

Performance Test

Petition for Post Conviction Relief

A. Preliminary Statements

1. Petitioner is eligible for relief as required by 42 Pa. C.S.A. §9543(a)(1) because Petitioner has been convicted on two counts of robbery, four counts of reckless endangerment and one count each of terroristic threats, burglary and conspiracy. He is currently serving a 6 ½ to 14 year sentence in a correctional facility in Franklin County, Pennsylvania.

2. Petitioner is eligible for relief pursuant to 42 Pa. C.S.A. §9543(a)(2) claiming the conviction resulted from (ii) ineffective assistance of counsel which, in the circumstances of this case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

3. Under Section 9543(a)(3), Petitioner asserts that the allegation of error has not been previously litigated or waived. Although Petitioner's trial counsel appealed the conviction, there is no evidence that said counsel made an allegation of ineffective assistance of counsel at any stage in litigation or in the appeals process.

B. Grounds for Relief

4. Petitioner is eligible for post conviction relief based on ineffective assistance of counsel. Counsel was ineffective for failing to give notice of alibi witnesses. The result of this failure to give notice was that it prevented counsel from introducing important evidence. To be successful on Petitioner's claim of ineffective assistance of counsel, Petitioner must show that the claim is of arguable merit, counsel had no reasonable basis for the action and that petitioner was prejudiced by the action.(Kolenda)

In the present case, Petitioner's claim of an alibi was of arguable merit. Petitioner informed his counsel of his desire to testify as to an alibi and of Petitioner's girlfriend and her alibi testimony. The Petitioner's testimony by itself was sufficient to establish an alibi. The evidence upon which petitioner was convicted was primarily identification evidence. Any alibi testimony presented would have discredited this identification testimony. A defendant must give notice of an alibi defense prior to trial. Counsel's failure to notify of alibi witnesses prior to trial prevented petitioner from introducing his girlfriend's testimony, which would have corroborated his alibi.

Counsel had no reasonable basis for the notification failure that prevented petitioner's alibi evidence. Although counsel argued that the failure to notify resulted from a choice related to strategy, the facts indicate that counsel failed to investigate the merits of petitioner's alibi testimony. "[C]ounsel's failure to file an alibi notice embraces the antecedent failure to investigate the strength or weakness of the possible alibi..." In this case, counsel failed to investigate the alibi testimony.

Further, previous counsel's failure to investigate the possibility of an alibi witness was a failure to explore a possible defense open to petitioner. According to U.S. v. Fisher, [a] defendant who is subjected to the possibility of incarceration is entitled to have the avenues of defense explored by his counsel..." Therefore, previous counsel's failure to notify of an alibi witness and related failure to investigate such a witness was not a rational action related to trial strategy but a failure to give effective assistance of counsel.

Finally, petitioner was clearly prejudiced by counsel's failure to give alibi testimony notice. This failure directly resulted in petitioner being unable to offer testimony from his girlfriend which would have corroborated his alibi testimony and undermined the prosecution's identification evidence.

Therefore, because petitioner's claim is of arguable merit, counsel had no rational basis for his failure to notify of alibi witnesses and this failure prejudiced petitioner, this petition for post conviction relief should be granted.

5. Petitioner is also eligible for post conviction relief based on ineffective assistance of counsel as a result of counsel's failure to request an alibi charge. In determining that counsel was ineffective, it must be shown that petitioner's claim is of arguable merit, that counsel had no reasonable basis for his action and that petitioner was prejudiced by counsel's action.

In order to determine whether petitioner's claim was of arguable merit it must be considered whether an alibi instruction was warranted. An alibi is "a defense that places the defendant at the relevant time in a different place than the scene..."

Here, petitioner offered testimony that he was at a convenience store at the time of the crime. Unlike the testimony in Kolenda, petitioner offered affirmative testimony that he was at another place when the crime was committed. According to Kolenda, the testimony of the accused may be sufficient in itself to raise an alibi defense. Since petitioner established an alibi by his own testimony, counsel was required to request an alibi instruction.

Further, the fact that it was not geographically impossible for petitioner to commit the crime given the alibi testimony is not dispositive. There is no minimum or threshold quantum of separation necessary. Therefore, petitioner's argument that counsel failed to request an alibi charge clearly has merit.

Further, this failure by counsel was not a reasonable trial strategy. After attempting to introduce petitioner's alibi evidence, counsel could not have reasonably made the choice to fail request a charge for alibi testimony.

Finally, counsel's failure to request the alibi charge clearly prejudiced petitioner. Eyewitness identification evidence was the basis for petitioner's conviction, and any alibi testimony would have discredited such eyewitness testimony. The lack of an instruction was prejudicial because it permitted the jury to possibly infer the petitioner was guilty if they found that an alibi was not established. Therefore, because petitioner's argument that an alibi instruction was warranted has merit, there was no reasonable basis for counsel not to request an

alibi instruction and the failure to request such an instruction prejudiced petitioner, this petition for post conviction relief should be granted.

Essay Question 1

1. If Frank had not died, Larry would not have been able to represent Wilma without informed written consent from Frank and Wilma. Additionally, Larry would not be able to reveal or communicate the information between them and use it adversely against Frank, for whom he has a duty.

An attorney can not represent a client if the representation would be harmful or adverse to the interest of a former or current client, according to the Pennsylvania Rules of Professional Conduct (“PRPC”). An attorney client relationship was created between Frank and Larry because Frank came to Larry to inquire about legal services and in the process communicated confidential information to Larry. As such, although Larry is not Frank’s attorney, Larry owes Frank a duty of confidentiality. As such Larry can not without Frank’s consent (informed and in writing) relay any content of their conversation to Wilma, as it would be adverse to the interest of Frank because he is seeking a divorce against her. Larry is not able to represent Wilma according to PRPC, unless he obtains informed consent from both parties.

2. Ben will be liable to the IRS for taxes on \$15,000 of the \$25,000 received upon Frank’s death.

Under the US Tax Code, the general rule is that the proceeds of a life insurance policy are not income. There is an exception to the general rule when the benefits and control are given over to a third party for valuable consideration. Under such a circumstance the recipient of the life insurance benefits is realizing income subject to tax.

In this case Ben’s receipt of \$25,000 is income. The transfer of the life insurance policy’s ownership benefit status, making it unchangeable, was for valuable consideration. Thus the exception is met and the \$25, 000 is income. The cash value of \$10,000 reduces the income to \$15,000 because Ben was required to report the \$10,000 as income upon receipt of the life insurance policy in 2005 and had a cost or consideration for the policy equal to that amount.

3. No, Ben will not be able to establish a contract exists to support his claim for a \$15,000 bequest under the PA Probate, Estates, & Fiduciaries Code.

Under the Code, any contract relating to the making of a will must be in writing. The writing does not have to be in a will, but should either be referenced in the will or put in a separate document. Absent such a writing, the contract will not be enforceable.

In this instance, the only evidence of a contract is oral. Frank orally promised Ben that in addition to the life insurance policy he would leave Ben an additional \$15,000 in his will. Frank

never changed his will before he died to reflect that promise nor did the parties ever reduce their agreement to writing. Absent such a writing, the probate court will not enforce the contract. Without such writing, Ben will not be able to establish the existence of the contract to support his claim.

4. As a pretermitted spouse, Wilma will receive an intestacy share of Frank's estate upon his death. Because Frank died without any issue, or any parents as far as it appears from the facts, Wilma's intestacy share would be the entire estate. In the alternative she can receive an elective share, which is 1/3 of the estate. However, it would be preferable for Wilma to take her intestacy share.

Under Pennsylvania's Probate, Estates, and Fiduciaries Code, a pretermitted spouse, which is a spouse who was not included in a will (because the marriage occurred after the will had been written) would be entitled to an intestate share of the decedent's estate, unless it can be proven that the decedent made the will in contemplation of marriage and purposely left the spouse out of the will. Under these facts, Frank prepared his will in 2001. He did not marry Wilma until several years later. Therefore, he could not have been contemplating marriage to Wilma when he prepared his will, and Wilma would be entitled to an intestacy share of Frank's estate. Although Frank served Wilma with a divorce complaint, no divorce had taken place. As such, Wilma and Frank may have been separated, but they were not officially divorced. Because there was no official divorce, Wilma will be treated like a pretermitted spouse and not like an ex-spouse, who would not receive anything under the will.

The intestate share of an estate for a person who dies with a spouse, but without any parents or issue, is the entire estate. Thus, Wilma is entitled to Frank's entire estate. In the alternative she could choose to take an elective share, which is 1/3 of the elective estate, but this would be less than the entire estate. Therefore, it would benefit Wilma to take the intestacy share and not the elective share.

Essay Question 2

1. The best legal argument that could be raised to support his petition to terminate child support is that Tony, his son is emancipated; however, because Tony is only 16 and may return to school, the argument will likely fail.

Under PA Family Law, a parent has a duty to provide for their children financially. A "child" for the purpose of a parent's duty to support is a child who is under 18 and not emancipated. In determining "emancipation" courts look to whether the child lives on his own, graduated from high school, or other indications of maturity.

Under these facts, Ed will likely argue that Tony is emancipated since he is out of school, living with a girlfriend and their child, and working. However, because Tony is still living with his Mom (along with girlfriend and baby), is only 16, and has the ability to return to school, a court will likely deem Tony to be un-emancipated. Further, the mere fact that Tony makes

minimum wage is not enough to terminate Ed's duty. Moreover, Tony's low level of education-9th grade undercuts the emancipation claim.

2. The court should override the objection because the PA Rules of Evidence permit lay opinions if the witness has first hand knowledge and the opinion is not outside a lay persons ordinary understanding as long as it's helpful to the trier of fact at trial.

Under the PA Rules of Evidence, lay opinions are not prohibited if based on first-hand knowledge, helpful to the trier of fact, and are not based on information outside the ability of an ordinary person to see, learn or understand. Courts in PA have previously permitted lay opinion as to intoxication.

Further, the Rules do not prevent lay opinion from evidence merely because the opinion goes to the ultimate issue of fact.

Under these facts, Officer arrived upon the scene of an accident and observed Ed. Officer noted that Ed "exhibited the classic signs of intoxication, including an unsteady gait, slurred speech, bloodshot eyes, and the odor of alcohol. This amounts to Officer's first hand knowledge. Because these are all symptoms that lay people are able to perceive, understand, and attribute to intoxication, Officer should be permitted to testify absolutely, in the form of an opinion. This testimony is clearly helpful to the trier of fact. Moreover, the fact that it goes to an ultimate issue of fact is of no consequence under the PA Rules of Evidence.

3. The court should grant Phil's Motion to suppress the drugs because his protestations invalidated Ed's consent. Under the 4th Amendment, police must have a valid search warrant or the search must fall under an exception. One such exception is consent given voluntarily and intelligently by someone with apparent or actual authority. Here Ed's consent was valid (voluntary) and he had actual authority. However the Supreme Court has said that where in the case of co-owners, one owner consents and another is present and objects the consent is not valid. In such a case, the police must obtain a search warrant before entering the house and therefore, the drugs should be excluded.

4. Cliff's best non-constitutional legal defense to the drug charges is entrapment.

Under PA Criminal Law, entrapment is an affirmative defense. Unlike federal law, PA is not concerned with a defendant's predisposition, but rather focuses on the objectiveness of the police conduct. Thus, if the Court finds that the police acted in an objectively unreasonable way so that an offense will be committed by one not ready to commit the crime, the defendant will establish the defense of entrapment.

Under the facts, Cliff likely will succeed on a claim of entrapment because the police used Phil, Cliff's friend. Over a two day period Phil called Cliff 11 times and insinuated that Phil couldn't get drugs from "Big Fred" due to money Phil owed him. As a result Cliff purchased the drugs for Phil.

Although such “controlled buys” are ordinary police practices, the Police tactics here can be found objectively unreasonable when they had Phil call Cliff 11 times in two days playing on the “friendly angle” between the two. Additionally, Phil promised to give Cliff, a known drug user, some of the drugs if he would purchase the drugs for him. This is a classic entrapment example. The police forced the opportunity upon Cliff in an objectively unreasonable way. Thus Cliff’s anticipated defense should be successful.

Essay Question 3

1. An affirmative defense raising the Statute of Limitations should be set forth under a separate heading “New Matter” which is attached to the Defendant’s Answer which must be filed within 20 days of receipt of the Plaintiff’s Complaint.

In Pennsylvania, the applicable statute of limitation of two years for a personal injury action requires that all suits arising out of the events giving rise to the litigation be filed within two years of the date of the incident or be barred. Here, Amy’s claim will be barred by the late filing of her complaint.

2. There should a Motion for Judgment on the Pleadings. At issue, is whether this motion is appropriate and the standard for granting this motion.

Under Pennsylvania Rules of Civil Procedure, once the pleadings are closed either party can make a motion for Judgment on the Pleadings. Under this motion, the standard is that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. The court can only review the pleadings, and taking all facts alleged in the pleadings in the light most favorable to the non-moving party determine whether the party is entitled to judgment as a matter of law.

Here, the motion is appropriate because the pleadings are closed. Additionally, applying the standard and assuming the defendant has filed a New Matter raising the statute of limitations affirmative defense then the motion should be granted. The motion should be granted for two reasons. First, there is no genuine issue of material fact in dispute because Kenny can agree with everything alleged in the Plaintiff’s complaint and still Kenny can assert the statute of limitations defense. Therefore there is no genuine issue of material fact in dispute. Second, the moving party is entitled to judgment as a matter of law because the statute of limitations was properly and affirmatively plead. The accident giving rise to the litigation occurred on July 1, 2005, as such Amy had two years from that date to file a personal injury cause of action. Although she retained Attorney Smart to represent her on June 27, 2007, he did not file her cause of action until July 12, 2007, 11 days after the Statute of Limitations deadline.

In conclusion, there should be a Motion for Judgment on the Pleadings and the motion should be granted.

3. Amy should bring the civil claim of professional malpractice against Attorney Smart for his representation of Amy in this matter, and she is likely to win because she will be able to demonstrate that Smart was negligent in filing the complaint after the statute of limitations had expired and that she would have been successful on the underlying claim. In PA, a claim of professional negligence against an attorney requires the plaintiff to prove a 2 part burden. She must first establish that the attorney was negligent, and she must then establish that she would have prevailed on the underlying action. In order to prove the first element, negligence, the plaintiff must go through the traditional duty, breach, causation, and damages framework of negligence. The second part of the burden essentially requires a mini-trial on the merits of the underlying claim to establish whether or not the plaintiff would have prevailed.

Here, Attorney Smart had a duty to represent Amy to the fullest requirement of the PA Rules of Professional Conduct (Rules). These rules required him to represent her with due diligence. Additionally, Smart contracted with Amy to represent her “aggressively and properly.” The requirements of the Rules and his own contract created his duty to Amy to represent her case. He breached his duty when he failed to ensure that the claim would be preserved under the statute of limitations. Causation, both factual and proximate, exists because his breach was the cause in fact of the suit’s dismissal, and this result is a foreseeable outcome of an attorney’s malpractice. Amy suffered damages in the amount she would have recovered in the proceeding. Therefore, Amy can establish the 1st element of her burden, Smart’s negligence.

It is likely Amy would have prevailed on the underlying claim. The facts appear to be undisputed. Amy had the green light in an intersection, and Kenny ran a red light. An accident resulted, in which Amy suffered injuries. The negligence and liability of Kenny in running the red light and causing the injuries to Amy appear clear, and she would have been likely to prevail. Therefore, Amy can establish the 2nd element of her burden.

Because Amy can establish that Smart was negligent and that she would have prevailed on the underlying action but for his negligence, she is likely to succeed in a professional malpractice claim against Smart.

4. Lawyers owe a duty of competence and diligence to their client. Regarding competence, lawyers must provide their clients with the necessary knowledge, skill, preparation, and diligence required to represent their clients’ best interests. Also, a lawyer must represent their client’s interests in a timely and diligent manner (for ex: making sure pleadings are timely filed). Once a lawyer is admitted to the bar, they are presumed to have general competency. Tort law is not a “specialty” area of law that only certain lawyers can work within. That Attorney Smart is admittedly a criminal law attorney does not preclude him from representing a client in a tort claim. However, it is not unreasonable for Attorney Smart to recognize that there are procedures unique to the civil process with which he may not be familiar. An attorney that does not have the necessary skill in an area of law, tort or civil law in general, may still be able to represent a client in that claim if they associate with another lawyer or learn the area of law (not at the client’s expense.) In this case, Smart breached his duty of competence and diligence to Amy when he failed to investigate whether there were any particular civil procedures related to timely filing a negligence complaint before he left for vacation; this breach of duty of competence in turn led to his breach of diligence as he failed to timely file the complaint thereby letting Amy’s claim

expire under the applicable statute of limitations that he could have discovered with reasonable investigation.

Essay Question 4

1. RBI could assert a claim based on the Due Process clause of the Constitution that their procedural due process rights were violated by the license suspension. They are likely to be successful on these grounds. The Due Process clause of the United States Constitution is found in the 14th Amendment. The procedural component of this clause provides that before anyone is deprived of their life, liberty, or property by the government they will be afforded “process.”

Several questions must be addressed in this case to determine if RBI’s due process rights were violated. First, the government actor requirement of the 14th Amendment is met because municipal governments such as C City are government actors. Second, was RBI deprived of life, liberty or property. An individual or corporation has a property interest in something such as employment from the government when they have a continued expectation of receiving it. It appears that RBI has a property interest in their license from C City because the license stated that termination will only be “for cause.” Such “for cause” language in contracts has been construed as providing for procedural due process rights before a government actor can deprive you of those rights. Furthermore, the fact that the license states that there will be a hearing on the termination provides more evidence that RBI had a property interest in their license.

Another question that must now be answered is how much process is RBI afforded under the Due Process clause and did the hearing, three months later, afford RBI adequate process. When determining how much process should be afforded under the Due Process Clause, courts examine three things: 1) the severity of the deprivation the P will suffer without more process, 2) the ability of more process to reduce the likelihood of errors, 3) any governmental interests that would weigh in favor of allowing the government to afford the level of process that they did. Under the analysis, it appears that the three month waiting period is not enough process for RBI. The amount of harm that RBI is suffering without additional process is severe: they are “out of business.” Furthermore, the availability of more process to reduce this harm is likely to weigh in RBI’s favor: while the outcome may be the same if RBI gets a hearing based on the Fire Marshall’s report, at least RBI would have the hearing and have a chance to stay in business. Without the hearing they are out of business. Third, the facts do not display any significant governmental reason for the three month delay. If C City was currently swamped with appeals, or if having an immediate hearing would cost C City a substantial sum of money, then they may be successful on this prong. However, under the facts provided there is no substantial governmental interest in the delay. Therefore, because RBI will suffer a severe harm without more process, and because the availability of an immediate hearing could reduce that harm, and because C City does not have any significant interest in delaying the hearing, the three month waiting period imposed on RBI violates their Due Process rights under the 14th Amendment.

2. There is sufficient evidence to make out a prima facie case for age discrimination in violation of the ADEA. The ADEA protects employees from adverse employment action based

on their age. The ADEA applies to businesses that employ 20 or more workers. It would appear from the facts that RBI qualifies under this statute.

In order to make out a prima facie case for age discrimination, Pete must show that he was over the age of 40 and was replaced by someone substantially younger than him. He must be otherwise qualified, and suffered some adverse employment action. Here, Pete was well qualified and had an unblemished record. He was 58, which puts him in the protected class, and he was in an employer-employee relationship with RBI. He was replaced with someone substantially younger, age 42, which created an inference of intentional age discrimination. The fact that the replacement is also in the protected class is irrelevant; as long as he is substantially younger, Pete has made his case. He was fired, an adverse action.

Having shown he was replaced with someone younger and that he is in the protected class, Pete has made a prima facie case for age discrimination, and the burden of production now shifts to RBI to rebut the presumption of intentional age discrimination that arose from Pete's prima facie case.

3a. In determining Pete's motion for a new trial pursuant to Rule 59(a), the trial court should determine whether the decision was against the weight of the evidence such that reasonable persons could not have disagreed as to the result or whether it shocked the conscience of the court.

It is within the province of the jury to weigh the evidence and render its verdict accordingly and the court should not impose its will on the jury unless it is clear that injustice will occur if it does nothing. Allowing the courts to do otherwise would undermine the entire jury system.

3b. The trial court should not award Pete a new trial because the weight of evidence was not against the verdict.

Assuming that a prima facie case of age discrimination was established an inference of discrimination is created. This inference or presumption can be lost if the employer can offer a legitimate non-discriminatory reason (LNDR) for its actions. Having met their burden of production, the inference of discrimination disappears. At this stage the Plaintiff/employee must persuade (burden of proof) the trier of fact that the LNDR was pretext, i.e. a lie or not the real reason and that his membership in the protected class was the determinative factor in the employer's decision.

Under these facts, RBI will offer the fact that Pete had the bottle in his bag on site and point to its long standing policy against such actions. This will suffice as its LNDR. This will cause the presumption of an inference of discrimination to drop out. Therefore, Pete will offer the fact that young employees were only given written warnings for violation the same policy, as well as the foreman's comments about an "old crew". However, Pete's showing will not be conclusive to prove discrimination, especially since his firing occurred after the fire and that RBI would likely try to crack down on such behavior. Thus, the court will not rule in Pete's favor

and grant a new trial because the verdict in favor of RBI was not against the weight of the evidence.

Essay Question 5

1. Barb owns Greenacres. At issue is the effect of failing to record a deed and the effect of Pennsylvania's race-notice statute.

Under Pennsylvania law, for a deed to be valid it must be validly delivered. Whether a deed is validly delivered is based on the grantor's intent. The grantor must have the present intent to deliver the deed. Failure to record a deed is not determinative on whether a deed is validly delivered.

Here, the delivery from Anne to Barb was valid. Anne gave a valid deed to Barb. Because Anne had the present intent to give the deed to Barb the delivery was valid. The fact that Barb failed to record the deed does not render her deed invalid because the correct inquiry is the grantor's present intent. It does not, however, protect Barb from subsequent BFP's for value who records first.

Pennsylvania law applies a race-notice statute. Under a race notice statute, a BFP who take for value and records first wins. A BFP is a bona fide purchaser, a purchaser who takes without Notice of any previous deeds. The recording statutes only protect those purchasers who take (1) for value (2) without notice and (3) record first.

Here, Barb did not take for value. Barb was a donee. She was given Greenacres as a reward for acts of kindness. Also, Barb did not record first.

Here, Chuck did take for value. Chuck took for slightly less than its actual market value. The amount of value is irrelevant, so long as it is value.

Chuck did have notice. Notice can be from (1) actual (2) inquiry or (3) record. Here, the title search did not reveal anything so Chuck did not have record notice. There is no indication that he had actual notice from Anne. The problem is he had inquiry notice. Inquiry notice is what he would have had, had he visited the site prior to purchase. A purchaser is deemed to know what he would have known had he visited the site. Here, Chuck took it "sight unseen." At the time Chuck purchased, Barb was living openly, visibly and had established a permanent full time residence. Had Chuck done a search of the property he would have seen this and had notice. As such, Chuck is deemed to have inquiry notice. Chuck recorded first. While Chuck recorded first, he took with notice and thus was not a BFP. Therefore he is not protected by the recording statute. If Chuck did not have notice then he would prevail over Barb because he would be a BFP without notice, for value, who recorded first.

In conclusion, although neither party can claim protection under the recording statute, the subsequent purchaser Chuck had notice. Therefore Chuck cannot claim the protection of the recording statute. As such Barb owns Greenacres.

2. Dave could sue for rescission on a theory of mutual mistake, however he is unlikely to be successful.

Pennsylvania recognizes mutual mistake as a defense to contract formation. Mutual mistake happens when 1) both parties are mistaken, 2) regarding a basic fact of the deal, which 3) adversely affects the exchange, and 4) the party adversely affected does not bear the risk of loss for the mistake.

Here, both parties were mistaken about the basic fact that the inscription was by the president-which adversely affected the exchange (Dave did not get what he thought he was buying; Ann didn't sell what she thought she was selling). However, it is clear that Dave knew that the purchase was risky because the signature hadn't been authenticated. Under these circumstances, Dave would bear the risk of mistake. He would not be able to rescind the contract due to mutual mistake.

3. No, Tim cannot successfully assert a claim against Anne based on the warranty in the deed.

Under Pennsylvania property law, a seller conveying title to land via a special warranty deed warrants against flaws in the title caused by her own actions, as compared to a general warranty deed, where the seller warrants against all problems in the title, including those caused by the action of her predecessors. A special warranty deed has only two covenants: that the seller has not conveyed the land to anyone else, and that there are no encumbrances on the land as a result of the seller's actions.

Here, the deed from Anne to Tim contained language "specially warrant[ing]" the deed. Anne was therefore only warranting as against flaws in the title caused by her own actions. The old tax lien now causing the problems in the title predated Anne's ownership and was unknown to her. Though the special warranty deed warrants against encumbrances on the land, the warranty only extends to encumbrances placed on the land by Anne. Here, Anne did not even have knowledge of this particular encumbrance. Tim will therefore not prevail in his claim against Anne on the basis of the special warranty in the deed.

4. Anne can claim that she was a third party beneficiary of the contract between EZ and Golden Years management and therefore she is entitled to the discount. An intended third party beneficiary is found when a contract is made by two people with the intention of benefiting a third party named in the contract. Once that person's rights have vested under the contract and/or they have detrimentally relied upon the contract, then they may enforce the contract. Here, although not specifically mentioned by name, the contract between EZ and Golden Years expressly provided that in exchange for being the pharmacy in Golden Years and setting up an emergency fund, EZ pharmacy would pay a large rental fee and give a twenty percent discount on all prescriptions purchased by Golden Years Residents. Anne was already living in Golden Years when the contract was made, therefore she was included as an intended beneficiary as a resident of Golden Years who would get the 20% discount. Anne has a claim to enforce the contract as a third party beneficiary of the EZ and Golden Years contract.

Essay Question 6

1. A board of directors can properly determine and distribute dividends so long as the corporation is not insolvent or would be rendered insolvent on account of the distribution. Insolvency is when the corporation cannot pay creditors as debts come due and/or the corporation's assets are less than its liabilities. Also, both directors and officers owe the corporation duties of care and loyalty; specifically, they must execute their duties in good faith and with the reasonable belief that what they are doing is in the best interest of the corporation. They must exercise the same care as that of a prudent person in managing their own business. This duty can be breached through both acts and omissions that harm the company; however, under the business judgment rule, they will not be liable for acts or omissions that harmed the corporation if they were decisions to act or not act in a certain way made in good faith and were rational and informed. A director that relies in good faith upon the assertions of its president or financial officer in making a decision is considered to have made a good faith informed decision and should not be held liable. In this case, the directors voted to distribute a total of \$125,000 (\$25,000 to each of the 5 shareholders). Based on the information provided by Bonnie, its chief financial officer, the directors, including Bonnie, (but not including Al) would not have had any reason to believe this distribution would have rendered the corporation insolvent. Their decision was in good faith, reasonable, and informed. However, Al, the president, chemical engineer, and director of research, breached his duty of care and loyalty to the corporation when he knowingly withheld clearly relevant and material information from the board in deciding whether to claim and distribute a dividend to shareholders—that is, Al withheld information of which he was aware regarding the corporation's impending tremendous liability. Had the directors been made aware, they would realize that such a distribution would render the corporation insolvent (if not already insolvent on account of these liabilities) and that a distribution would not be proper. The corporation can sue Al, who breached his duty of care and loyalty to the corporation, to recover the dividend that was distributed. However, the other directors should not be held liable as Bonnie presented to the board in good faith all the information she had available to her (the other important info was withheld by Al), and the rest of the directors (except for Al) relied in good faith upon both their president and CFO, and believed a distribution would not render the corporation insolvent.

2. OFI can revoke its acceptance of the Fiberlight because they were told specifically that it would serve their purposes, received further assurances, and adequately and timely revoked their acceptance after the product failed to work as promised.

Under the doctrine of fitness for a particular purpose, a seller may be held liable when he offers a product knowing of a particular purpose to a relying buyer and the product fails to meet the needs of the buyer. A revocation can occur successfully when a buyer has no knowledge or reason to have knowledge of a problem with a product when it was received, the buyer then timely informs the seller of the problem and timely informs the seller of the revocation, and the buyer takes care that any problems with the goods are not more than the usual wear and tear associated with use.

In this case, OFI may revoke in part because Chemco knew of their specific needs and Al acting on behalf of Chemco assured OFI that the product was fit for a particular purpose. In fact, the product failed to work properly in the concrete injection process that Al was specifically informed about and it blew out two molds damaging the equipment and injuring visitors at OFI. OFI legitimately did not know of the problem when it accepted the product. Even when OFI had suspicions that the product may not have the necessary fine consistency, Al assured OFI's production manager that the product would work as he claimed. After the failure of Fiberlight to work as promised OFI timely notified Chemco of its intention to revoke and further notified them of potential lawsuits and fines associated with the product's failure in their plant. Finally, so long as the remaining Fiberlight was not damaged past any usual wear and tear OFI may successfully revoke the acceptance.

Thus, because of the steps taken by OFI and the improper actions of Al, OFI may revoke its acceptance.

3. Assuming OFI can revoke its acceptance of the Fiberlight, it has an obligation to hold the remaining quantities and follow instructions from Chemco concerning disposition of the goods. Under the UCC, if a buyer revokes its acceptance of a product but still has some of the product, it has certain obligations to the seller. The buyer has the obligation to keep the remaining product to give the seller time to pick it up or provide instructions for its disposition. If the seller does not pick up its goods or provide instructions the buyer has a right to sell the remaining product. In this transaction, the buyer acts as an agent of the seller. In the event the buyer is able to sell the remaining product, it must remit the sale proceeds to the seller because it was acting as seller's agent. However, buyer gets to keep a reasonable fee for conducting the sale.

Here this means that any remaining Fiberlight that OFI has in its warehouse, they must keep in order to allow Chemco to pick up its goods or provide instruction for disposition. If OFI sells the remaining product it must remit the proceeds to Chemco less a reasonable fee for conducting the sale.