To satisfy complete diversity, every plaintiff must be of diverse citizenship from every defendant at the time the complaint is filed. An indiviaul is a citizen of the state where he or she is domiciled at the time the complaint is filed, which is where the person maintains her permanent home. A corporation is a citizen of eery state where incorporated and where it maintains its principal place of business.

Complete diversity is met becasue A is a citizen of Nevada, B is a citizen of California, and the ski resort is incorporated and does business solely in Utah.

The plaintiff's claim must exceed $75,000 excluding interests and costs. While a plaintiff may aggregate her claims against a single defendant, the plaintiff may only aggregate her claims against multiple defendants if the defendants are jointly liable.

Here, A's claim is only for $30,000. Thus, the amount in controversy requirement is not met and thus the court does not have diversity jurisdiction over this claim.

Supplemental Jurisdiction

Supplemental jdx permits a federal court to hear additional claims that do not on their own meet the diveristy or federal question jurisdiction requirements. This requires each additional claim to share a common nucleus of operative fact with an existing claim that invoked either federal question or diversity jurisdiction. This is met when claims arise from the same transaction or occurrence as the underlying case.

Here the court has SMJ over the Forest Safety Act claim because it satisfies federal question jurisdiction as noted above. The court does not have independent SMJ over the negligence claim becuase it is purely state law and as noted above does not satisfy diversity. But the court has supplemental jdx over it becasue it shares a common nucleus of operative fact with the underlying claim. This is met because the negligence claim arises from B's conduct on the resort which was on federal land, which gave rise to the federal claim. Thus, the federal court has supplemental jurisdiction over the negligence claim.

US Forest Service Ski Safety Act Claim

Federal courts have jurisdiction over claims in a well-pleaded complaint that arise under federal law. This requires the plaintiff to seek enforcement of a right arising from a federal statute, regulation, or the US Constitution.

Here, A could have originally filed the action against the ski resort in federal court because the case invokes federal question jurisdiciton. This is met because the claim arises under the federal US Forest Service Ski Safety Act, which authorizes the resort to be sued for injuries on its property because it is on U.S. Forest Service land. Thus, the federal court would have originally ahd subject matter jurisdiction over this claim.

Thus, Abby's action is properly removable to the Nevada federal district court.

2. Whether the Nevada state court has personal jurisdiciton over Bella and the ski resort

The state court likely does not have personal jurisdiction over either Bella or the resort.

A court must have PJ over all parties. A court will have PJ over a defendant based on proper service of process in the forum state, or if the defendant is domiciled in the forum. When a traditional method for exercising PJ over a defendant is not satisfied, PJ exists only if the exercise of jdx complies with Nevada's long arm statute and federal due process standards.

Bella

Here, B was served in Nevada. But this was improper because service that is effected based on fraud or force is not suffient to satisfy PJ by personal service. B was fraudulently served in Nevada becasue the lawyer told her to come to the state to "raise A's spririts." But A wanted nothing to do with B and the lawyer knew that she could be served if she was lured to Nevada. Thus, to exercise PJ, the long arm statute must be met.

Nevada's long arm statue reaches the constitutional limit, so a court only needs to apply federal due process standards. THis requires a defendant to have such minimum contacts with the forum state so jurisdiction does not offend traditional notions of fair play and substantial justice.

A court will maintain specific jurisdiction over a defendant if the defendant has sufficient minimum contacts with the forum state, the plaintiff's claim arises out of the defendant's in-state activities, and the exercise of personal jurisdiciton comports with fair play and substantial justice.

Minimum contacts requires the defendant to have purposefully availed him or herself of the benefits of the forum, and it is foreseeable that he or she could be haled into court in the forum state.

Here, neither B nor the resort maintain sufficient minimum contacts. Neither reached out to or targeted the forum. So even though purposeful avialment does not require the defendant to enter the forum, it must be more than an incidental connection. B and the resort's only connection with Nevada is that B knows A from college, and that a Nevada resident was injured on the resort's property. Neither B nor resort could have reasonably anticipated that they would be haled into court to defend the lawsuit in Nevada.

The court also lacks specific jurisdiciton because relatedness is not met. The defendant's contact with the forum and the plaintiff's claim must be related. Thus the claim must arise from the defendant's contact with the forum state for a court to exercise specific jurisdiction.

Here, A's claims arise from B's negligence in Utah, and the resort's location in Nevada. Thus, even if either party made contact with Nevada, A's injury did not arise from that contact.

Thus, exercising PJ over either would offend notions of fair play and substantial justice because the burden on the defendants to defend the suit in Nevada is significant.

Thus, the Nevada state court doe snot have personal jurisdiction over Bella and the ski resort.

3. Whether Abby properly served summons and complaint on Bella and the ski resort

Due process requires that the defendant be sufficiently notified of a pending lawsuit. THis requires that notice be reasonalby calculated under the circumstances to apprise the interested parties of the action.

Bella

In Nevada, an individual may be served by handing him or her a copy of the summons and complaint, leaving copies of the papers at the defendant's dwelling house or usual place of abode with someone of suitable age and discretion residing in the dwelling, or by delivering a copy to an agent authorized to receive service of process.

Here, B was served process in Nevada when the attorney gave her a copy of the summons and the complaint. While a party may not personally serve another party, a party's lawyer may. While B was lured into coming to Nevada to raise her friend's service, it likely does not affect valid service of process.

Thus, A properly served summons and complaint on Bella.

Ski Resort

A party may mail a defendant a notice and request to waive formal service, including a copy of the complaint and two copies of the waiver form, with a prepaid means of returning the forms. If the defendant executes and mails the waiver form the plaintiff within 30 days, the defendant waives formal service of process. This applies to individuals and corporations. If a defendant fails to return the waiver, the plaintiff must have the defendant served personally or by substitued service.

Here, A validly sent a waiver of service to the ski resort because she sent the copy of the summons and complaint and the requisite forms. But A sent the waiver to the resort's ticket office in Utah. Generally, a corproation is served by serving an officer or an authorized agent of the corporation. Thus, sending the forms to the ticket office is likely insufficent to properly serve the resort.

4. The consequences if B fails to respond to the offer of judgment.

In Nevada, any party may serve an offer of judgement to resolve all claims in the action, at any time more than 21 days before trial. Failure to accept an offer within 14 ddays will constitute rejection. If a party rejects an offer of judgment and fails to obtain a more

favorable judgemetn at trial, that party is barred from recovering any fees or costs, and must pay the offeror's post-offer costs, reasonable attorneys' fees, and expenses incurred from the time that the offer is made to trial.

If B fails to respond to the offer of judgement, it will be a rejection of the offer. The offer was made over 21 days before trial, so B will be responsible for all reasonable attorneys' fees and costs that A incurs from the time of rejection through trial if A recovers at least $75,000 at trial.

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

AUGUST 2020
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NEVADA BOARD OF BAR EXAMINERS

QUESTION 4

Exam Information

Applicant ID: 81

Exam Date: 8/2020

Exam Name: Question 4

Count Specifics

Total word count: 1706

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

Jenny's Claims Against David

Assault

To establish a prima facie case for assault a plaintiff must show an intentional act by defendant that created a reasonable apprehension in plaintiff of an immediate harmful or offensive contact to plaintiff's person.

Here, David David lunged at Jenny and tried to knock her to the ground. Although he did not touch her (and thus perpetrate a battery), his attempt put Jenny in reasonable apprension that she would be knocked to the ground. This is evidenced by her telling the manager that she really thought he was going to hit her.

Thus, David is liable for assault.

Trespass

Trespass is the intentional, physical invasion of plaintiff's real property. Anyone in actual or constructive possession of the property may maintain this action.

Here, David entered Jenny and Paul's hotel room without their consent. The facts referred to it as Paul's room, but the couple checked into the room together so it is Jenny's as well. It could be argued that renting a hotel room constitutes constructive possession of the property and therefore this action could be upheld.

Conversion

Conversion is an intentional interference with the plaintiff's right to possession of a chattel serious enough to warrant paying the full value. Acts of conversion include theft.

Although it is described as Paul's laptop, because Jenny and Paul are married it may be considered her property too under community property principles. More facts would be needed to determine if it was indeed separate or community property.

Assuming the laptop was community property, Jenny can sue for conversion.

Intentional Infliction of Emotional Distress (IIED)

Jenny may try to establish a case for IIED against David, stemming from the assault. Jenny must show that the defendant committed an intentional or reckless act that is so extreme and outrageous as to cause severe emotional distress to the plaintiff. The plaintiff must suffer actual damages, but physical injury is not required.

Here, it is questionable whether lunging at someone is so extreme and outrageous. However, David's position as an employee tends to make the action more outrageous. Additionally, more facts are needed to assess the emotional distress component. Jenny was clearly shaken up and described herself as being "scared to death" from the incident.

If Jenny could show ongoing distress from the incident, she may be able to recover under IIED.

David's Defenses

Self Defense

When a person reasonably believes that he is about to be attacked, he may use such force as is reasonably necessary to protect against injury. A reasonable mistake as to the existence of danger is allowed. Force must be reasonable and only that which is necessary to prevent the harm.

Here, David could argue that he believed Jenny was about to attack him. Jenny "angrily" confronted him and was waving her fists, as well as throwing chairs. This was an aggressive approach and could ahve caused reasonable belief that an attack was imminent. Therefore, his attempt to knock her down was self defense. Trying to knock her down was a reasonable amount of force to use for the situation.

Consent

The only other possible applicable defense would be consent to enter their room. No facts indicate this existed, other than an implied consent for an employee of a hotel to enter your room for business purposes.

Jenny's Claims Against the Casino

Vicarious Liability

An employer will be vicariously liable for tortious acts committed by her employee if the tortious acts occur within the scope of the employment relationship. However, intentional torts are generally not within the scope of employment, with few exceptions such as force authorized by employment, which does not apply here. Thus, Jenny will not be able to sue the casino under vicarious liability despite the employer/employee relationship.

Liability for Negligent Hiring/Supervision

Employers may be liable for their own negligence by negligently selecting or supervising their employees. To establish a prima facie case for negligence, plaintiff must show a duty on the part of the defendant to conform with a specific standard of conduct, breach of that duty, actual and proximate cause of plaintiff's injury, and damages.

A duty of care is owed to all foreseeable plaintiffs. A hotel guest is a foreseeable plaintiff for negligence at a hotel. The reasonable person standard is a minimum standard of care, essentially what would the average person do? Innkeepers, or hotels, are held to a very high degree of care where they are liable for slight negligence. It is a minimum hiring standard to not hire someone with egregious past acts in former employment. It is also a minimum supervising standard that when an employee commits a crime on the job, you would fire them or more closely supervise them.

When the conduct falls short of the level required by the standard of care, breach has occurred. It is a question for the trier of fact. It is clear here that the hotel breached the standard of care by hiring David and then for not firing him or changing his access to guest's rooms after the discovery of his theft.

The breach caused the plaintiff's injuries. If the casino had not hired David he would not have been there on the day in question to commit the intentional torts, or at the very least he would not have had the same access to Jenny and her belongings, demonstrating actual cause. Proximate cause is based on the foreseeability test. It was foreseeable that by employing someone with a history of violence and theft, he would commit those acts again, which he did.

Lastly, damages are met because there are economic damages for the laptop and emotional suffering. Additionally, there may be punitive damages here as the casino's conduct seems reckless.

Casino's Defenses

The casino may assert partial comparative negligence. They could assert that Jenny contributed to her injuries as she "provoked" David when she first came at him. This would likely fail.

The casino could also try to allege that the manager misspoke when he stated David's past behavior and that they did not in fact have notice of his behavior. This would likely fail as well.

Paul's Estate: Survival Action

A victim's cause of action will survive her death to permit recovery for all damages from the time of injury to the time of the victim's death. These actions may be brought on behalf of the decedent and allow for recovery for the decedent's pain and suffering as well as recovery for actual damages. The personal representative for Paul's estate will bring the action.

Negligence

To establish a prima facie case for negligence, plaintiff must show a duty on the part of the defendant to conform with a specific standard of conduct, breach of that duty, actual and proximate cause of plaintiff's injury, and damages.

A duty of care is owed to all foreseeable plaintiffs. A hotel guest is a foreseeable plaintiff for negligence at a hotel. The reasonable person standard is a minimum standard of care, essentially what would the average person do? Innkeepers, or hotels, are held to a very high degree of care where they are liable for slight negligence. A hotel has a duty to keep the environment safe and warn guests of dangers.

When the conduct falls short of the level required by the standard of care, breach has occurred. It is a question for the trier of fact. A jury could find that the hotel breached the standard of care because it was aware of the tripping hazard but did not follow through on fixing it or placing a warning.

The breach was the proximate cause of Paul's injuries. The cause is questionable. One could argue but for the uneven floor, Paul would not have tripped. However, Paul was texting while walking and could have tripped on a temporary hazard. However, Paul still would not have tripped at that spot if not for the uneven floor. Proximate cause is a foreseeability test. It is absolutely foreseeable that a casino guest would trip on an uneven floor with no warning sign, particularly at a casino where a lot of drinking probably occurs.

Lastly, there were clearly damages as Paul twisted his knee and was limping afterwards.

Comparative Negligence

A survival action will face the same limitations as if Paul brought the suit himself. Therefore, if comparative negligence is found, based on Paul's texting while walking, the award can be reduced.

Battery

A battery occurs when a defendant intentionally makes harmful or offensive contact with the plaintiff. Contact can be direct or indirect.

Here, in the course of stealing Paul's laptop, David pushed Paul and he fell down the stairs. By pushing Paul, David made intentional contact with him that was harmful. It does not matter whether or not David intended for Paul to fall down the stairs or subsequently die. He only had to intend the conduct.

Thus, David is liable for battery.

Trespass

Trespass is the intentional, physical invasion of plaintiff's real property. Anyone in actual or constructive possession of the property may maintain this action.

Here, David entered Jenny and Paul's hotel room without their consent. It could be argued that renting a hotel room constitutes constructive possession of the property and therefore this action could be upheld.

Conversion

Conversion is an intentional interference with the plaintiff's right to possession of a chattel serious enough to warrant paying the full value. Acts of conversion include theft.

Here, David stole Paul's laptop because he took it from Paul's room without consent. Because it was theft and Paul no longer had any access to the laptop, it was conversion.

Negligent Hiring/Supervision

The analysis regarding negligent hiring and supervision from above is incorporated here. Had the hotel not hired David, Paul would not have been battered (and subsequently died), nor would his laptop have been stolen.

Paul's Widow

Wrongful Death

Wrongful death acts grant recovery for pecuniary injury resulting to the spouse and next of kin. Recovery is allowed only to the extent that the deceased could have recovered had he lived. Jenny can recover for funeral and medical expenses, loss of consortium and loss of support.

Loss of Consortium

Jenny can sue for indirect interference with the marital relationship and/or services due to the negligent tortious conduct.

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

AUGUST 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

Exam Information

Applicant ID: 175

Exam Date: 8/2020

Exam Name: Question 5

Count Specifics

Total word count: 1860

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

Offered by Prosecution

1. Police dispatcher's testimony about caller's description of the SUV driver's rate of speed and running the red light.

Relevance

In order to be admissible in a trial, evidence must be relevant to the case at hand. Evidence is relevant if it tends to make the existence of any fact more or less probable than it would be without the evidence. Evidence may be excluded under the Rule 403 balancing test if the probative value of the evidence is substantially outweighed by (1) danger of unfair prejudice, (2) confusion of the issues, (3) misleading the jury, (4) undue delay, (5) waste of time, or (6) needless presentation of commulative evidence.

Here, Dan is being tried for a hit and run accident where a witness saw a blue SUV speed, run a red light, and hit a sedan. This initial information was provided by the 911 caller. As this is the foundational information of the case, it makes the existence of the facts more probable than without this call. This relevance is not substantially outweighed by any unfair prejudice.

As such, the caller's call is relevant.

Hearsay

Hearsay is an out of court statement by a declarant offered for the truth of the matter asserted. Hearsay is generally inadmissible, unless it falls under an exception under the rules of evidence.

Here, the police officer is testifying as to an 911 call by a caller, which accounts to an out of court statement by a declarant. The testimony is likely being offered to show that the person who caused the accident was driving a blue SUV, speeding, and hit the sedan in the intersection, and as such is being offered for its truth.

Accordingly, the testimony about the 911 call is hearsay and is inadmissible absent an exception.

Excited Utterance

A statement relating to a startling event made while the declarant was under the stress of excitement caused by the event or condition is admissible for its truth.

Here, the 911 caller was sobbing on the phone call immediately after the accident occurred. On the phone, the caller pleaded "please hurry, I can see the sedan driver is hurt really bad." This shows that the caller had just witnessed the startling event of the car crash, wanted to help the person injured, and was still under the excitement of the accident when she called.

Therefore, because the caller made an excited utterance, the police dispatcher's testimony about the 911 call is admissible.

2. Bob's testimony that Dan was always speeding dangerously fast around their neighborhood.

Relevance

See rule above regarding evidence.

Here, because the car in the accident was speeding, and Bob always sees Dan speeding, it would be relevant to the fact that Dan could be the driver who was speeding during the accident. There may be the risk of unfair prejudice here, as just because one speeds in a neighborhood does not mean he speeds on other roads, or was speeding and caused the accident in question. However, the 403 balancing test only excludes relevant evidence if the relevance is substantially outweighed by its unfair prejudice. It is not likely to rise to that level here.

As such, Bob's testimony is relevant.

Hearsay

See hearsay rule above.

Here, Bob is testifying about Dan's speeding, and is therefore not making an out of court statement.

As such, this testimony is not hearsay.

Lay Witness

A witness who is not an expert may testify and give their opinion or inference so long as their opinions are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding or determination of a fact in issue.

Here, Bob is Dan's neighbor who has seen Dan speed in the neighborhood on a number of occasions. He may rightly give his opinion (subject to other evidence rules) that he perceives Dan to be a speedy driver, in order for the prosecution to make its case that Dan is the one who committed the crime.

Therefore, Bob may testify as a lay witness.

Character Evidence

Character evidence refers to a person's general propensity or disposition for honesty, peacefulness, and violence. Generally, character evidence is inadmissible to prove conduct in conformity with the crime in question. However, evidence of the habit of a person is relevant to prove conduct in conformity with the habit.

Here, Bob is testifying to Dan's habit of "always speeding" around the neighborhood. As the prosecution is offering Bob's testimony to show that Dan has a habit of speeding, so of course he was speeding during this occasion, which caused the accident. The defense will argue that just because Dan speeds around the neighborhood does not mean he speeds everywhere else. However, this argument will likely fail, because Bob is so sure that Dan "always" speeds, a court will allow Bob's testimony and let the jury decide the weight to give it.

Accordingly, Bob may testify that Dan always speeds around the neighborhood.

3. Esther's testimony that Dan told her he though he hit "something" with his car.

Relevance

See rule above for relevance.

Esther's testimony is very likely relevant that Dan told her he hit something with his car, as that something very well could have been the sedan in question.

Spousal Immunity Privilege

In criminal cases, a witness spouse has the privilege of refusing to testify against their party spouse in order to protect communications, regardless of confidentiality between the spouses both during and before marriage. This includes testimony, observations, and impressions had between the spouses. Under the federal rules of evidence, this privilege is held only by the witness spouse, and not by the party spouse.

Here, if Esther decides that she does not want to testify at all, she may refuse to testify under this privilege. However, if she decides to testify, Dan cannot prevent her under this privilege.

Marital Communications Privilege

If a spouse decides to testify in criminal or civil cases, the confidential communications between the spouses during marriage are still protected. This privilege is held by both the witness spouse and the party spouse. As such, if the party spouse does not wave this privilege, the witness spouse may not testify to the confidential communications. However, observations are not protected under this rule.

Here, Dan waited until he was inside, along, with Esther before he told her that "I think I hit something with my car, and the police may be coming soon." This was a communication between just the two of them, and meant to be confidential. As such, this communication will be protected under this privilege, and Esther may not testify to this statement from Dan. However, if she chooses to testify, she may still describe what she saw that day and to other conversations that were not confidential under this privilege.

Summarily, Esther may not testify that Dan said he hit "something" with his car.

4. Lucy's testimony that on the day of the accident Esther called and asked what the penalties were for a hit and run accident.

Relevance

See rule for relevance above.

Lucy's testimony would likely be relevant, because this is an odd question to have when Esther's husband is on trial for a hit and run accident. There is no substantial prejudice and this testimony is relevant.

Hearsay

See rule above for hearsay.

Here, Lucy is testifying about an out of court statement by Esther. However, it is not likely being offered for its truth, as the truth of the matter would be whatever the actual penalties are for a hit and run. Simply testifying that Esther asked the question is not admitting anything to the court.

As such, Lucy's testimony is not hearsay.

Accordingly, as the testimony is relevant, not hearsay, and is a statement directly heard by Lucy, this testimony is admissible.

Offered by Dan

5. Bob's testimony that Dan told Bob that he had just witnessed an accident and was in a rush to call the police.

Relevance

See rule for relevance above.

Here, Bob is testifying that Dan told Bob he had just witnessed an accident, which would make the fact that Bob Dan caused the accident less probable. As there is little evidence of prejudice here, this testimony would be relevant.

Hearsay

See hearsay rule above.

Here, Bob is testifying to Dan's statement when he got home the day of the accident. The defense is likely admitting it for its truth that Dan did not cause the accident, but said he witnessed the accident, so must have witnessed the accident.

As such, the statement is hearsay.

Statement by Party Opponent

A direct statement by a party is admissible if offered against him by his opponent.

Here, Dan's statement, while made by a party, is being offered by Dan, and not against Dan. As such, this statement will not qualify under the statement by party opponent exemption.

Prior Consistent Statement

A prior consistent statement may be offered to rehabilitate a witness on the stand if the opposing party called the witness's credibility into question.

Here, if Dan were testifying, this statement to Bob would be admissible to support Dan if Dan made the claim on the stand that he only witnessed the crash and did not cause it. However, simply having Bob remember this prior statement from Dan does not qualify under the prior inconsistent statement exception.

As such, the statement is not admissible as a prior consistent statement

As there are no available exceptions to bring in Bob's testimony about Dan's hearsay statement, Dan's statement is inadmissible hearsay.

6. Lucy's testimony that the damage she observed to Dan's SUV on the day of the accident was too minor to have resulted from his SUV impacting the sedan at 65 mph.

Relevance

See above rule for relevance.

Lucy's testimony would be relevant due to her expertise as a retired police officer who had conducted over 100 accident investigations. There is no substantial prejudice here, so her testimony would be relevant.

Expert Witness

A witness may testify as an expert if they are qualified, if their testimony is relevant, and if they are reliable. Reliability relies on the Daubert test to determine if the expert's methods have been tested, are generally accpted, have been peer reviewed, have high rates of error, and if they meet the usual standards of the profession. Experts may give an opinion or inference on an ultimate issue in a case.

Here, Lucy has conducted over 100 accident investigations and reconstructions over her career, so she appears to be qualified. We already established that her testimony is relevant to the case at hand. Finally, it is unclear whether Lucy did any specific tests other than looking closely at the damage to Dan's SUV, that would support her conclusion that the damage was too minor to have come from impacting a sedan at 65 miles per hour. That being said, because she is qualified and her testimony is relevant, the court will likely allow the testimony, allow the prosecution to cross-examine Lucy, and then let the jury decide the weight to give the testimony.

Accordingly, Lucy will likely be able to testify as an expert witness.

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

AUGUST 2020
EXAMINATION ANSWERS

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NEVADA BOARD OF BAR EXAMINERS

QUESTION 6

Exam Information

Applicant ID: 85

Exam Date: 8/2020

Exam Name: Question 6

Count Specifics

Total word count: 1948

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

Question 6)

NV is a community property state. All property acquired during marriage is presumed to be commmunity property. All property acquired before marriage is separate property. Separate property also included property that is acquired during marriage through gift, devise or inheritance. In order to detemine the character of an asset, courts will trace back to the source of the funds used to acquire the asset. A mere change in form of an asset does not change its characterization unless it is transmuted or gifted to the community. The burden of proving that an item is separate property is on the spouse claiming it is separate property. With these basic principles in mind, we can now turn to the specific items of property involved in this instance.

1) Henry's PERS benefits and Wendy 401(k)

PERS Benefit

Under a typical defined benefit retirement plan the retirement benefit is tied to a salary level and years of service. The employee retirement benefits accumulated during marriage, whether or not vested at the time of divorce are community property and treated as deferred compensation. A pro rata appraoch will be applied and the numerator will be the years of service while married and the denominator will be the total years needed to retire. If the spouse is not yet eligible for retirement, a present cash value will be applied or a "wait and see" approach can be applied. The present cash value approach determines the present cash value of the community interest and the spouse receives this as divorce. The wait and see method is preferred by NV becasue it is often difficult to satisfy the present cash value method. Becasue the size of the ultimate benefits are not known at the time of divorce, the parties must "wait and see" to determine the amoutn of the actual community benefit.

Here, the court will likely use the "wait and see" approach since it is uncertain when H will retire and the amount of the benefits is determined by when he retires. Because the amount is uncertain the courts will use the wait and see approach to see how much the benefits end up being and the prorating the amount that is owed to the community. H and W were married for 15 years, so 15 years of work would be in the denominator to calculate the amount for community. H worked for 5 years before he was married and that amount would certainly be separate.

Part of the PERS benefit plan is community and part is separate.

401(k)

A 401(K) is a defined contribution pla. In characterizing the seperate property and community property components, tracing rules apply. The separate property component are those assets in the account as of marriage plus income earned by those assets. the community property component is the contributions to the account during the marriage plus the income earned by those community contributions.

Here, since all of the 401(k) plan was acquired during the marriage, this whole plan until the date of divorce would be considered community property.

The 401(K) plan is community property.

2) The net equity in the home title in W's name

The home was the W's separate property since it was owned by W before marriage.

Under the pro-ration rule, if an installment purchase was made before marraige, and the principal payments were made with community funds during hte marriage, the asset is part community and part separate property in proportion to the principal payments made. NV generally follows the CA proration rule, but the NV courts have modified the CA approach but prorating the appreciation in the property's value from the date of purchase to the date of divroce pursuant to a formula that takes into account the number of monthly payments made with the separate and community funds. Only principal payments that reduce debt trigger the proration rule.

Here, the property was purchased by W before marriage which means that this property is her separate property but because community funds were used to pay down the mortgage (H used funds from the salary and income in his account to pay down the mortgages of the home and condo) that means that part of the house is community property in proportion to the amount paid down (in principal) by the community property.

The house is part community and part separate property

3) the equity in the condo

The condo was H's separate property since he owned this condo at the time of marriage.

Under the pro-ration rule, if an installment purchase was made before marraige, and the principal payments were made with community funds during hte marriage, the asset is part community and part separate property in proportion to the principal payments made. NV generally follows the CA proration rule, but the NV courts have modified the CA approach but prorating the appreciation in the property's value from the date of purchase to the date of divroce pursuant to a formula that takes into account the number of monthly payments made with the separate and community funds. Only principal payments that reduce debt trigger the proration rule.

Here, it appears that income from the separate property (the rent of the condo) was used to pay for the mortgage payments of the condo. This appears to mean that no community funds were used to pay down the loan. Generally, income is considered community property, but using tracing principles this may be the clear and convincing evidence that community funds never paid down the loand of the condo.

Likely there will not be a community interest in the condo through the pro-rata approach.

Titled as joint tenants

Taking title as joint tenants is clear and convincing evidence that overcomes the community presumption and raises the presumption that the husband and wife own the property as joint tenants - separate property one half each.

Here, in 2018, H had conveyed title to himself and W as joint tenants. This overcomes the community presumption and each W and H will be deemed to own the condo separately one half each.

the condo is the separate property of H and W since it was titled jointly.

Gift

A spouse to spouse transfer of title of real property creates a presumption of gift that can only be overcome by clear and convincing evidence.

Here, even if the title does not, for some reasoon, overcome the community presumption, the transfer that H did to convey the condo to himself and W would create the presumption that a gift was intended to W.

H and W would each has a separate property interest in the condo.

4) the line of credit

Funds borrowed during marriage, and goods purchased on credit during marriage are presumptively on community credit. However, borrowed funds are classified according to the primary intent of the lender.

Here, generally the funds borrowed during marriage would be preusmed to be community debt. W may aruge that she did not know about this credit line since she was not involved with the property until the following week. However, likley the lender is looking to both H and W evidenced by the fact that the following week after the loan, H tilted the property in both H and W's names. This seems to indicate that the lender told H that he was looking to both H and W and that is why H had to retitle the property.

Likely the line of credit is community property

5) the money in H's bank account, the travel trailer titled in H's name and car title in W's name

H's bank account

H's bank account appears to be part separate and part community property. Salary is community property. Income from separate property "the rent, issues and profits" thereof is separate property.

The mere fact that the bank account is commingled with separate and community funds does not transform or transmute the separate property into community properyt as long as the funds remain traceable.

Here, is H is able to trace to the income from the condo and the salary, then the salary will be community but the remainder will be separate property.

The bank account has some salary in it which is community property and then rest appears to be separate.

Travel Trailer titled in H's name

Direct tracing method

Genearlly, all property acquired during marriage is community property. Under the direct tracing method, the spouse could attempt to satisfy the direct tracing under which the spouse must show that the timing of the separate property deposits and the withdrawals clearly indicates an intent to park the separate property funds in the account just long enough to purchase the disputed assets.

Here, in 2019 H inherited $35K which is separate property (see above). H may be able to use the direct tracing method to show that he just parked this money in the account (which is likely his separate property anyway - see above) to just the next day to buy a travel trailer. The fact that H put this money in the account for one day appears to be suggestive that this was parked in this account just long enough to purchase this trailer.

H will be able to use the direct tracing method to show that this trailer is his separate property

titled property

In addition to the direct tracing method, H may also point to the fact that the trailer is titled in his name alone. Property titled in one spouse's name alone is generally not enough evidnece to overcome the community presumption

Here, H would probably be more succesful with the direct tracing method than with arguing that the title shows his intent of separate property since the community presumption is so strong.

H will likley use the direct tracing method instead of this titled property

W's car

Property titled in one spouse's name alone is generally not enough evidnece to overcome the community presumption. There must must be clear and convincing evidence that 1) separate funds were used by tracing or 2) a gift to the separate estate was intended.

Here, tracing would be used to determine what funds were used to purchase the car. W will argue that it was her separate property that was used to purchase the car since the funds from her bank account was used to buy the car. However, the funds in the bank account (even though titled in her name alone) is salary and salary is community property. Since community property was used to purchase the car, the car is community property. Note, the titling of the bank account in W's name alone would not be enough to overcome the community presumption.

The car is community property

Community assets and separate property at divorce

Note that it is important to classify interests in the property since the community assets will be distributed evenly absent some compelling reason otherwise. Whereas the court does not have the power to distribute separate property (except for support reasons of the spouse or children). Therefore, all the property above that is classified as separate will remain that party's separate property and the court cannot disperse it. The community property classified above will be equally divided among the parties absent any compelling reason. The courts have noted that a compelling reason likely has to be financial misconduct.

Here, there does not appear to be any financial misconduct so there is probably no reason to stray from the equal division of the community property. W may argue that H was unfaithful, however, this is not a compelling reason for the court to disperse the funds unevenly since this is not a financial misconduct.

The court will distribute the community funds evenly

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

AUGUST 2020
EXAMINATION ANSWERS

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NEVADA BOARD OF BAR EXAMINERS

QUESTION 7

Exam Information

Applicant ID: 129

Exam Date: 8/2020

Exam Name: Question 7

Count Specifics

Total word count: 1849

******* Question 7 STARTS HERE *******

David and Richard can Constitutional challenges with respect to the following actions by the police:

Identification Process

Pre-trial identification methods that are unnecessarily suggestive so as to create a substantial likelihood of misidentification may violate a criminal defendant's right to due process under the Due Process Clause of the Fifth Amendment (applicable to the federal government) and Fourteenth Amendment (applicable to the states). David and Richard will argue that the officers' method of having Jane identify them was too suggestive and violated their rights for two reasons: first, Jane was asked to identified the suspects from 30 to 40 feet away by viewing them in a police vehicle with tinted windows, which would not give her clear enough view of the suspects to reasonably identify them; and second, no other people were included in the "lineup" of David and Richard and the police had already suggested they were guilty by telling Jane they had "caught a couple of guys". Courts have previously held that lineups which include only the suspects, or which have photos of the suspect that are conspicuously larger or different from the rest, violated the defendant's right to Due Process. Thus, David and Richard's challenge to the identification process should succeed.

The remedy for violation of a defendant's rights at a pre-trial identification is to exclude the identification. However, the witness will still be permitted to make an in-court identification of the defendant(s) so long as there is an independent source for the identification. Thus, Jane may ultimately be allowed to identify David and Richard in her testimony at trial if the court finds that she is doing so based on her perception of them at the time of the robbery, rather than during the identification process.

Arrest

The Fourth Amendment provides for a criminal defendant's rights to be free of unreasonable searches and seizures by the government, which covers arrests as an arrest is deemed a seizure of a person. Government action is present here because the police officers are government employees that arrested David and Richard. All arrests must be based on probable cause, which is trustworthy facts or knowledge that would be sufficient for a reasonable person to believe that the suspect(s) have committed or are committing a crime for which arrest is authorized by law. David and Richard will argue that their arrest was unconstitutional because there was no probable cause, given that the only basis for the arrest was the identification by Jane via a flawed and misleading lineup process. However, David and Richard were already in police custody based on the officer's statement to Jane that the police had "caught a couple of guys". Thus, more information is needed on why the officers had already picked up David and Richard to determine if they had probable cause. If David and Richard's arrests were based solely on Jane's identification, then the arrests were unconstitutional.

The remedy for an unconstitutional arrest in violation of the Fourth Amendment is to exclude any evidence obtained from the arrest under the Exclusionary Rule. The Exclusionary Rule is a judge-made doctrine which excludes evidence obtained in violation of a criminal defendant's rights under the Fourth, Fifth and Sixth Amendments, as well as any evidence obtained due to the illegal evidence, subject to exceptions for (i) fruits of an unconstitutional confession (further discussed below), (ii) evidence obtained from a source independent of the illegality, (iii) evidence for which the causal connection between the illegal police conduct and the evidence is remote, (iv) evidence that would have inevitably discovered anyway and (v) violations of the knock and announce rule. These exceptions do not apply here. Therefore, if David and Richard's challenge to the arrest succeeds, they should be able to suppress all evidence obtained from searching David's person, as well as David's confession and the backpack and gun obtained as a result thereof. If the evidence is nonetheless wrongfully admitted at trial, then a conviction of the defendants must be overturned on appeal unless the government can prove beyond a reasonable doubt that the error in admitting the evidence was harmless.

Search of David's Person

The Fourth Amendment prohibition on unreasonable searches and seizures also applies to evidentiary searches and seizures, such as the search of David's person after he was arrested that yielded a piece of Jane's jewelry hidden in his sock. As discussed above, government action is present here because the search was performed by a police officer. David will have standing to object to the search because it was into a constitutionally protected area in which he had a reasonable expectation of privacy - the inside of his clothing. An evidentiary search of an individual generally must be supported search warrant that is supported by probable cause and describes with particularity the areas to be searched and the items be seized; however, there are six exceptions which will permit a warrantless search and seizure.

The prosecution will argue that the exception for a search incident to a constitutional arrest applies and permitted them to search David's person. Pursuant to this exception, when an individual is arrested, the police are permitted to conduct a contemporaneous search of his person and of any areas into which he might reach to obtain a weapon or destroy evidence. David will argue that the search was not permitted because the exception only applies if the arrest is constitutional, and his arrest was not constitutional because it was not based on probable cause, as discussed above. If it is determined that the police did not have probable cause to arrest David, then David's argument will succeed. The Exclusionary Rule would apply and would suppress the jewelry from being admitted at trial.

David's Confession

Miranda: Pursuant to the Fifth Amendment Miranda doctrine, a criminal defendant has a right against compelled self-incrimination and thus must be informed of certain rights when they are placed in a custodial interrogation by the government. Specifically, the individual must be informed (i) that they have a right to remain silent, (ii) anything they say can be used against them in court, (iii) they have the right to the presence of an attorney and (iv) if they cannot afford an attorney, one will be appointed for them. An individual will be deemed to be in custody if a reasonable person under the circumstances would not feel free to leave and if the environment for the interrogation presents the same inherently coercive pressures a police stationhouse. Interrogation is defined as any words or conduct that

the police should know would likely elicit an incriminating response. Here, the facts indicate that David was under arrest in the back of a police car, and therefore would be considered to be in custody as he could not leave. Furthermore, Officer Smith was questioning David about the crime, which would constitute an interrogation as it would likely lead to incriminating statements. Government action is present because David knew he was being questioned by a police officer.

David will argue that his confession was unconstitutionally obtained in violation of his Miranda rights because Officer Smith did not properly Mirandize him. While the Miranda warnings given to a defendant do not need to be a word-for-word match to the warnings set forth above, they must capture the substance of the required warnings. Here, Officer Smith did not clearly state that David had a right to have an attorney present. The prosecution will argue that David was still informed of his right to remain silent and waived that right by saying "yes, I heard you" and then proceeding to answer questions, such that the questioning was permitted. However, a waiver of Miranda rights must be knowing and voluntary. Thus, David can counter that he could not knowingly waive his rights when he was not given the full Miranda warnings. On balance, given the total omission of David's right to an attorney, his challenge should succeed.

The remedy for violation of a defendant's Miranda rights is to have the confession be inadmissible at trial pursuant to the Exclusionary Rule. The confession will still be permitted to used to impeach the defendant, however, if they choose to take the stand and testify.

Richard's backpack and gun: David will argue that, because his confession was unconstitutionally obtained, the backpack and gun the police found due to his statements are "fruits of the poisonous" tree and must be excluded under the Exclusionary Rule. This argument is not likely to succeed. The Exclusionary Rule does not work to suppress nontestiomonial evidence obtained in violation of a defendant's Miranda rights unless the police acted in bad faith, such as by purposefully failing to give Miranda warnings at all. Here, it does not appear that Officer Smith was acting in bad faith, and he did not fail to give the warnings entirely, but just made a mistake in describing David's rights. Unless more evidence is found that indicated bad faith on the police's part, the backpack and gun will not be suppressed due to the violation of David's Miranda rights. However, if David's arrest is unconstitutional, they would be suppressed on that basis (as evidentiary "fruits of the poisonous tree" *will* generally be excluded if obtained due to an unconstitutional arrest).

It should separately be noted that Richard would not have standing to challenge the police's search and seizure of the backpack and gun based on the Fourth Amendment because he hid them somewhere outside of his home, and would not have a reasonable expectation of privacy in the area where he hid them. As discussed above, person only has standing to challenge an evidentiary search and seizure if they had a reasonable expectation of privacy in the item or area searched.

Confrontation Clause: In the event that David's confession to the police is found admissible at trial, Richard will argue that it cannot be used against him unless David takes the stand and is cross-examined. Pursuant to the Confrontation Clause set forth in the Sixth Amendment, a criminal defendant has a right to confront adverse witnesses against them. This right has been interpreted to prohibit the use of one co-defendant's confession that implicates the other co-defendant unless the confessing defendant takes the stand and is subject to cross-examination (or if the confession can somehow be redacted to clearly only refer to the confessing defendant).

Conclusion

Based on the facts presented, it appears likely that David and Richard's arrest was unconstitutional in violation of the Fourth Amendment because the officers relied solely on a seriously misleading identification process as to the defendants and therefore did not have probable cause for the arrest. If so, then all of the evidence obtained from the arrests - the stolen jewelry in David's sock, David's confession and Richard's backpack and gun - should be excluded under the Exclusionary Rule, as none of the exceptions to the Exclusionary Rule apply here. If more information indicated that the arrest was in fact based on probable cause, then David's confession should still be excluded as it was obtained in violation of his Miranda rights, but the jewelry, gun and backpack could be admitted.

******* Question 7 ENDS HERE *******

AUGUST 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 8

Exam Information

Applicant ID:	85
Exam Date:	8/2020
Exam Name:	Question 8

Count Specifics

Total word count: 2420

******* Question 8 STARTS HERE *******

Question 8)

1) is there a contract?

Law: Common law

The common law governs contracts. However, for a contract involving the sale of goods, article 2 of the UCC applies. Goods are all things that are movable at the time they are identified to the contract.

here, this contract is for services of painting the house. Because the services are not goods that are movable, this contract is governed by the common law.

Common law applies here.

Formation

For an agreemnt to be enforced as a contract, there must be mutual assent, meaning an offer and acceptance, and consideration.

Offer

An offer creates a power of acceptance in the offeree and a corresponding liablity on the part of the offeror. For a communication to amount to an offer it must 1) contain a promise, undertaking or commitment with the intent to enter a contract 2) the offeree must have knowledge of the offer and 3) it must have definite and certain terms.

Here, when A requested a quote form B, this was not an offer since this was just an invitation to bargain. Then B sent an email to A with: "have inspected.... can paint for $2000, work to be completed within 1 week... advance payment of $500...." which would be considered an offer since this is contains a promise to paint and an intent to enter into the contract, A received this offer indicated by the fact that she responded, and then it also had definite terms relating to price, time.

There was an offer by B to A.

Acceptance

The langauge of the offer controls the manner of acceptance. Unless otherwise stated, the acceptance can be made by any reasonable means. An acceptance is a manifestation of assent to the terms of the offer.

CL Mirror Image rule

Traditioanlly, contract law insisted on an absolute and unequivocal acceptance of each and every term of the offer. any different or additional terms would be deemed a rejection and a couteroffer.

A's voicemail

Here, A called and left a voicemail (which is probably a reasonable means of trying to accept since the offer did not say how to accept) but A changed the terms. A added that the paint must be "decorator's paint" and changed the price to $1750. Under common law, this would be considered a rejection and a counter offer.

A's voicemail was a rejection and a counteroffer.

B's email response

Here, B resonded by email that "can start next week" which is a different term that was was in the voicemail. B agreed to the decorator's white paint, but B said that the price must be $2000. B also required that the response be in email form. (See above for controlling the manner of acceptance).

B's email response is a rejection and a counteroffer since it contained different and additional terms.

A's text to B

Here, A texted B "next week will be ok... price still $1750." This was not a proper means of acceptance since the offer from B in the email limited acceptance to email and A did not email B, but instead texted him. Additionally, A also changed the price which would constitute another rejection and counteroffer by A under common law.

A's text is likely another rejection and counteroffer.

Implied acceptance by performing

An offer can be accepted by the promise to perform or by beginning performance

Here, the parties began to perform which would probably constitute acceptance of the last offer from A (via text). A began to perform by sending a check of $500 to B and B begain peforming by accepting the check and commening painting on A's house the next week.

There was acceptance by performing.

Consideration

Courts will enforce a promise to a contract only if it supported by consideration or a substitute. consdieration requires a bargain for exchange and that which is bargained for is of legal value. It must constitute a legal benefit and detriment to the parties.

Here, the parties have consideration since there was a bargain for exchange. A is gaining a painted house and losing money. B is losing his services of painting and gaining money.

There is consideration

conclusion: There is a valid contract.

Terms:

the terms of the contract are: 1) price of $1750 as indicated by the text message - $500 advance, 2) starting next week, and 3) decorator's white paint to be used.

2) What are B's claims and defenses?

Statute of frauds

Certain agreements must be in writing signed by the party to be sought to be bound. Absent such a writing, makes the agreement voidable by the party to be charged. Contracts for services that will be perfomed over a year long must be in writing.

Here, the contract is for services that will be performed within a year (about 1 week) so statute of frauds will not apply

Statute of fraud will not apply here.

Substantial performance

Performance under common law contracts do not need to be perfect. Substantial performance is all that is required, but a party must not commit a material breach. To determine whether a breach is material, courts look to: the amount of benefit received, the adequacy of damages, extent of performance, hardship to the breaching party, and whether the breach was willfull.

here, B's probably greatest arguement would be that he substantially performed. B painted approximately 85% of the house (which is substantial) and also he painted in a color that was just slightly off. B will aruge that the benefit recieved to A was great since he performed almost fully and the color was only slightly off. B will also aruge that it is not fair for A to take back all the money that she had paid B since A was there and saw the painting occur. The fact that A allowed B to continue painting until 85% was done, would be a hardship on B and making B work for 4 days without paymnet would be a great hardship to B.

Likely B will be able to show that he substantially performed and thus, A will not be excused from the contract.

Condition excused

An express condition limits the obligations created by other contract language, but does not create an independent obligation. Strict compliance with the express condition is required. An occurance of a condition may be excused by a later action or inaction of the person protected by the condition. For example the condition may be excused by a material breach, waiver, or substantial performance.

here, the paint color may be considered a condition. If so, then this condition should have been strictly complied with (especially in light of the fact that the contract expressly stated the decorator's paint was to be used). However, B may be able to argue that the condition was excused since B substantially performed (see above) with a different white paint and this should excuse the condition since A did not say anything about the paint until 4 days later. Even if substantial performance does not excuse the condition, likley the inaction of A of telling B when A had seen the paint on her house that paint was not correct for 4 days, would lead B (reasonably) to believe that the paint color was allowable and it was waived.

The paint color was likely excused since A did nothing for 4 days when she say this paint being used.

Damages:

Generally, a nonbreaching party is entitled to the difference betweent teh contract price and the market value, plus incidental and consequential damages, minus mitigation

The usual goals of damages is to put the non-breaching party in the position she would have been in had the promise been performed. Incidental damages include expsnses reasonably incurred in dealing with the breach. Consequential are those that are foreseeable and contemplated by the parties.

Here, B may argue that he should receive the benefit of his bargain by getting the contract price.

B may be able to receive expectation damages of the contract price and he may be able to receive incidnetal damages that resulted from performing (maybe denying other jobs or the time/labor requried).

B probably will be able to recover damages.

A's Failure to Mitigate

Along the same lines, B may argue that A failed to mitigate her damages when she failed to tell B that the paint was wrong, but instead allowed B to continue using the wrong paint and thus increased her damages.

Restitution

As an alternative to contract damages, restitution may be available. Resitution is based on preventing unjust enrichment. This is an action under a quasi-contract theory. Generally, the measure of restitution is the value of the benefit conferred.

Here, B may argue that he should be paid restitution for the benefit conferred upon A (i.e., that 85% of her house was painted). A will argue that she did not want this color and thus did not confer a benefit and instead has to pay another person to repaint her house.

A court may allow B to recover some damages for his work, and potentially resitution.

Detrimental reliance

A promise is enforceabel if necessary to prevent injustice if the promisor should reasonably expect to induce reliance and reliance actually occurred.

Here, B will argue that he detrimentally relied on the fact that for 4 days A did not react to the paint color so he assumed that this paint color was allowable. This would probably be reasonable since A was there and could have easily said something to B the first day of using the paint.

B probably could use detrimental reliance to enfoce the contract against A.

Adequate assurances

A party with reasonable grounds for being insecure should request adequate assurances in writing and if hte other party does not respond then this will lead to anticipatory repudiation - which allows the party to excuse the contract and sue right away.

Here, B may argue that if A was so concerned about the paint color, she should have contacted him and asked him about it. Instead, A did not do that, but let B continue painting the wrong color.

A did not seek adequate assurances.

Anticipatory repudiation

When A failed to pay B, B can sue under anticipatory repudiation right away. Anticpatory repudiation is an excuse and a way to sue someone right away under the contract.

Here, when A told B that she wanted her money back, she breached the contract and B can sue A.

3) what are A's claims and defenses?

Statute of frauds

A may argue that she is excused from this contract and does not need to perform becasue this contract should have been in writing. However, the statute of frauds does not apply here and this is an enforceable contract (see above)

Mistake/ambiguity

A may argue that there was never a meeting of the minds and therefore no contract. If there is a material ambiguity or misunderstanding, then there is no meeting of the minds.

here, likley this will not be a good defense since it appears (see above) that there was a meeting of the minds - especially regarding the paint color - and therefore there was a valid contract. A may argue that the price was never fully agreed upon, however, by performing, the contract was accepted,

This is probably not a strong defense by A.

Breach

A may argue that B breached the contract by failing to abide by the promise in the contract to use the decorator's paint. Performance under common law contracts do not need to be perfect. Substantial performance is all that is required, but a party must not commit a material breach. To determine whether a breach is material, courts look to: the amount of benefit received, the adequacy of damages, extent of performance, hardship to the breaching party, and whether the breach was willfull.

Here, A will argue that the paint color was extremely importnat to this contract (in fact, potentially the most important term in the contract) and she made the paint color very clear to B. When B used the wrong paint color, this would be a breach of the contract. However, B will argue that all that is required is substantial performance, not perfect performance. B will argue that he performed 85% of the painting (using the wrong color - but likley that color was excused - see above). B will argue that his breach was minor, considering the fact that A had not confronted him about the paint color for 4 days.

Likely a court will find that this was not a material breach and that A is still bound by this contract.

Failure of express condition

See above

Here, A will argue that B failed to abide by the express condition of the paint color (see above) however, this will probably not be a strong argument since the condition was likley excused.

the condition was likely excused.

Damages:

Generally, a nonbreaching party is entitled to the difference betweent teh contract price and the market value, plus incidental and consequential damages, minus mitigation

The usual goals of damages is to put the non-breaching party in the position she would have been in had the promise been performed. Incidental damages include expsnses reasonably incurred in dealing with the breach. Consequential are those that are foreseeable and contemplated by the parties.

Here, A may argue that she should get her money back and also should be put in the position that she would have been in had the contract been performed correctly (i.e., the right paint color on her house). However, as noted above, A did not do a good job of mitigating her damage since she probably increased her damages by allowing B to continue using the wrong paint color. It would be foreseeable that A would have to hire another person if the paint was wrong and she may be able to recover a little for that. However, A's failure to mitigate will make it difficult for her to recover much damages

A's may not be able to recover much for damages.

Specific performance

Specific performance is an equitable remedy that A may seek in order to get the right paint color. However, specific performance is not generally allowed in service contracts.

Here, specific performance probably would not be the right remedy for A since A seems to indicate that she does not want B to paint her house and in fact wants B to leave her property for good.

Specific performance will not be available

******* Question 8 ENDS HERE *******

AUGUST 2020
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test

Exam Information

Applicant ID: 289

Exam Date: 8/2020

Exam Name: Performance Test

Count Specifics

Total word count: 2829

******* Performance Test STARTS HERE *******

MEMORANDUM

From: Examinee

To: Senior Partner

Date: August 12, 2020

Re: Minden Ranches LLC v. Brown and Smith

Introduction and Brief Statement of Facts

This Memorandum will objectively address the potential liability of our client, Minden Ranches ("MR") as it relates to lawsuits threatened to be filed by two separate plaintiffs, Nancy Brown ("Brown") and Joan Smith ("Smith"), for injuries sustained while each plaintiff was mountain bike riding on property owned or leased by MR.

MR raises cattle on 20 acres of land it owns just outside the city limits of Minden, Douglas County, Nevada. MR's 20 acre parcel abuts federally owned BLM land to the west and a 2-acre parcel within the Minden city limits to the east. MR grazes cattle on the 20-acre parcel and on the BLM land pursuant to BLM grazing rights. MR leases the adjoining 2-acre parcel for its ranching operations from the Robinson Family Trust ("RFT"). The lease with RFT expired 2.5 years ago and, while MR continued to make lease payments for the subsequent 2 years, MR has not made monthly rental payments to RFT for the last 6 months. MR continues to occupy and utilize the 2-acre parcel for cattle ranching and raising alfalfa despite not paying rent for such use. The Carson River flows through both the 2-acre parcel and the 20-acre parcel and on the other side of the river is a steep canyon.

George Elliot, the CEO of MR, recall seeing mountain bike riders on trials in the canyon from time to time. According to a recent news article, officials stated that the Carson River Trail attracts mountain bike riders from around the world. In 2018, MR posted "No Trespassing" signs where public roads provide access to the canyon. Elliot is not aware whether such signs are still posted becuase he has not been to the area for a period of time, but witnesses report that the signs are no longer posted, having been washed away in the heavy winter weather of 2018-2019. Officials stated that this trial collapsed in two places due to heavy erosion from record-breaking snow and rain in the winter of 2018-2019.

On May 8, 2020, Brown and Smith were riding mountain bikes on the Carson River Trial separately with a tour group when the accidents leading to their injuries occured. Brown's accident occurred on a well known short cut trail that passes through the 2-acre parcel. Smith's accident occurred where the trail crosses the 20-acre parcel. Both Brown and Smith were seriously injured as a result of the accidents. Brown is seeking $1M in damages. Smith's claimed damages are unclear at this juncture but she claims will have at least $250,000 in medication bills alone.

Both Brown and Smith allege that their injuries result from MR's failure to keep the trail safe or post any warnings.

Legal Authority and Analysis

The crux of this case is the applicability of NRS 41.510, commonly referred to as Nevada's recreational use statute, and if NRS 41.510 does apply, whether MR is immune from liability or whether one of the exceptions apply thereby making MR liable to the plaintiffs.

I. Applicability of NRS 41.510

Under NRS 41.510, property owners or occupants do not owe any duty to keep their property safe for others using it for recreational purposes unless the owners or occupants granted permission to the users in exchange for consideration. Lee v. Lamar, citing NRS 41.510. Specficially, Section 1 of 41.510 provides that "an owner of any estate or interest in any premises, or a lessee or occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity, or to give warning of any hazardous condition, activity or use of any structure on the premises to persons entering for those purposes."

The court has held that NRS 41.510 applies where (1) the defendant is the owner, lessee, or occupant of the premises where the plaintiff was injured; (2) the land where the plaintiff was injured is the type of land the Legistlature intended the statute to cover; and (3) the plaintiff was engaged in the type of activity the Legislature intended the statute to cover. Lee v. Lamar, citing Boland v. NV Rock. Each of these three requirements will be addressed in turn.

(1) The defendant is the owner, lessee, or occupant of the premises where the plaintiff was injured.

This prong is met. There are 2 parcels at issue here where each of the injuries occurred: (a) the 2-acre parcel (where Brown was injured) and (b) the 20-acre parcel (where Smith was injured).

MR concedes, and property records will show, that MR owns the 20-acre parcel where it grazes its cattle. There is no dispute as to ownership or use of this parcel.

The 2-acre parcel is leased by MR from RFT. However, the 5-year lease with RFT expired 2.5 years ago and, while MR continued to make lease payments for the subsequent 2 years, MR has not made monthly rental payments to RFT for the last 6 months. Brown will likely try to argue that 41.510 is not applicable in this case because MR is not the owner or lesee of this parcel. However, the court in Smith v. Sno Eagles (cited in Boland v. NV Rock), held that "occupant" should be interpreted to encompass a resident of land who is more transient than either a lessee or an owner. Further, the court in Boland found that the defendant was an "occupant" of the land in question because it mined the land for over 25 years, thereby creating a degree of permanence." Boland v. NV Rock. In sum, the court uses a broad definition as to who qualifies as an occupant of the land for the purposes of NRS 41.510. In this case, MR qualfies as an occupant under the statute. It is not required that they own or lease the property where the injury occurred; so long as they occupy the parcel, this prong is satisifed. The facts are clear that MR continues to occupy and utilize the 2-acre parcel for cattle ranching and raising alfalfa despite not paying rent for such use. RFT has not objected to this use or nonpayment of rent nor taken any action to remove or evict RFT from this parcel. Thus, this element of the Boland test is met.

(2) The land where the plaintiff was injured is the type of land the Legislature intended the statute to cover.

This prong is also met. Boland notes that while the NV statute does not specify what type of property is covered by the statute, the intent of the legislature is that the property be used for recreation. Thus, the type of property should be rural, semi-rural, or nonresidential so that it can be used for recreation. The Boland court held that an open gravel pit was covered by the statute. The Court in Brannan held applied the statute to "open" land, a broad definition. The court in Lee held that the defendant's nonresidental, urban, property met this standard under the statute, noting that 41.510 uses the broad language of "any estate" and "any premises" which therefore requires the court to apply a broad construction.

Importantly, the court has held that property is covered under a recreational use statute even where the landowner has taken actions to prevent others from using the property. Lee v. LLC, citing White v. CIty of Troy. Thus, MR's actions in posting "No Trespassing" signs will not preclude the property from qualifying under the statute.

It is clear that both the 2-acre parcel and the 20-acre parcel where the biking trails ran through are the type of land the Legislature intended the statute to cover. This is not defeated by the fact that MR tried to keep people off their land by posting No Tresapassing signes. The court will most likely find that this prong is also met.

(3) The plaintiff was engaged in the type of activity the Legislature intended the statute to cover.

This prong is easily met. In 2007, NRS 41.150 was revised to specifically include "riding a road or mountain bicycle" in Section 4(h). Both plaintiffs were riding a mountain bike when their accidents occurred.

In sum, MR has a strong argument that NRS 41.510 applies in both of plaintiff's cases. Now we turn to the questions of whether they are immune from liability under the statute or whether one of the exceptions applies thereby exposing MR to potential liability.

II. Immunity from Liability Under NRS 41.510

Since we can likely successfully argue that the statute applies, then assuming no statutory exception applies, we can successfully argue that Section 1 of the statute precludes MR from any liability related to Brown or Smith's injuries.

Moreover, even if the plaintiffs argue that permission was impliedly granted to all mountain bikers using the trails on eitehr property, MR would still be immune from liability. NRS 41.510(2) provides that if an owner, lessee or occupant of the premises gives permission to another person to participate in recreational activities upon the premises, the owner, lessee, or occupant does not thereby extend any assurance that the premises are safe for that purpose or assume responsibility for or incur liabilty for any injury to person or property caused by any act of persons to whom the permission is granted. MR can first successfully argue that it did not give express or implied permission for any mountain biker to access the trails on either parcel. There is no evidence of express permission. Implied permission to access either parcel cannot be proven either. The fact that MR knew that mountain bikers were using the trails but did not take further action - other than the No Trespassing signs - is not sufficient to deduce implied consent. Even if it were, MR avoids liability as provided in Section 2 of the statute.

We will turn to each of the statutory exceptions to immunity from liability below.

III. Exceptions to Immunity from Liability

A. NRS 41.510 does not limit an owner or occupant's liability if permission to partcipate in recreational activities was granted for consideration. NRS 41.510(3)(a)(2).

This exception is not applicable here becuase, as discussed above, permission was not granted to participate in recreational activities, whether or not consideratoin was present. MR did not grant permission, express or implied, to either plaintiff or any mountian biker to access the trails on either parcel, and they certainaly did not grant such permission for consideration (e.g., MR did not charge a fee for permitted users to access the trails on either parcel). This exception is not applicable.

B. NRS 41.510 does not limit an owner or occupant's liability where an injury was caused by another person to whom permission was granted to partcipate in recreational activities on the premises. NRS 41.510(3)(a)(3).

This exception is not applicable becuase it does not involve an injury caused by a third party to whom permission was granted to participate in recreational activites on the premises. The injuries were caused by the plaintiffs falling off the trail from their mountain bikes and were not caused by another party on the land, whether or not permission to be on the land was granted. This exception is not applicable to this case.

C. NRS 41.510 does not limit an owner or occupant's liability where the owner or occupant engaged in "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." NRS 41.510(3)(a)(1).

This exception may be applicable to our case and warrants further discussion. Several cases have discussed whether and how the owner or occupant can be charged with a "willfull or malicious" failure to guard or warn against a dangerous condition, use, structure or activity on the premises that is covered by the statute.

The court in Gard stated that there must be design, purpose and intent to do wrong and inflict the injury. Gard citing Crosman. The Gard court found the landowner did not act willfully or maliciously when it failed to maintain or warn against dangerous conditions in abandoned mines wehre the plaintiff was injured.

The court in Davies v. Butler, cited by Boland held that "willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible result." The Court in Boland found no evidence that the land owner/occupier wilfully acted to cause the plaintiff's injury. Plaintiff was injured while dirt biking in an open gravel pit that had a sudden drop off, with no warning. The court found that the owner/occupier, while aware that dirtbikers used the property, they were not aware of any accidents on the sand piles since it's existence years before.

The court in Neal found that even if a jury could find that defendant had knowledge of a rope swing used on his property, the jury could not find that the defendant had knowledge that injury was probable; the rope swing had been used for many years and there was no evidence that the D had knowledge of previous accidents.

Similarly, the court in Escobal v. HHC found no evidence that defendant knew of previous injuries on its land where the plaintiff was injured and thus plaintiff failed to show willful misconduct as a matter of law.

These cases are persuasive and comparable to the instant case. While MR, by its admission, was aware that mountain bikers frequently used the trails that crossed its property, there is no evidence that MR was aware of any accidents resulting from a person's use of these trails, whether or not such accidents occurred on mountain bikes or during some other recreational activity. This argument might be strengthened if we can show that MR has owned the 20-acre parcel for many years (we know they had a 5 year lease on the 2-are parcel) and about how long MR has known that mountain bikers were accessing the trails on this parcel. The longer they have owned the property, and the longer they have known about mountain biking on the trails without accident, the stronger this argument could be. Further fact finding should be sought in this regard. Even so, thus far we have found no case where the land owner/occupier has been found to have acted willfull or maliciously when they merely knew of the activity taking place on their land but had no knowledge of any accidents or injuries resulting therefrom.

Moreover, we can successfully argue that there is no evidence of "design, purpose and intent to do wrong and inflict the injury" as noted by the court in Gard. It appears that MR did not inspect those portions of its parcels where the trails were located very frequently, if at all. In fact, it was not their practice to inspect even the areas where the "no trespassing" signs were posted. If there were evidnece that MR had knowledge of the washed out trails, had knowledge of hte washed out no trespassing signs, and had knowledge that such could lead to serious injury for the mountain bikers, such might change this analysis. Absent such facts, it appears we can most likely successfully argue that MR did not act willfully or malicioiusly in its failure to guard or warn against a dangerous condition.

It should be noted that a harmful fact can be found in the newspaper article where Elliot responds to accusations that he recieved a letter in May 2019 warning him of the dangerous conditions of the trail. Elliot appears to acknowledge receipt of this letter and says they took no action becuase they use the properties for ranching and not mountain bike tours. The plaintiffs will use this to show that MR acted willfully in not maintaining the trails. Our focus must be the case law which clearly states that the defendant must have knowledge of prior accidents in order to be found to have acted willfully.

There was one case cited in Boland, McMurray v. US, where the court found that the owner/occupier acted willfully. in that case, the evidence showed that the defendant knew that other persons had actually been burned and stil failed to prevent the public from entereing the area where people were burned from the hot springs on his land.

Our case can be distinguished from McMurray because, as noted above, there is no evidence at the present time which indicates that MR had any knowledge of other persons who had been injured on the property, whether they were mountain biking or doing other recreational activities.

Conclusion

In conclusion, we can most likely argue that the statute applies. We have strong arguments that no exceptions to the immunity to liabiliyt apply, but the willful exception may be problematic, primarily due to the May 2019 letter and Elliot's response thereto. Even so, I think we can succesfully argue that

******* Performance Test ENDS HERE *******