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QUESTION 1

A hiring at will can be terminated at the pleasure of either party.

Rendered services under an express or implied contract entitles the employee to recover for services he or she has rendered. After a contract has been carried out with the acquiescence of the parties it shall not be repudiated. Where shown to have existed an agency relationship will be presumed to have continued in the absence of evidence to show its termination.

In Maryland, the burden of proving a revocation or termination of an agency is on the party asserting it. In an action on a contract, the defendant has the burden of proving that the plaintiff abandoned the contract or ended it when he relies upon that as a defense. Notice of revocation must be unambiguous and unequivocal. Ambiguity or uncertainty in such case should be construed against the party asserting it.

In this case it is apparent that an agency existed and the burden falls on the party asserting termination to prove that the contract between the parties was in fact terminated at the time claimed. On these facts the burden falls on Signs, Inc. Here, Signs Inc. failed to meet its burden to prove that the agency ended on the date claimed, i.e., June 2009, rather than October as claimed by Paul.

To establish the rescission of a contract by implication or inference, the acts relied on must be unequivocal and inconsistent with the existence of a contract and the evidence must be clear and convincing.

Signs, Inc. has produced no acts on the part of Paul which were clearly inconsistent with the continued existence of the agency after June 2009, the date Signs, Inc. claims that the contract terminated.

The fact that Signs, Inc. tendered partial payments to Paul after the date it claims the contract terminated support a finding by the court of the continuance of the agency contract as claimed by Paul.

Vincent v. Palmer, 179 MD 370, 19 A.2d 183 (1941); *Buckholtz v. Goodman Signs*, 234 MD 471, 199 A.2d 915 (1964); and *Woodcock v. Dennis*, 175 MD App. 9, 199 A. 845 (1938).

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QUESTION 2

"Expert testimony may be admitted, in the form of opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making this determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

These determinations are within the discretion of the trial judge. That said, while Dr. Winters may be qualified to testify as to neurological (physiological) factors that may affect competency, criminal responsibility, or the ability to form specific intent, it is doubtful that his interest, casual reading, and single continuing education course qualify him to express an opinion on non-physiological, psychological or psychiatric conditions. *Samsun Corp. v. Bennett*, 154 Md. App. 59, 838 A.2d 381 (2003).

If the court determines that Dr. Winters is qualified to testify, there is an insufficient basis to support his opinion. The basis may be insufficient due to the brevity of the examination. *Burrows v. Sanders*, 99 Md. App. 69, 635 A.2d 82 (1994).

An expert's opinion may be based on reliable hearsay information. Md. Rule 5-703(a). However, because a criminal defendant has a motive to testify falsely, such evidence is inherently unreliable and an expert may not base an opinion on what the defendant has told the expert (unless that information is otherwise admissible). *Connor v. State*, 225 Md. 543, 171 A.2d 831 (1961).

Under the *Reed-Frye* test the results of a new scientific test, and expert opinions based on such tests, are inadmissible unless the accuracy of the test is generally accepted within the scientific community. *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Even if the court determined that Dr. Winters had an adequate basis to form his opinions, his opinions themselves are inadmissible.

First, no expert may ever express an opinion regarding the truthfulness of a declarant. *Globe Security System v. Sterling*, 79 Md. App. 303, 556 A.2d 731 (1989); *Hutton v. State*, 339 Md. 480, 663 A.2d 1289 (1995). Although an expert may assume the truthfulness of information, the expert may not vouch for its credibility. Dr. Winters is not entitled to opine that Dave was not "faking it."

Second, although generally an expert may express an opinion that "embraces an ultimate issue" pursuant to Md. Rule 5-704(a), the expert may still not invade the province of the jury. *Cook & Darby v. State*, 84 Md. App. 122, 578 A.2d 283 (1990). In a criminal case, the expert may not express an opinion "whether a [criminal] defendant had a mental state or condition constituting an element of the crime charged." Md. Rule 5-704. An intent to kill is an element of attempted murder. Dr. Winters cannot render an opinion that Dave did not intend to kill Vic.

The court should sustain the objections of the State's Attorney.

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QUESTION 3

Standing

The parents must first establish standing to challenge the legislation. It has been noted that a parent of a student enrolled in a school has sufficient standing to challenge a school action. *Illinois ex. Rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948); *Parents Involved in Community Schools v. Seattle School District No. 1, et al.*, 551 U.S. 701, 127 S.Ct. 2378 (2007). Accordingly, a court may find that the parents of students affected by a law regulating school activity also have standing. It is clear that the affected students would have standing, and their parents could bring the suit on their behalf. The law can be challenged on the following grounds, once standing is established.

The County's law can be challenged on the following grounds:

1. The law is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights because it contains insufficient criteria to determine whether a student is in violation. *See Ashton v. Brown*, 339 Md. 70, 660 A.2d 447 (1995). There is no definition of "gang colors" so on any given day any or all students could be in violation of the law. Similarly, there is no definition of "school official" so students are not on notice as to who is authorized to cite them for a violation of the law.

The law also violates procedural due process rights that stem from the Fourteenth Amendment. Students have a liberty interest in the right to assemble and associate with one another, and may have a property interest in education (and their money). Accordingly, the law should be overturned because it does not provide a hearing of any type prior to expulsion and imposition of the steep fine.

2. The law limits the students' First Amendment rights to assemble and associate with one another on campus. Assuming, arguendo, the governmental purpose of limiting gang activity is legitimate and substantial, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment…." *N.A.A.C.P. v. Alabama ex rel. Patterson, Attorney General*, 357 U.S. 449, 460 (1958). Since freedom of association is a fundamental right, any law that limits it must withstand strict scrutiny, and will be struck if it is not narrowly tailored to address a compelling governmental interest. *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007). A law is not narrowly tailored if there are less restrictive ways to achieve the purpose. There may be less restrictive ways to address "gang violence" such as employing security, holding seminars, or even instituting a uniform dress code policy. Accordingly, the law should be overturned.

3. The law violates the Equal Protection Clause of the Fourteenth Amendment. Since a fundamental right is involved, *supra*, the law must again be reviewed using strict scrutiny (that is, the law must be necessary to further a compelling interest). While ensuring school safety is a laudable goal, the County's law cannot ensure that this goal will be met and it unfairly punishes

certain students who gather free of restriction. Since there are less invasive means of limiting gang activity (e.g., beefing up security, etc.) the law cannot withstand this challenge.

4. The penalty in the law is "immediate dismissal" and a "$3,500 fine". This penalty may violate Articles 16 and 25 of the Maryland Declaration of Rights and the Eighth Amendment's proscription against cruel and unusual punishment since "the punishment is grossly and inordinately disproportionate to the offense…." *State v. Stewart*, 368 Md. 26, 34, 791 A.2d 143 (2002), *citing Mitchell v. State*, 82 Md 527, 534, 34 A. 246 (1896). The Eighth Amendment has been found to apply to civil fines such as the one at issue, if they are designed, in part, to punish. *Austin v. United States*, 509 U.S. 602 (1993); *Korangy v. U.S.F.D.A.*, 498 F. 3d 272 (4th Cir. 2007).

However, the Councilmember may be immune from suit based solely on the comments made prior to adoption of the law. A public officer is generally immune from tort liability for an act or omission involving the exercise of a legislative function. *Mandel v. O'Hara*, 320 Md. 103, 576 A.2d 766 (1990); *Bernstein v. Board of Education*, 245 Md. 464, 226 A.2d 243 (1967); Restatement (Second) Torts, Section 895.

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QUESTION 4

A. Amendment to complaint and arguments for and against that amendment.

Mary could file a motion to amend the Complaint to add the leash manufacturer as a necessary party in the case. Because the Circuit Court did not issue a scheduling order in the case and trial is set to occur in less than 30 days, she will have to obtain leave of Court to file the amendment. Maryland Rule 2-341 (a) and (b). A proposed Amended Complaint should accompany the motion.

Mary's argument for the amendment could be that complete relief can not be accorded among the parties already in the case as the absence of the leash manufacturer in the case precludes the complete determination of all known potential causes of the incident in the same proceeding at one time. Maryland Rule 2-211 (a). The leash manufacturer is subject to service of process in Maryland as it is located in Baltimore.

Hansel and Gretel would argue that the leash manufacturer is not a necessary party and that complete relief can be accomplished between Mary, Hansel and Gretel now without the addition of the leash manufacturer and without a delay in the trial of the case.

B. Post judgment motions by Hansel and Gretel.

Counsel for Hansel and Gretel could file a motion pursuant to Maryland Rule 2-533(a) for a new trial or in the alternative for a remittitur of the damages exceeding the *ad damnum* clause in the Complaint. The scope of this rule provides that the Court may set aside all or part of any judgment entered, grant a new trial to all or any of the parties, and/or grant a new trial on all of the issues or some of the issues if the issues are fairly severable. Maryland Rule 2-533(c). *See Hebron Volunteer Fire Department, Inc. v. Whitelock*, 166 Md. App. 619, 627, 628, 890 A.2d 899 (2006) (the use of a motion for new trial and alternately seeking a remittitur); *see Biiou v. Young-Battle*, 185 Md. App. 268, 290-292, 969 A.2d 1034 (2009).

Based on the given facts, a motion for judgment notwithstanding, the verdict under Maryland Rule 2-532 could be filed by Hansel and Gretel, but only on the grounds advanced in support of Hansel and Gretel's earlier motion at the close of all the evidence at trial pursuant to Maryland Rule 2-532 (a). The Court denied that earlier motion.

A motion for judgment notwithstanding the verdict may be joined with a motion for a new trial. Maryland Rule 2-532 (c).

C. Impact of the filing of the post judgment motions by Hansel and Gretel on any appeal of the judgment by Hansel and Gretel.

If timely filed within 10 days after entry of the judgment, a motion for a new trial or, alternatively, for a remittitur and a motion for judgment notwithstanding the verdict preserve the right to appeal such that the notice of appeal would then be filed within 30 days after the entry of (1) a notice withdrawing the motion or remittitur or (2) an order denying a motion for new trial

or remittitur pursuant to Maryland Rule 2-533 or disposing of a motion for judgment notwithstanding the verdict pursuant to Maryland Rule 2-532. Maryland Rule 8-202 (c).

If a motion to revise the judgment is filed pursuant to Maryland Rule 2-535 more than 10 days after entry of the judgment but within the 30-day period provided by that rule, the appeal time is not preserved. See Maryland Rule 8-202 (c).

D. Post judgment motion by Mary.

Mary's counsel could move to increase the *ad damnum* clause of the Complaint to conform to the jury verdict.

A motion pursuant to Maryland Rule 2-341 (b) to amend the amount sought in the Complaint to confirm to the jury verdict could be filed by Mary's counsel accompanied by a proposed Amended Complaint. Maryland Rule 2-341 (c). This motion must be made before the entry of an appealable final judgment. *See Bijou v. Young-Battle, supra*, 185 Md. App. at 290 ("[r]eading the Rule [Maryland Rule 2-341 (b)] and Committee note together with related Rules and case law, we conclude that the Committee note provides a plaintiff with a window of opportunity to amend the *ad damnum* in the circuit court before the entry of an appealable final judgment. It does not relieve a plaintiff of the responsibility to seek that amendment. See *Wright v. Commercial and Savings Bank*, 297 Md. 148, 464 A.2d 1080 (1983).").

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QUESTION 5

A review of the common law indicates that Landlord may not have the authority to terminate Tenant Smith nor recover any rent from Tenant Jones believed to have accrued after he vacated.

Tenant Smith:

Tenant Smith breached the express terms of his lease by subletting to Sister and allowing her to compete with Tenant Jones. Landlord became aware of the breach as early as 2008 (when Sister began mailing her share of the rent to Landlord) or in September 2010 (when Tenant Jones advised Landlord of Sister's law practice), yet did nothing. Under these circumstances, Landlord may have waived her right to protest Smith's breach. *LaBelle Epoque, LLC. V. Old Europe Antique Manor, LLC.*, 406 Md. 194, 213, 958 A.2d 269 (2008) ("A party waives a contractual right by intentionally relinquishing the right or engaging in conduct that warrants the inference that the right has been relinquished.") Landlord may still be able to sever her ties with Tenant Smith, however, since the 5-year lease should expire sometime in 2011.

Tenant Jones:

Under the common law, a landlord in a commercial lease was under no duty to mitigate damages. Thus, when a commercial tenant vacated its leased premises prior to the expiration of the lease, the landlord had no duty to mitigate damages by finding a new lessee for the premises, but "could do nothing and hold the tenant liable for the entire amount of rent payable during the remaining term of the lease." Circuit *City Stores, Inc. v. Rockville Pike Joint Venture Limited Partnership*, 376 Md. 331, 353, 829 A.2d 976 (2003). However, if, as here, the Landlord decides to allow another to occupy the premises rent-free for a term longer than the original lease, she may be deemed to have accepted Tenant Jones' surrender of the property and is, therefore, barred from collecting the remaining moneys due under the lease. *Eidleman v. Walker & Dunlop, Inc.*, 265 Md. 538, 290 A.2d 780 (1972).

Tenant Jones may still owe the 10% that he unilaterally withheld. Landlord cannot be found to have waived her rights by continuing to accept the reduced rent, under the facts, since Tenant Jones moved out the next month.

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QUESTION 6

Ace and Homeowner entered into a contract on June 7, 2010. There was an oral offer and acceptance with appropriate consideration on the part of both Ace and Homeowner. This contract had a definite price and term and is controlled by common law principles rather than the UCC because it is a contract for services. The contract called for Ace to paint Homeowner's house with Wonder Paint and to complete the job in three days, beginning on June 10. The contract was capable of performance within one year so the contract did not violate the Statute of Frauds. Section 5-901(3), Courts and Judicial Proceedings Article, Annotated Code of Maryland.

Homeowner attempted to vary the terms of the contract by electing another brand of paint on June 8. However, Homeowner's unilateral attempt to vary the contract terms was ineffective because there was neither a meeting of the minds on the changed contract terms nor any consideration for the change in the terms of the contract.

Homeowner had no sound basis on which to repudiate the contract on June 10. Although she may no longer have needed the house painted to sell it, there would be no substance to an argument that she should be relieved of her contract duties due to frustration of purpose. Her motivation for painting the house may have been to help with its sale. However, the purpose of the paint job was to improve the appearance of the house, and the early sale of the house did not frustrate achievement of that purpose (*Acme Markets, Inc. v. Dawson Enterprises, Inc*., 253 Md. 76, 251 A.2d 839 (1969).

Ace is entitled to recover damages for Homeowner's breach of contract; namely, (i) the losses proximately caused by the breach (ii) the losses that were reasonably foreseeable and (iii) the losses that have been proven with reasonable certainty. *Impala Platinum, Ltd. v. Impala Sales, Inc*., 283 Md. 296, 220, 389 A.2d 887, 907 (1978). The damages Ace may be entitled to recover are as follows:

1. His expectancy is the profit he would have made had he completed the job. The amount is not specified in the facts, but is obviously some amount less than the $2,600 he proposed for his labor. If Ace was able to perform other painting jobs later in the day on June 10, or on the two other days he had planned to devote to painting Homeowner's house, he would be obliged to mitigate damages by offsetting the profits from those efforts against the damages he asserts against Homeowner. In the event that he was able to offset some of his losses against Homeowner, Ace is still entitled to his consequential damages. However, Ace can not recover more than he had expected as a result of the contract with Homeowner. Ace can not receive more than the benefit of his original bargain with Homeowner.

2. The cost of the paint that Ace bought for the job is a consequential form of damages since he cannot return it because the paint was mixed specifically for Homeowner's job. Similarly, any of the associated supplies which he may not be able to use for other jobs should be included in consequential damages.

3. Ace may also be able to recover incidental damages for his transportation and other overhead costs associated with traveling to the house on June 10 and, if necessary, for properly disposing of the unwanted paint.

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QUESTION 7

The facts contain several issues regarding the professional conduct of Susan Wendy and Paul under the Maryland Lawyers' Rules of Professional conduct ("Rule" or "Rules", as required):

1. Wendy should have recognized that neither of them had sufficient experience to handle the complex legal issues that may have been presented. Susan and Wendy should have made the disclosure to John and advised him and they would perform all necessary research and seek the advice of a more experienced attorney should the need arise. At that time, John's consent to the involvement of other counsel should have been obtained. Rule 1.1.

2. Pursuant to Rule 1.5 (c), Wendy was required to obtain John's agreement to the payment of a contingent fee in writing. The written agreement, signed by John, should have stated the method by which the fee would be determined and whether the expenses of litigation would be deducted prior to or after the calculation of the contingent fee. Given the inexperience of both Wendy and Susan, it is doubtful that the contingent fee of fifty percent (50%) is reasonable under Rule 1.5 (a).

3. Wendy should have deposited the check received from John for the cost of the medical records into a separate client trust account established by them in accordance with Rule 1.15 and Title 16, Chapter 600 of the Maryland Rules.

4. John should have been advised that Paul would be needed to represent his interests. Under Rule 1.5 (e), John must give his written consent to the joint representation or the division of fees among his attorneys must be made in proportion to the services rendered by each lawyer. Again, the total fee paid to John's attorneys must be reasonable in the aggregate. Care must be exercised by Wendy and Susan that they not disclose confidential information to Paul prior to obtaining John's consent. Rule 1.6.

5. When Susan agreed to undertake the representation of Tires For All in the merger with her former client, she may have violated Rule 1.9. Susan must evaluate whether informed consent in writing must be obtained by the former client to the representation of the current client, Tires For All. Rule 1.9 requires an analyses of the facts and information obtained from the former client during the course of Susan's representation to confirm that the attorney client privilege is not violated and that the information is not used to the disadvantage of the former client during the contemplated representation of Tires For All in the merger transaction. There is insufficient information in the facts presented in the Question to perform the analyses, but the applicant must recognize that Rule 1.9 must be adhered to by Susan and her partner, Wendy, prior to undertaking any representation that may be the same or a substantially related matter in which the new client's interests are materially adverse to the interests of the former client as more fully described in that Rule.

6. Since Wendy represents John in his claim against Tires For All, Rule 1.7 and Rule 1.10 disqualifies Susan as a member of the firm from undertaking the representation of Tires For

All in the merger transaction unless Rule 1.7 permits the representation, and John and Tires For All provide informed consent to the conflict of interest.

The nature of the informed consent that is required by Rule 1.7(b) must also be discussed together with an analysis as to whether there is a significant risk that the representation of John will be materially limited by Wendy's or Susan's responsibilities to the former client, All Cars, Inc, to Tires For All or by a personal interest of either Wendy or Susan. Rule 1.7(a)(2). It should be noted that screening of Wendy or Susan under Rule 1.10 is not permitted under the facts presented.

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QUESTION 8

(a) Mandatory Motion to Suppress the Unlawful Search and Seizure of marijuana from Bill's person pursuant to Md. Rule 4-252 (a)(3). The Motion must be filed within 30 days after the appearance of counsel or the first appearance of Bill before the court pursuant to Md. Rule 4-213 (c). Bill would have no standing to suppress the marijuana found in the console as he was not the owner of the vehicle and had no right of privacy in it.

(b) Arguments to support granting of Motion to Suppress the marijuana taken from Bill's person.

1. Bill would argue that he was a non-owner passenger in a car, and therefore, the K9 alert to the car in and of itself did not give rise to probable cause to believe he was involved in criminal activity so as to justify his arrest and search incident thereto.

2. He would argue that the alert, at most, gave police reasonable, articulable suspicion to detain him. It did not give reasonable, articulable suspicion of criminal activity that would justify an investigatory frisk for a weapon.

3. Even if a Terry Frisk was permissible, no additional search or seizure would have been justified based on Trooper Charles' findings during the frisk because the incriminating nature of the item in the inner thigh area of his pants was not immediately apparent.

4. Even if a Terry Frisk for weapons was justified, its execution violated Bill's 4th Amendment rights because it exceeded the scope of a permissible weapon's frisk since the officer knew it was not a weapon.

5. That the strip search at the police station was not a proper search incident to a lawful arrest that occurred at the traffic stop some distance away.

(c) State's argument in support of the legality of the search of and seizure from Bill of the marijuana.

1. The K9 alert to the car generated probable cause to believe that any and all of the car's occupants were in possession of illegal drugs and, therefore, the police could arrest Bill and search him incident to the arrest.

2. That at the very least, the K9 alert generated reasonable articulable suspicion of criminal activity on the part of all occupants of the car sufficient to justify a Terry Frisk for weapons.

3. That when, during the frisk, the officer felt a large bag of 'something" at Bill's inner thigh area, that together with the discovery of marijuana residue in the car created probable cause to believe Bill was in possession of illegal drugs and to arrest and search him incident to that arrest.

(d) Court ruling

1. When the police handcuffed Bill and transported him to the station, there was probable cause to arrest him and search him incident to that arrest.

2. That an alert to the vehicle by a qualified drug sniffing dog furnishes probable cause to perform a warrantless "Carroll" search of the vehicle for all drugs (*see State v. Wallace*, 372 Md. 137, 146, 812 A.2d 291 (2002)) and gave Trooper Charles reasonable articulable suspicion illegal drug activity was afoot and allowed him to detain and frisk for weapons.

3. There was also probable cause that Al had committed a traffic offense. Even without the K9 alert, the police had the right to ask the occupants of the car to exit during the traffic stop (*see Pennsylvania v. Mimms,* 434 US 106, 110 98 S. Ct. 330 (1977); *Maryland v. Wilson,* 519 US 408, 410-11, 117 S. Ct. 882 (1997) (extended *Mimms* to passengers). The police had reasonable articulable suspicion to justify Bill's detention (Terry Stop).

4. The police also had reasonable articulable suspicion to justify a weapon's frisk of Bill (a Terry Frisk). Bill was a passenger in a vehicle to which a drug sniffing dog had alerted. There was reasonable articulable suspicion that Bill was in possession of illegal drugs which, in turn, raised reasonable articulable suspicion he was in possession of a firearm. Possession or use of a firearm is commonly associated with the drug culture. The fact that Bill exhibited nervousness and gave a bogus reason for shaking also supports reasonable articulable suspicion.

5. It was proper for Trooper Charles to infer from the presence of the large bag of something in Bill's inner thigh area (not an ordinary place to carry goods) that the bag contained illegal contraband and Bill was attempting to conceal it. Therefore, it was an appropriate search incident to arrest.

6. It was not unreasonable for Trooper Charles to transport Bill to the police station to carry out the search incident to arrest rather than have him drop his pants at the scene. Searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the police station. *See US v. Edwards,* 415 US 800, 94 S.Ct. 1234 (1974); *Holland v. State,* 122 Md. App 532, 731 A.2d 364 (1998); *see, generally, Stokeling v. State,* 189 Md. App 653, 985 A.2d 175 (2009).

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QUESTION 9

1. To what extent, if any, can Motel and Dave be held liable for Lucky's injuries?

For the plaintiff to recover damages, a defendant's negligence must be a cause of the plaintiff's injury. There may be more than one cause of an injury, that is, several negligent acts may work together. Each person whose negligent act is a cause of an injury is responsible.

A defendant whose negligence is the primary cause of the accident is not absolved from liability for the resulting injuries because of the negligence of a co-defendant which caused a second accident.

If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not concur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not.

If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. The connection between a defendant's negligence and the plaintiff's injury may be broken by an intervening cause. But in order to excuse the defendant, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one, if it is the culpable act of a human being, who is legally responsible for such act.

The defendant's negligence is not deemed the proximate cause of the injury, when the connection is thus actually broken by a responsible intervening cause. But the connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation. *Gen. Motors Corp. v. Lahocki*, 286 Md. 714, 410 A.2d 1039 (1980).

Here, the subsequent negligence of Dave is reasonably foreseeable and part of the chain of events arising from Motel's negligence. As such, Motel is liable for all of Lucky's injuries including those ultimately caused by Dave as his actions were a reasonably foreseeable consequence of the original negligent act. If the fact finder cannot separate Lucky's damages between those caused by Motel and those caused by Dave, they will both be jointly liable for all of Lucky's damages. If the damages can be distinguished, Motel is still fully liable but will have a contribution claim from Dave to the extent Dave does not pay his apportioned part.

2. The fireman's rule bars recovery by Fred

The fireman's rule generally prevents firefighters from recovering tort damages inflicted by a negligently created risk that required their presence on the scene in their professional capacity. *Crews v. Hollenbach*, 358 Md. 627, 642, 751 A.2d 481, 489 (2000).

However, fireman and policeman are not barred from recovery for all improper conduct. Negligent acts not protected by the fireman's rule may include failure to warn the fireman of pre-existing hidden dangers where there was knowledge of the danger and an opportunity to warn. They also may include acts which occur subsequent to the safety officer's arrival on the scene and which are outside of his anticipated occupational hazards. In these situation a fireman or policeman is owed a duty of due care. *Flowers v. Rock Creek Terrace Ltd. Partnership*, 308 Md. 432, 520, A.2d 361 (1987).

In the case here, it is obvious that Fred was in the midst of his firefighting duties at the moment he was injured; he was making his way through heavy smoke to attempt to fight the fire. Therefore, Fred can only escape the barring effect of the Fireman's Rule if he can show that his injury occurred "after the initial period of his anticipated occupational risk" or because of a "pre-existing hidden danger where there was knowledge of the danger and an opportunity to warn." *Flowers*, 308 Md. at 448, 520 A.2d at 369. None of that was present here.

In conclusion, the accumulation of smoke during a fire and the resulting limitation of visibility for a responding firefighter is a type of hazard faced by firefighters in their ordinary duties. Fred was present at the scene of the fire in order to fulfill his duty to the public as a firefighter. It was during the performance of his inherently dangerous occupation that he was injured after falling into a stairwell that he could not see on account of the fire. *Jonathan D. Hart, et ux. v. Shastri Narayan Swaroop, Inc.*, 385 Md. 514, 870 A.2d 157 (2005). Thus, Fred's lawsuit against Motel will fail.

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QUESTION 10

PART A

The first issue that will need to be addressed is whether Mother will need to show a material change in circumstance regarding custody, or that this is a third-party custody case. The separation agreement, containing the custody arrangement, is between two fit and proper parents. Only Mother has sought a change in custody. This is not a third-party custody case but remains a dispute between fit parents. If this custody agreement was only between Mother and Aunt and Uncle the court would presume Mother's decision to modify the agreement was a material change in circumstance and the court would analyze on the best interests of the child based on exceptional circumstances. *See Green v. Green*, 188 Md.App. 661, 982 A.2d 1150 (2009).

In cases where a request for modification is filed more than 30 days after the entry of an Order concerning custody/visitation, and that request is based on any ground other than a change in circumstance since the last Order was entered, a trial court is without authority to grant the request unless movant shows that the court lacked jurisdiction, to correct a clerical error, or that the Order was a result of fraud mistake or irregularity. *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114 (2003).

Facts to support a material change in circumstances for Mother include: Mother's relocation, suitable housing, employment and completion of rehabilitation program. Facts against a finding of a change in circumstance are Mother's short history of having: (i) suitable housing, (ii) a job, and (iii) completion of the rehabilitation program. The short duration, therefore, is not long enough to establish a material change.

PART B

Once the court has found a material change in circumstances the court will determine what is in the best interest of the child and will proceed as if performing an initial custody determination. *Braun v. Headley*, 131 Md.App. 588, 750 A.2d 624 (2000). The best interest factors a court is to consider in making a custody and visitation determination have been established in *Montgomery County Department of Social Services v. Sanders*, 38 Md.App. 406, 381 A.2d 1154 (1978) and its progeny. These include the following:

(1) Fitness of the parents;

(2) The character and reputation of the parties;

(3) The desire of the natural parents and agreements between the parties;

(4) Potential of maintaining natural family relations;

(5) Preference of the child;

(6) Material opportunities effecting the future life of the child;

(7) Age, health and sex of the child;

(8) Suitability of the residence of the parents and whether non-custodial parent will have adequate opportunity for visitation;

(9) Length of separation from the natural parent who is seeking custody;

(10) Prior voluntary abandonment or surrender of custody of the child;

(11) Health of parties; and

(12) Stability of parties.

From the facts provided, all of the factors listed are not applicable to this case.

The factors the court will consider in this case to determine if the change in custody is in the best interest of Daughter are:

The fitness of the parents

Applicants should discuss Mother having just started working and just recently obtained suitable housing and whether the period of work and occupancy are a long enough period to indicate stability and fitness. Mother continues to use alcohol even though she has a history of substance abuse, and she recently completed a rehabilitation program.

Desires and agreements of the natural parents

Mother and Father agreed to the current arrangement.

Suitability of the residence of the parents and whether the non-custodial parent will have adequate opportunity for visitation.

Father's residence is 1 ½ hours away from Mother's residence. We are not aware if that will affect his opportunity for visitation. The court would want to know what arrangement Mother will make for after school care as she is working until 5 pm.

Stability of parties

A change in custody would move daughter from the place where she has lived for at least two years. Mother's work history and living arrangements are of short duration. Mother has recently completed a rehabilitation program for substance abuse so there is a short history of abstinence. Daughter would have to change schools.