



The State Bar of California

OFFICE OF ADMISSIONS

Dear [REDACTED]

The Committee of Bar Examiners regrets to inform you that you were unsuccessful on the July 2024 California Bar Examination.

Your written answers were all read, and your total scaled score was below 1390.

Below are the assigned grades, the operant grades, the raw and scaled totals on the written portion, the MBE scaled score (if applicable), and the total scaled score you received on the examination. The operant grade, which is used to calculate scaled written scores, is one of the following: the first read grade, if your answers were read only once, or the average of the first and second read grades. The raw written score is the sum of your operant grades, after the PT grade has been doubled. Also provided below, if applicable, is your MBE scaled score.

For the General Bar Examination, the total scaled score is the sum of the scaled written score multiplied by .50 and the scaled MBE score multiplied by .50. For the Attorneys' Examination, the total scaled score is equal to the scaled written score.

Also provided below, if applicable, is the national percentile rank information for your performance on each of the seven MBE content areas and for your MBE scaled score (i.e., the percentage of all examinees taking the same administration of the bar examination who scored below your score, based on national data). In addition, the local percentile rank for your MBE scaled score is reported (i.e., the percentage of all California examinees taking the same administration of the bar examination who scored below your score).

WRITTEN	1st Read	2nd Read	Operant Grade	MBE Percent Below
Essay 1:	60	60	60	Civil Procedure:
Essay 2:	60	55	57.5	Constitutional Law:
Essay 3:	55	55	55	Contracts:
Essay 4:	55	55	55	Criminal Law:
Essay 5:	65	60	62.5	Evidence:
Essay 6:	65	65	65	Real Property:
				Torts:
Raw Written:	420.0			
Scaled Written:	1356.3756			Local:
Scaled MBE:	0			National:

TOTAL SCALED SCORE: 1356.3756

For further information, see the Exam Results Information page on the State Bar website under [Information for Unsuccessful Applicants](#).

The Committee of Bar Examiners

1)

1. Upon what theory or theories may the Pick shareholders bring claims against Alex and Baker and what is the likely result?

PickWinners Inc. is a corporation, since no information indicates otherwise the corporation presumably has been properly formed and the required paperwork has been filed with the Secretary of State. A corporation is a legal entity created for the purpose of doing business. By filing to become a corporation, the founder or owners limit their personal liability for the actions of the corporation.


Derivative Suit

Pick's shareholders may file a derivative suit since they have made a demand to the Board and it was denied. A derivative suit can be filed by a shareholder after a written demand to the Board if they feel the Board of Directors (BOD) has harmed the value of the stock. Here, the shareholders likely seeing the decline of Pick's stock, and learning of the competitor business created by one of Pick's BOD feel that Pick should have taken actions to take on the Esave business and improve the value of Pick's stock value.

BJR - The Business Judgement Rule is a rebuttable presumption that protects BOD members if they have acted in good faith using their best judgment. Here, Alex and Baker will use the BJR to say that they did act in the best interest of shareholders. Alex and Baker evaluated the option of adding a lower end subsidiary by hiring an analyst to review the option. At the time of Cate presenting the opportunity, Alex and Baker said they had hired an analyst 2 months prior, this is possibly too long ago, since markets can rapidly change. Alex and Baker should have possibly re-evaluated the lower end market again when Cate presented the opportunity to them.

Duty of Diligence - The BOD members owe a duty of diligence to shareholders, to diligently review options and make decisions for the betterment of the corporation and its shareholders. Here, as discussed above with the BJR, Alex and Baker hired an analyst who looked at the low-priced end of the market. One analyst reviewing this option once (2 months ago) is likely not diligent behavior of the BOD. One analyst looking at the option may not have led to a sufficient review, and Alex and Baker likely owed a higher duty to their shareholders.

Duty of Loyalty - The BOD has a duty of loyalty to the corporation and its shareholders to act in the best interest of the corp. Here, Alex and Baker seemed more focused on their loyalty to their wealthy investor clients and not focused on the good of the company. By limited their area of focus they were also limiting the profits of the corp and shareholders. Even though they felt they had explored the option of expanding to lower priced investments, their investigation of the option was limited which makes it seem as though they had a preference to maintain the status quo and focus only on wealthy investors.



Shareholders would likely be successful in their derivative suit against Baker and Alex because they did not seem to act with diligence and really make decisions in the best interest of the shareholders and the corp.

Direct Suit

Shareholders may be able to file a direct suit against the members of the BOD if there behavior warrant it.

Piercing the Corporate Veil - The Corporate Veil may be pierced if the BOD commits fraud, the corporation was undercapitalised at formation, failure to follow corp formalities or if the BOD treats the corporation as its alter ego.

Fraud - If the BOD commits fraud they open themselves up to a direct suit piercing the corp veil.

Undercapitalization - Undercapitalization at formation means that when the corporation was formed, it was formed with inadequate capital, essentially making it difficult for the corporation to succeed. Here we are not given any significant facts regarding the formation of the corp, so it is likely that the corporation was adequately capitalized at formation. This is not a basis for the shareholders to pierce the corp veil.

Corp Formalities - Corp should have regular board meetings. Here there is no indication that the corp failed to follow corp formalities.

Alter Ego - BOD treat a corp as their alter ego if they act as though the corp assets belong to them. Here there is no indication that Alex or Baker acted in such a way as to treat the corp as their alter ego.


Shareholders would be unlikely able to pierce the corp veil and directly sue Alex and Baker.

2. Upon what theory or theories may the Pick shareholders bring claims against Cate and what is the likely result?

Derivative Suit -

Pick's shareholders may file a derivative suit since they have made a demand to the Board and it was denied. A derivative suit can be filed by a shareholder after a written demand to the Board if they feel the Board of Directors (BOD) has harmed the value of the stock. Here, the shareholders likely seeing the decline of Pick's stock, and learning of Cate's competitor business feel that Pick should have taken actions to take on the Esave business and improve the value of Pick's stock value.

Usurpation of Corporate Opportunity - If a BOD member takes an opportunity for themselves that the company could have taken, then that is usurpation of a corp opportunity. This is allowed in circumstances when the idea has been presented to the BOD, with all pertinent information, and the BOD declines to act on the opportunity. Here,



Cate tried repeatedly to get Alex and Baker on board for the Esave opportunity, but they declined. If Cate's proposal to the BOD was a thorough and convincing proposal, and she was still declined, then she cannot be prevented from acting on the opportunity herself.

Duty of Loyalty - A BOD member owes a duty of loyalty to shareholders to act in the best interest of the corp and its shareholders. Here Cate felt that Esave was a great opportunity for the business and tried repeatedly to convince the board to create a subsidiary and capture this market, but her efforts were continually declined.

Duty of Diligence - The BOD members owe a duty of diligence to shareholders, to diligently review options and make decisions for the betterment of the corporation and its shareholders. Here, Cate was concerned about the decline of the stock's value and looked for ways to increase shareholder value. While Cate acted diligently in this regard, since she felt that her fellow BOD members were the cause of the decline in stock value, Cate should have alerted shareholders and perhaps initiated a shareholder vote on the Esave option before giving up on it being part of Pick.

Shareholders may be successful in a derivative suit against Cate if she was not diligent enough in her efforts to convince the board to create Esave before she took the opportunity for herself.

Shareholders may be successful in their derivative suit against Cate.

Direct Suit

Shareholders may be able to file a direct suit against the members of the BOD if their behavior warrants it.

Piercing the Corporate Veil - The Corporate Veil may be pierced if the BOD commits fraud, the corporation was undercapitalized at formation, failure to follow corp formalities or if the BOD treats the corporation as its alter ego.

Fraud - If the BOD commits fraud they open themselves up to a direct suit piercing the corp veil. Here, if Cate had not been explicit about the Esave opportunity or had in some way discouraged her fellow BOD members from the opportunity, then the shareholders may have been able to argue that Cate committed fraud, the facts however, seem to indicate quite the opposite, Cate mentioned the opportunity to her fellow board members repeatedly and even shared a proposal with her idea to try to convince them. Fraud is not a reason to pierce the corp veil.'

Undercapitalization - Undercapitalization at formation means that when the corporation was formed, it was formed with inadequate capital, essentially making it difficult for the corporation to succeed. Here we are not given any significant facts regarding the formation of the corp, so it is likely that the corporation was adequately capitalized at formation. This is not a basis for the shareholders to pierce the corp veil.

Corp Formalities - Corp should have regular board meetings. Here there is no indication that



the corp failed to follow corp formalities.

Alter Ego - BOD treat a corp as their alter ego if they act as though the corp assets belong to them. Here there is no indication that Cate acted in such a way as to treat the corp as their alter ego.

Shareholders would be unlikely able to pierce the corp veil and directly sue Cate.

Question #1 Final Word Count = 1479

END OF EXAM

2)

1. What property interest does Darla have in Lot B?

Olivia - Olivia is the original owner of Greenacre and had a fee simple ownership of the property.

Barry - Olivia conveyed Lot B to Barry as a gift. The deed to Barry contained the following covenant "if at any time, Barry, his heirs, successors or assigns shall use the premises for any purpose other than as a personal residence, said Lot B shall immediately vest in fee simple in Zach or his surviving descendants. Barry had a fee simple interest in Lot B, subject to a contingent remainder. This means that Barry owned Lot B as long as he respected the covenant that Olivia put in the deed.

Simon - Olivia's son, inherited Lot A upon her death and held title to Lot A in fee simple.

Zach - while living Zach held a contingent remainder on Lot B

Does the covenant in Olivia's deed apply to Developer? In order for the covenant to run with the land there must be a writing, intent for the covenant to run with the land, the covenant must touch and concern the land, there must be privity, and there must be notice.

Covenant - "if at any time, Barry, his heirs, successors or assigns shall use the premises for any purpose other than as a personal residence, said Lot B shall immediately vest in fee simple in Zach or his surviving descendants."

Writing - The covenant was in writing because it was written in the deed to Barry from Olivia that was properly recorded.


Intent - Olivia's intent was for the covenant to run with the land because she specifically included language indicating that the covenant was not just a restriction on Barry's use of the land, but that it applied to his heirs, successors or assigns.

Privity - horizontal privity exists between Olivia and Barry. Olivia gifted the property to Barry subject to a contingent remainder

Vertical Privity - When Barry sold Lot B to Developer, there was vertical privity between the two. Developer is Barry's successor in interest because he purchased Lot B from Barry.

Touch and Concern the Land - The covenant directly relates to how the land may be used. Thus it touches and concerns the land.

Notice - Actual - Inquiry - Constructive - While there is no indication that the developer had actual notice of the covenant because it does not appear that Barry told him about the covenant. Developer would not have inquiry notice because by inspection of the land,



there would be no way to know about the covenant restricting its use. The Developer did have constructive or record notice because the covenant was included in the deed from Olivia to Barry, which was properly recorded. The deed would have been part of a simple title search done prior to purchase.

Restraint on Alienation - Overly restrictive covenants are generally ruled to be invalid. Here the restraint in the deed from Olivia to Barry simply limits the property to personal residential use. It does not seem overly restrictive, and thus is likely valid.

Darla - As the surviving descendant of Zach, Darla held a contingent remainder on Lot B. As long as the covenant in Olivia's deed to Barry is not deemed too restrictive to be valid, then Darla as the surviving descendant of Zach would have a fee simple interest in Lot B because Developer as the successor in interest to Barry failed to honor the covenant. The covenant states that if the premises are not being used for personal residence then Lot B shall paddy to Zach or his surviving descendants. As Darla is Zach's surviving descendant, she has a fee simple interest in Lot B.

RAP - Rule Against Perpetuities - An interest in land cannot vest more than one life in being plus 21 years. If the covenant violates the RAP it will be invalid.

2. What claim(s) may Simon make to maintain a right of way over Lot B to the public highway?

Simon will likely claim that he had an appurtenant easement by necessity over the dirt road on Lot B.

An easement is a non-possessory interest in land. Easements can be formed in a number of ways including express easement, necessity, easement by prescription.

Servient - The servient estate is the land which is burdened by the easement. Here, Lot B is the servient estate because the dirt road crosses Lot B.


Dominant - Lot A is the dominant estate, because it is the lot using the easement.

Simon does not have an express easement because there is no writing recorded which grants Simon access to the dirt road which crosses Lot B.

An easement formed by necessity is an easement that is needed in order to access the land. Here lot A and Lot B are adjoining lots and there does not seem to be another road besides the public highway which runs next to lot B. Since Lot A would be inaccessible without access to the dirt road running across Lot B, an easement by necessity is formed over Lot B.

An appurtenant easement runs with the land. In order to run with the land, it must touch and concern the land. Here, since the easement provides access to Lot A, it touches and concerns the land.

Notice - Since there appears to be no written document creating the easement over Lot B,



Developer or Darla may not have record notice of the easement. Inquiry notice is when, upon reasonable inspection a person could ascertain the information. Here, if Developer or Darla visited the land, they would likely see that on Lot A, Simon had built a house, and that the owner of the house had no other way to access their house and property other than the dirt road.

Easement by Prescription - similar to adverse possession, but not obtaining a possessory interest. To establish an easement by prescription, use of the easement must be open and notorious, hostile, continuous, and for the statutorily required time. Here, Simon's use of the easement was open and notorious, because he used to road regularly and was not trying to sneak across Lot B. It was continuous because Simon used the road on Lot B after his mom passed away, and their use was continuous. Since Olivia died 30 years ago, it is likely that Simon would not need to tack on the use of his mother, but she also used the road. The 30 years that Simon used the property after his mother passed away is likely sufficient to meet statutory requirements. Hostile - It seems like Simon's use and Olivia's before him was not hostile. Since Olivia gifted the property to Barry, it is unlikely that Barry would try to restrict Olivia or her son's use of the only access road. For this reason, there is no easement by prescription.

Question #2 Final Word Count = 1156

END OF EXAM

3)

1. What ethical violations if any did August commit?

Duty to Report - A lawyer has a duty to report when they are aware of the misconduct or ethical violations of another attorney. Here, Paul informed August that he had spoken with Dani and that she was unaware of the settlement offer. August did nothing with this information. If August was unsure whether this was an intentional failure of Len to communicate with his client, then he should have at minimum reached out to Len to confirm receipt of the settlement offer. If August knew that Len was failing to communicate with his client, then August had a duty to report the misconduct.


Communication with represented parties - A lawyer shall not knowingly communicate with a person whom they know is represented by counsel without the authorization of their counsel. Here, August did not directly reach out to Dani, but he requested his client reach out to Dani to communicate the settlement demand. This is not direct communication, but it is likely still improper. August should have reached out to Len and asked him to communicate the settlement demand.

Fee agreement - Here we are told that there is a valid written contingency fee agreement. Contingency fee agreements are proper in a negligence action. Contingency fee agreements are not allowed in criminal or domestic matters. In CA fees cannot be unconscionable. Under ABA, fees must be reasonable. CA requires the fee agreement must be in writing if it is more than \$1000. Here we are told there is a valid written fee agreement. While the exact fees are not clear, we will presume they are proper. Additionally, in a contingency fee agreement, the fee agreement needs to state how other costs will be charged. There is no information to tell if this information is included, so we will presume it was.

Duty to Communicate - A lawyer has a duty to communicate with clients. Here, August apparently withdrew as Paul's counsel because he asked Rita to assume joint responsibility for Paul's lawsuit. While Paul did write a letter to Paul letting him know, he probably should have met with Paul and obtained informed written consent from him before handing his case off to another attorney. Paul could have wanted to find his own alternative counsel when August decided to withdraw, but he was not given that opportunity.

Duty to the Profession - A lawyer has a duty to behave in such a way as to respect the profession. Here, August's handing off his client to another attorney without first discussing the matter with his client seems underhanded and shady. It will likely reflect poorly on him as an attorney, and make his client feel mistreated.

2. What ethical violations if any, exist in August and Rita's arrangement?



Duty of Confidentiality - A lawyer has a duty to keep client communication about their case confidential. Here, August had Paul's permission to discuss his case with Rita, but it is not clear whether Paul was aware that August was talking to Rita with the intent to transfer his case to her.

Rita assuming joint responsibility - Rita may not be able to maintain confidentiality between both of her clients when she is representing both of them.

Fee sharing - Lawyers can share fees with other lawyers, but the fees must be shared in proportion to the amount of work. And the client must be informed in writing. Here, August agreed to give Rita 50% of his contingent fee. Depending on where they are in the process, this may or may not be a proportionate share. If it is not a proportionate share then, the fee sharing is improper. It does not appear as though August has given Paul written notice of his intent to share his fee with Rita.

Communication with represented parties - A lawyer shall not knowingly communicate with a person whom they know is represented by counsel without the authorization of their counsel. Here, when August discussed his case with Rita, Rita said that she knew Dani and could work with her. It is not stated if August informed Rita that Dani was already represented by counsel. Rita should not have reached out to Dani to discuss her case with her if she was still represented by Len.

Duty to Communicate - A lawyer has a duty to communicate with clients. August wrote a letter to Paul explaining the arrangement but it was not received by Paul until after Rita had already begun working on his case. This is likely not the proper way that August and Rita should have communicated. It is also unclear if Rita informed Dani that she would be representing both Dani and Paul in their suit.

Conflict of Interest - Current - A lawyer shall avoid conflicts of interest. If a lawyer reasonably believes they can provide competent representation despite conflicts then they may do so, but in CA they must obtain informed written consent. Here August and Rita have arranged for Rita to assume joint responsibility for both Dani and Paul's cases. Since Paul is suing Dani, this is a direct conflict of interest. There is no indication that Rita has informed both Paul and Dani that she intends to represent both of them. While Rita may feel that she can provide competent representation, if the case does not settle, and they decide to go to court, there is no way that Rita can represent both parties and she needs to withdraw.

Duty of Loyalty - A lawyer has a duty to act in the best interests of their client. Here since Rita is assuming joint responsibility for Paul and Dani, it is very unlikely that she will be able to continually act in the best interest of both of her clients.

Withdrawal - A lawyer should withdraw if they are unable to provide competent representation for a number of reasons. Here since Rita has a major conflict of interest, she is putting herself at risk of committing more ethical violations and she should withdraw



from one or both clients representation.

3. What ethical violations if any, did Len commit?

Duty of Communication - A lawyer has a duty to communicate with clients, they must be made aware of all settlement agreements even if the attorney feels they are not a good deal, or the client has expressed interest in a better settlement agreement. Here, August sent a written settlement agreement to Len, Dani's attorney, and he did not respond to the letter or inform his client. Len breached his duty to communicate by failing to inform Dani of the settlement offer.

Duty of Competence - A lawyer has a duty to provide competent representation. They should act with the knowledge education and skill of a competent attorney. Here, Len is not providing competent representation because he is failing to keep his client informed about the case and failing to discuss legal options with his client.

Duty of Diligence - A lawyer shall diligently represent their client. In CA a lawyer shall not recklessly or negligently miss deadlines or fail to file proper paperwork. Here, Len receiving a settlement offer and failing to respond or communicate its contents to his client shows a lack of diligence.

Withdrawal - It is unclear if Len withdrew as Dani's attorney or if she fired him. If Len was choosing not to communicate with his client and/or did not have time to provide her with competent representation then, Len should have withdrawn as her attorney.

Question #3 Final Word Count = 1257

END OF EXAM

4)

1. Did the court err in seating Juror #5?

The plaintiff has the right to a fair and impartial jury. Here, the fact the juror #5 worked as an engineer at Motor, and still owner stock in Motor would seem to limit her impartiality.

Work as an Engineer - The facts are not explicit as to what type of work Juror #5 did as an engineer at Motor. Since the suit involves the defective design of one of the components, it is possible that Juror #5, as an engineer, could have been involved in product development and design. If juror #5 was indeed involved in the development and design of the product in question, then it would be improper for her to serve on the jury, because despite her best intentions of impartiality, she would essentially have to admit error on the part of her or her team in order to find for the plaintiff. This sets and unreasonably high standard for the plaintiff to meet.

Stock Ownership - Here, juror #5 has disclosed that she owns 50 shares of motor's stock, which amounts to only 2% of her assets. Owning a stake in a company means you have a vested financial interest in the success of the company. While 2% of her financial assets seems like a small amount, a decision in favor of the plaintiff is likely to have a negative impact on the financials of Motor. Even if it is a small amount, a person is never likely to choose against their own financial interests.


For these reasons, the court should not have allowed juror #5.

2. Did the court correctly deny Palma's motion for a directed verdict?

A directed verdict is appropriate when there are no material facts in dispute.

Implied warranty of mercantibility - merchants warrant that a product is fit for a particular use. Here Motor was the manufacturer of car, and also the seats installed in car. The seats installed in car are designed for people to sit in while driving or riding in the car, and should be designed to be the safe in an accident. Since Motor asserts that the seat being reclined is the cause of Palma's injury, we must assess whether overly reclining the seat was a foreseeable occurrence. Arguably, if the seat being reclined made the seat unsafe, then Motor owed a duty to its purchasers to warn them of such information.

Under a theory of strict product liability Palma is correct that misusing a product is not a defense for defective design when that misuse is foreseeable. A product manufacturer owes a duty to purchasers to provide a safe product, and they are required to ensure the safety despite foreseeable misuse. Here, Palma was sitting in the passenger seat. It is foreseeable that a passenger may wish to recline their seat, even to the fullest extent possible since they are not the one driving the vehicle, it is commonplace for a passenger to recline and even have a nap while riding in the car. If a reclined seat is not a safe seat, then Motor had a duty to warn its customers of this.



Here, Motor did not concede that the seat was defective, it simply stated that Palma's injuries were the result of her seat being excessively reclined. Palma has submitted evidence that she was in fact not excessively reclined. The fact of whether Palma's seat was excessively reclined was still a fact in dispute. Also whether the seat collapsed because of a defective design was still in dispute. Thus the facts in this case were still in dispute and the court did not err in denying a directed verdict.

3. How should the court rule on Palma's motion for a new trial?

Res Judicata - Res judicata prohibits the retrying of the same case, between the same parties unless there is an applicable exception to the rule.

New Evidence - Palma received anonymous report of Motor safety tests conducted 3 years earlier. If the reports could be authenticated and are truly what they appear to be, then they are relevant new evidence that would have a large impact on the outcome of the trial and they should be considered by the court through a new trial or on appeal.

Fraud - If Motor did try to conceal the reports intentionally, their conduct was improper and possibly fraudulent. During discovery parties must disclose all discoverable evidence that is not privileged. The reports are likely not privileged work product because they were prepared 3 years prior, they were not prepared in preparation for litigation, they were prepared for the purpose of marketing their product. If Motor was aware of the product defect and they did not take remedial measures to correct the defect they should be held liable for the harm caused.

no Impartial jury - Palma may also argue that she was not afforded the right to an impartial jury since one of the jurors had a vested financial interest in the outcome of the case.

Palma should be able to retry her case through a new trial or on appeal.

Question #4 Final Word Count = 854

END OF EXAM

5)

1. What damages can Perry recover?

Fraud is the misrepresentation of facts for the intent of deceiving someone. Here, Perry was successful in his suit against Denise because she intentionally preyed upon his lack of knowledge and his trust in her, for her own pecuniary gain.

Punitive damages - generally punitive damages are not awarded in breach of contract cases but punitive damages may be appropriate in instances of fraud as in this case, because the defendant took advantage of the trust of the plaintiff and lied to them repeatedly for her own gain. The court may assign punitive damages as it sees fit.

Compensatory damages - Compensatory damages are aimed at compensating the plaintiff for the damages they suffered as a result of the defendants actions. Here, since the Jaguars ball was worth \$5000 when Denise tricked the plaintiff into selling it for \$20. He would be able to recover the difference.

For the Sluggers ball, Perry may also seek compensatory damages for the difference between the \$2k that Denise told him she sold the ball for and the \$10k that she actually sold the ball for.

Expectation Damages - these are the damages that Perry would have expected had he not been defrauded by Denise

Causal - Here, Denise is the direct cause of Perry selling the jaguar ball for only \$20, and the Slugger ball for what he thought was \$2k because she, as the expert he hired, lied to him and told him that was the value.

Certain - the amount that the ball is worth is certain because Denise determined that the Jaguar ball would sell on the open market for \$5000, and the Slugger ball sold for \$10k

foreseeable - It is foreseeable that Perry would lose this money because Denise lied to him

mitigation - Perry did not have the ability to mitigate damages, because he entered into a contract with Denise for her to help him sell the balls and she defrauded him.

Consequential - Perry may be able to recover consequential damages to cover his added expenses incurred as a result of Denise defrauding him. He likely had to hire an attorney to sue Denise and may have had to seek opinions from other experts.

Incidental damages - If Perry were to have to resell his baseballs, and needed to pay additional fees for this purpose, then he could possibly collect incidental damages for the costs associated with it.

2. What equitable remedy or remedies can Perry obtain?

Constructive Trust - a constructive trust is an equitable remedy where the defendant is required to hold the wrongly acquired property in trust. A constructive trust is the preferable remedy when an item is increasing in value. Here, Denise may be required to hold the Jaguar ball and the car she purchased with Perry's money in a constructive trust.

Equitable Lien - An equitable lien is an equitable remedy where the plaintiff is granted a lien against the property that the defendant improperly holds. It is the preferable remedy where the item has decreased in value or if the whole value of the item cannot be traced to plaintiff. Here, the facts tell us that the Jaguar ball "was worth \$5000", this could mean that it is increasing in value or that it is decreasing. If it is decreasing, then Perry would likely want to get an equitable lien or money damages for the Jaguar ball.

For the car that Denise purchased, the Voy, we are told that it is increasing in value and is now worth \$20k. The facts are not explicit about the price that Denise paid for the Voy. The facts state that she used the \$8k that she stole from Perry, but we are not told if this covered the entire cost of the car. If it did, then likely Perry would be better off with a constructive trust, but if Denise purchased the Voy with some of her own money and Perry is unable to obtain a constructive trust, then he should seek an equitable lien.

Rescission - Perry could seek to rescind his contracts with Denise so that he could have back his items and it would be as though the contract was never formed. This is likely not the best option for Perry because one of his items was sold to a third party and it may not be retrievable

Unjust enrichment - Perry should seek to collect the increase in value on the Voy because it would prevent the unjust enrichment of Denise. Denise does not deserve to reap the profits on her investment because she defrauded her uncle and without her fraud she likely would not have been able to purchase the Voy.

TRO/PreLim Injunction - Perry may wish to seek a prelim injunction or TRO if there is a risk of Denise selling off the Voy or the Jaguar ball she still has in her possession. In order to seek this remedy there are certain requirements

Irreparable Harm - Since both items are unique

Inadequate Legal remedy - Since both items are unique they may not be replaceable, but since Perry was wa

Balance of Hardships

Question #5 Final Word Count = 860



END OF EXAM

6)

Your Honor, and may it please the court.

The state has proved beyond a reasonable doubt that the defendant committed second degree murder

The Columbia Penal Code states that Second Degree murder is the unlawful killing of a human being with malice aforethought, but without the premeditation, deliberation and willfulness necessary to elevate the offense to first degree murder. (CPC §§187, 189 McNally) In McNally, similar to the case at hand, the defendant claimed the killing of the victim was accidental, but the state has shown that even though the actual shooting may have been accidental, the defendant deserves to be convicted of 2nd degree murder for the foregoing reasons.


An unlawful killing is one that is not justified or excused (McNally) As decided in Frye, a defendant must raise the issue of justification or excuse but does not bear any burden of proof or persuasion in a murder prosecution (McNally) If a defendant does not raise the issue, it is waived (McNally) Here, the Mr. Dalton has waived the issue of justification or excuse.

Malice, for the purpose of constituting murder of either degree, may be expressed or implied (McNally CPC §188)

It is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature (McNally CPC §188) In McNally as is the case here, there seems to be no indication of express malice, so we must examine implied malice.

Implied malice is present "when the circumstances attending the killing show an abandoned and malignant heart" (McNally CPC §188) In McNally they determined that whether circumstances attending the killing show an abandoned and malignant heart is a subjective test. The mental component is established where the defendant knows that his conduct endangers the life of another and acts with conscious disregard for life is implied malice (McNally) In McNally as in our case, the defendant had to know that his conduct was endangering a life. When interviewed by Detective Ames, the Mr. Dalton said he knew the gun was loaded because he had not taken the bullets out from when he bought it, and yet he still pointed the loaded gun at Ms. Vons.

While the defendant and his roommate have both stated that the defendant and Ms. Vons were in love, we have heard testimony from a few people that doesn't paint such a rosy picture. Ms. Vons' best friend stated that the victim told her on the day of the shooting, that she wished the defendant was back in jail. The defendant's roommate told police that he was woken up by the victim and the defendant arguing. And we have heard testimony from Ellen Donato, an expert criminalist, that the defendant's version of this "accidental" shooting just could not have happened. It seems quite clear that the defendant acted with implied malice, by pointing a



loaded gun at someone he had been arguing with, and going further to the point of cocking the gun. It is settled that brandishing a loaded firearm at a person is an act dangerous to human life (McNally)


The court in McNally also rejected the defendant's argument that a person does not act with implied malice when he is under the influence of alcohol or drugs, engages in joking or horseplay with a firearm and causes the discharge of the firearm killing another person (McNally). In McNally as in our case, the defendants and the victims had been drinking and using drugs. This didn't convince the court that there was no implied malice in McNally, and it should not convince the court here.

In McNally, the court went further in its assessment stating that the defendant's behavior following the shooting is also probative of implied malice. In McNally, the defendant's behavior of hiding the weapon and showing a lack of remorse only solidified the court's opinion that McNally showed implied malice. Here, while the defendant showed remorse in the vehicle on the way to the police station, immediately following the shooting; when his roommate was holding the victim's body, the defendant was busy washing the gun trying to remove fingerprints. This behavior should also support the court's finding of implied malice.

At the bare minimum the state has proved beyond a reasonable doubt that the defendant is guilty of involuntary manslaughter.

Involuntary manslaughter is a lesser offense of murder, distinguished by its mens rea (Freud). The mens rea for murder is specific intent to kill or conscious disregard for life (Freud). Absent either of these states of mind, the defendant may incur homicide culpability for involuntary manslaughter (Freud). Under the CPC involuntary manslaughter is defined as a killing "in commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (Freud, CPC §192). In Freud the court said that this is in effect criminal negligence. In Freud, the defendant took out an unloaded gun and loaded it after having an argument with his wife where she said "sometimes you make me so mad I could kill you." (Freud). In Freud as in the present case, the defendants have claimed the shooting was an accident. If a person wanted to playfully or jokingly point a gun at someone, they had better make sure the gun is unloaded. In Freud, the defendant did just the opposite. In the present case, when the defendant took the gun from his girlfriend, he could have taken out the bullets to ensure their safety or at minimum checked to make sure the gun was unloaded since he has stated both that he knew it was loaded and he knew it wasn't, like a reasonable person, but instead he cocked the gun. This behavior is inexcusably negligent.

The Columbia Supreme Court explained that criminal negligence exists when the defendant engages in conduct that is "aggravated, culpable, gross, or reckless (Penny cited in Freud). Further it is conduct that is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life or, in other words, a disregard of human life or an indifference to consequences, which is an objective test (Penny Cited in Freud). Playing with a gun as the defendant claims he and the victim were doing is incompatible with a proper regard for human life.



Involuntary manslaughter, like other forms of homicide, also requires a showing that the defendant's conduct proximately caused the victim's death (Freud). When there are concurrent causes of death, the defendant is criminally responsible if his or her conduct was a substantial factor contributing to the result (Freud).

A Cause is concurrent if it was operative at the time of the death and acted with another cause to produce death (Freud) In Freud, the defendant claimed that the victim's cause of death was her drinking, and taking the gun. The court rejected this argument because the death of the deceased could not be attributed to any supervening or intervening cause, such as the victim's taking hold of the gun or being intoxicated, but was the proximate result of the negligence of the defendant (Freud). Similarly in our case, the victim taking hold of the gun did not cause her death, her death was caused by the fact that the defendant took hold of the gun, cocked it and fired it.

It was the defendant's negligence that caused Ms. Vons death, and he should be convicted of 2nd degree murder, or at the very minimum involuntary manslaughter.

Question #6 Final Word Count = 1257

END OF EXAM