

Vermont Bar Examination - February 2014

Model Answer – Question 1 - February 2014

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

Model Answer – Question 2 - February 2014

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

Model Answer 3 - February 2014

Two potential tort theories of liability should be considered under these facts: negligence and premises liability.

The four requisite elements of a negligence claim are the existence of a legally cognizable duty owed by the defendant to the plaintiff, breach of that duty, such breach as the proximate cause of plaintiff's injury, and actual damages. *Langle v. Kurkul*, 146 Vt. 513, 517, 510 A.2d 1301, 1304 (1986). 16 V.S.A. § 834 limits schools' duty of supervision in scope, to protect students only from "unreasonable risk, from which it is foreseeable that injury is likely to occur. In other words, Vermont schools owe their students a duty of "ordinary care," which requires individuals to act as the reasonably prudent person would under the circumstances. *Edson v. Barre Supervisory Union No. 61*, 2007 VT 62, 182 Vt. 157, 161, 933 A.2d 200, 204 (2007). The "reasonably prudent person," in this context, may to some extent be measured against what a reasonable parent would do in a given situation. See *Id.* ("To a limited extent, school officials stand *in loco parentis* to pupils under their charge.").

As to Alan: East clearly owed at least a duty of "ordinary care" to its football players at times they were under the supervision of its coaches or administrators. The *in loco parentis* relationship would likely be held to mean that a coach is responsible to remind players about a safety policy and penalize players who fail to observe it. The East coach arguably did breach this duty owed to Alan by virtue of failing to remind players about and to enforce the helmet policy. The policy was specifically implemented for player safety, such that head injuries caused by objects thrown by rowdy fans was reasonably foreseeable to East.

It should briefly be noted that East would be liable for its football coach's negligence. An employer may be held vicariously liable for the torts of an employee when the tortious acts are committed during, or incidental to, the scope of employment. *Brueckner v. Norwich Univ.*, 169 Vt. 118, 122–23, 730 A.2d 1086, 1090–91 (1999). For conduct to fall within the scope of employment, it must be the same general nature as, or incidental to, the authorized conduct. *Id.*

Certainly the failure to act on the helmet policy occurred during the coach's carrying out his duties as coach such that East would be vicariously liable for negligent conduct by the coach.

Assuming a breach of duty here, the next required element is causation. Causation requires both "but-for" and proximate causation. See *Wilkins v. Lamoille County Mental Health Servs., Inc.*, 2005 VT 121, ¶¶ 13-14, 179 Vt. 107, 889 A.2d 245. "But for" causation requires the plaintiff to show the tortious conduct was a necessary condition for the occurrence of the plaintiff's harm.

Id. Proximate cause means that a defendant's negligence must be "legally sufficient to result in liability such that liability attaches for all the injurious consequences that flow from the defendant's negligence until diverted by the intervention of some efficient cause that makes the injury its own." *Collins v. Thomas*, 2007

VT 92, 182 Vt. 250, 253-54, 938 A.2d 1208, 1211 (2007) (internal quotations, brackets, and cites omitted).

But-for causation likely can be established here, as it seems very likely the evidence would show that wearing an East helmet, with its built-in eye protection, would have deflected the can and prevented harm to Alan. With regard to proximate cause, the question is whether the injury to Alan was the natural consequence of the East coach's failure to have Alan wear his helmet at the time of the soda can incident. This issue is usually a question of fact, and in this case the circumstances should lead a jury to find that the coach's inaction was a proximate cause of Alan's injury.

A possible defense which might be raised against causation is that the throwing of the soda can was an "intervening cause" that breaks the chain of causation between the coach's behavior and Alan's injury. "Whether or not the negligence of a third person may or may not amount to such an intervening cause turns on the issue of whether or not some such negligent act or intervention was something the original actor had a duty to anticipate." *Estate of Sumner v. Dep't of Soc. & Rehab. Servs.*, 162 Vt. 628, 629, 649 A.2d 1034, 1036 (1994) (citations and quotations omitted). A jury would likely find the soda can incident was foreseeable to East given what was known about the ill behavior of West's fans, as well as in light of the fact that East's policy was based on the potential threat to player safety.

The final element of a negligence claim is proof of actual damages. Damages which might be recovered include past and future medical expenses, pain and suffering, loss of enjoyment of life, and possibly loss of future income. See *Smedberg v. Detlef's Custodial Serv., Inc.*, 2007 VT 99, 182 Vt. 349, 357, 940 A.2d 674, 679 (2007) (jury must award medical expenses and non-economic damages for pain and suffering). If Alan's physicians were to testify without contradiction that he is likely to suffer future pain and impairment and incur medical expenses, a jury award would have to take these issues into account. See *Wetmore v. State Farm Mut. Auto. Ins. Co.*, 2007 VT 97, 182 Vt. 610, 612, 938 A.2d 570, 573 (2007) ("Where a jury awards future medical expenses that are explicitly intended to compensate a plaintiff for future pain alleviation but makes no award for future pain, suffering, anguish and loss of enjoyment of life, a new trial ... will generally be proper."). For the duration Alan remains a minor, economic damages may be recovered by his parents as the plaintiffs.

It should be noted that East cannot raise the medical insurance payments for Alan's surgery as a defense to the medical expenses component of damages. In other words, East cannot argue Alan would receive a "double recovery" upon holding it responsible for medical expenses.

Where an insurance company makes a payment to compensate a plaintiff for injuries, "the collateral-source rule prevents the defendant wrongdoer from benefiting from the plaintiff's foresight in acquiring the insurance through any offsetting procedure." *Hall v. Miller*, 143 Vt. 135, 141, 465 A.2d 222, 225 (1983).

Alan and his parents may possibly have a negligence claim against West, but they would face the difficulty of the rule that there is generally no duty to control the conduct of third-persons absent a special relationship between a defendant and such third-person. See *O'Brien v. Synnott*, 2013 VT 33, 72 A.3d 331, 334 (2013) (quoting Restatement (Second) of Torts § 314A cmt. e (1965)) (defendant is "not required to take precautions against a sudden attack from a third person which [the defendant] has no reason to anticipate"); *id.* § 320 (explaining that actor has duty to control conduct of third persons only when actor "knows or should know of the necessity and opportunity for exercising such control"). Plaintiffs would likely have to demonstrate that West had some special control over the individual in question, such as perhaps he or she was an individual who was at a teacher or school official's direct supervision at the time of the incident.

Two possible defenses may be available to East. The first is that East would be expected to assert that the release signed by Alan and his parents exculpates East from liability. The second is that East would be likely to argue Alan was comparatively negligent.

Though there is no Vermont Supreme Court case precisely on point, the Court's discussion in prior injury cases strongly indicates that public policy grounds would almost certainly be held to preclude enforcement of such a release. In *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 670 A.2d 795 (1995), the Vermont Supreme Court indicated its approval of the factors considered by the California Supreme Court in *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 32 Cal.Rptr. 33, 383 P.2d 441 (1963). Application of the *Turkl* factors make the release at issue here likely invalid for public policy reasons, as a school provides an essential public service where the school has a bargaining advantage over a student and his family (one factor) subject to public regulation (another factor).

Another potential defense is comparative negligence. Comparative negligence must be asserted in a defendant's answer as an affirmative defense. See V.R.C.P. 8(c). A defendant bears the burden of proving a plaintiff's own negligence is a proximate cause of the plaintiff's injuries. *Barber v. LaFromboise*, 2006 VT 77, 180 Vt. 150, 158, 908 A.2d 436, 443 (2006). If the fact finder determines a plaintiff's negligence was more than 50% of the cause of plaintiff's injury, a plaintiff may not recover any award. 12 V.S.A. 1036.

Here, it is likely that a jury would find Alan was negligent for failing to keep his helmet on when walking off the field given that players were specifically advised by East to wear their helmets. However, Alan's negligence must be judged as to what a reasonable teenager would do in the same situation. If his teammates also regularly disregarded the rule then there is a good chance a jury would find East's negligence was a greater cause of his injuries than his own negligence (or

at least 50%, which would still allow recovery). If Alan is found to be comparatively negligent, the court would reduce any award by the percentage his own negligence is deemed to have caused his injury. *Barber, Id.*

It would seem unlikely that Chris would have any cause of action against East. However, he does appear to have a valid tort claim against West based on a breach of duty owed according to premises liability law. In Vermont, a landowner owes a “business invitee” a duty to use reasonable care to keep premises in a safe and suitable condition to avoid unnecessary or unreasonable exposure to danger. *Menard v. Lavoie*, 174 Vt. 479, 480, 806 A.2d 1004, 1006 (2002). A lesser duty is owed to “social guests” and trespassers. Alan would likely be regarded a “business invitee” on the theory that players on visiting teams are there, in part, for the benefit of West. Thus, West had a duty to inspect its field for reasonably safe conditions prior to the game. The fact that the West principal had actual knowledge of the hole on the field prior to the game suggests a strong claim on Chris’s part, and in fact may even be sufficient to support liability if Alan were deemed only a “social guest.” It can be briefly noted here that Alan may also have a premises claim against West if the reportedly poor lighting were determined to be a cause of the soda can incident.

Like Alan, Chris’s damages would include pain, suffering, loss of enjoyment of life and cost of incurred and future medical expenses. An additional component of damages for Chris, and/or possibly his parents, may include the scholarship money lost due to his inability to play college football.

2) There appears to be no liability on the part of East for Chris’s damages. Thus, possible apportionment is examined with respect to East and West’s potential liability to Alan. For purposes of this analysis, I will assume that East and West are both deemed to have been negligent and that each of their negligence was a proximate cause of Alan’s injuries.

Where multiple defendants are found liable in negligence for a plaintiff’s injuries, generally those defendants are jointly and severally liable. See *Plante v. Johnson*, 152 Vt. 270, 274, 565 A.2d 1346, 1348 (1989). This rule means that either defendant may be required to pay the entire judgment awarded a plaintiff. While the language of the comparative negligence statute appears to allow for prorating liability among defendants according to their relative causal responsibility for a plaintiff’s injuries, the Vermont Supreme Court has rejected such an interpretation. See *Levine v. Wyeth*, 2006 VT 107, 183 Vt. 76, 101, 944 A.2d 179, 195 (2006) aff’d, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). Here, however, there is a good chance that Alan would be assessed with some comparative negligence. In this case, the law does allow for apportionment among joint tortfeasors. *Id.* Thus, a jury would be called upon to determine the relative percentages of responsibility for Alan’s injuries among Alan, East, and West. Determining how responsibility might be apportioned between East and West would likely not be critical to an attorney’s evaluation of Alan’s case, as both prospective defendants would likely be able to satisfy a monetary judgment.

A final point to note is that East and West may not seek indemnification against one another, even if they are held jointly liable and Alan and his parents were to choose to pursue only one of the schools. “Vermont law precludes contribution among joint tortfeasors but recognizes a right

of indemnity if (1) there is an express agreement by one party to indemnify the other, or (2) the circumstances are such that the law will imply such an undertaking.” *Peters v. Mindell*, 159 Vt. 424, 427, 620 A.2d 1268, 1270 (1992). There is nothing in the facts indicating either exception to the rule against “contribution” would apply here.

MODEL ANSWER 4 - FEBRUARY 2014

1. Did the Board act improperly at the first meeting when it cleared the room for a private discussion? Discuss.

YES, THE BOARD ACTED IMPROPERLY.

Without question the Proslug Board is a “public body” because it is a “board . . . of any agency, authority or instrumentality of the state” and not one “established by the governor for the sole purpose of advising the governor with respect to policy.” 1 V.S.A. § 310(3) (defining “public body” for purposes of open meeting laws). All public bodies are required to hold all meetings in a manner that is “open to the public at all times.” *Id.* § 312(a). A public body cannot take binding “formal action” except in a public meeting (with one narrow, inapplicable exception involving real estate transactions). *Id.*; *see id.* § 313(a)(2). The public must also “be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting as long as order is maintained.” *Id.* § 312(h).

The law permits a public body to exclude members of the public and go into executive session only in order to consider a narrow set of specific topics. 1 V.S.A. § 313(a). These exemptions from the open meeting requirement are “strictly construed” in favor of open public access. *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 104 (1993). While the “employment or evaluation of a public officer or employee” is a valid reason for entering executive session, *id.* § 313(a)(3), two-thirds of the members of the public body present at the meeting (if it is a public body of state government) must affirmatively vote to exclude members of the public before entering executive session. *Id.* § 313(a). Moreover, the motion to go into executive session “shall indicate the nature of the business of the executive session.” *Id.* This motion and the vote of the members must also be recorded in the minutes. *Id.*

Proslug’s Board acted improperly in clearing the hall on direction from the board chair. Though the Board chair is tasked with establishing “reasonable rules” for public comment, 1 V.S.A. § 312(h), he could not unilaterally clear the hall based on the critical comments of one member of the public, even if Ms. Smith went on a tirade. Moreover, while the other members of the Board “agreed,” there is no indication of a formal motion or vote, and no member of the Board “indicate[d] the nature of the business of the executive session” prior to the public being excluded from the meeting. Even though the Board appeared to have proper grounds to enter executive session, namely discussing “employment or evaluation of a public officer or employee,”¹ the procedure by which it went about entering executive session was improper, thus invalidating the exclusion of the public.

1 One could argue that the Board entered executive session to discuss, “[c]ontracts, labor relations agreements with employees . . . [or] grievances . . . where premature general public knowledge would clearly place the state . . . or person involved at a substantial disadvantage.” 1 V.S.A. § 313(a)(1). Use of this exception requires the Board to show a “substantial disadvantage” if the negotiations are made public, which is not always present in contract negotiations. *See Blum v. Friedman*, 172 Vt. 622, 623-24 (2001) (mem.). This argument simply highlights the fact that a public body is required to state its reason for entering executive session and publicly vote on the motion before excluding the public from discussion.

2. *Is Ms. Smith legally entitled to the relief she requests in the first Superior Court action? Discuss.*

NO, SHE IS NOT ENTITLED TO ANY OF THE RELIEF SHE REQUESTS.

Citizens can sue for violations of the open meetings law in Superior Court if they are an “aggrieved person.” 1 V.S.A. § 314(b). To be considered “aggrieved” a person must show some type of injury – in short, they must have standing. *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101 (1993). Here, Ms. Smith’s ejection from the first meeting could constitute an injury, especially where she was ejected based on her comments regarding whether Mr. Monata should retain his position – the very issue she has challenged in her first court action. It is important to remember that any public comment is allowed at an open meeting “as long as order is maintained” and the “reasonable rules established by the chairperson” are followed. 1 V.S.A. § 312(h). Even if Ms. Smith’s “interrogation” of the Board at the second meeting could be considered out of order, it likely would not negate her claimed injury.

That being the case, Ms. Smith likely has standing to bring her suit, but she still cannot obtain any of the injunctive relief she requests. Her suit is against the Board, not Mr. Monata, and she is seeking to invalidate its action in renewing his contract. Even where a public body enters executive session improperly, if no binding action is taken during the executive session an aggrieved person has no claim to relief because the body has taken no action outside an open meeting. 1 V.S.A. § 313(a).

More importantly, a public body’s action is not void if taken in violation of the law (e.g. outside public meeting) so long as it is subsequently ratified in an open meeting. *Katz v. S. Burlington Sch. Dist.*, 2009 VT 6, ¶¶ 6-7; 185 Vt. 621 (mem.); *Valley Realty & Dev., Inc. v. Town of Hartford*, 165 Vt. 463 (1996). Thus, Ms. Smith cannot undo the Board’s vote on the grounds it improperly entered executive session because the Board subsequently noticed and voted on Mr. Monata’s contract extension at an open public meeting after the public had an opportunity to comment. Even though Ms. Smith directly asked the Board for comment on its decision, the Board is not required to respond to all public comments or discuss the underlying details of its decision. *Katz*, 2009 VT 6, ¶¶ 6-7.

Ms. Smith’s claim for money damages will likewise not succeed. By statute, only injunctive or declaratory relief is available in an action alleging a public body has violated the open meetings law. 1 V.S.A. § 314(b); *Rowe v. Brown*, 157 Vt. 373 (1991) (no tort action available for violation). Any monetary penalty is available only in a criminal misdemeanor action brought by

the Attorney General. 1 V.S.A. § 314(a) (limiting criminal penalty for knowing and intentionally violating the law to \$500).

3. *Did the Board have proper legal grounds to deny Ms. Smith's three document requests? Discuss.*

IT IS UNLIKELY THE BOARD PROPERLY WITHHELD THE DOCUMENTS.

The “free and open examination of records” is the policy of the State as declared in the Public Records Act. 1 V.S.A. § 315. Any person may request and inspect public records from a “public agency” such as a state board. *Id.* § 316(a); *see also* § 317(a)(2) (defining public agency to include “any . . . board . . . of the State”). A “public record” is “any written or recorded information, . . . which is produced or acquired in the course of public agency business.” 1 V.S.A. § 317(b). A “request” for public records need not take a prescribed form, but must be made during a business day. *See id.* § 316(a). Here, Ms. Smith appears to have made an appropriate request for public records.

A public agency must respond to a records request in writing within three business days of the request and must either produce the requested records or clearly state the basis for withholding the records. 1 V.S.A. § 318(a)(2). Any written response must also clearly state the requestor's appeal rights. *Id.* § 318(a)(2). In responding to Ms. Smith's records request, the administrative assistant merely denied her request over the phone. He failed to respond in writing and did not provide a basis for the denial or inform Ms. Smith of her appeal rights. This was improper, but does not immediately entitle Ms. Smith access to the requested records.

A public agency can withhold certain public records if the law exempts their disclosure to the public. 1 V.S.A. § 317(c). Courts construe these exceptions “strictly against the custodians of records and resolve any doubts in favor of disclosure.” *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10, 177 Vt. 287. In examining the records Ms. Smith has requested, only one falls into an exemption from disclosure. The meeting minutes of the Board are necessarily public and must be disclosed. The Board is legally required to take minutes and record binding actions. 1 V.S.A. § 312(b). Moreover, all minutes of open meetings are public, *id.* § 312(b)(2), other than those taken during executive session, *id.* § 313(a).² Likewise, the public records law expressly states that employee salary and benefit information is public. *Id.* § 317(b).

2 Ms. Smith's request for “all of the Board's meeting minutes” could be considered an “unusual circumstance” because of the “voluminous amount of separate and distinct records which are demanded in a single request.” *Id.* § 318(A)(5)(B). The public agency has an affirmative duty to “consult with the person making the request in order to clarify the request” to ensure that the most responsive records are produced. *Id.* § 318(d). Here the public agency made virtually no effort to respond to, let alone clarify, Ms. Smith's request.

An employee's medical information, on the other hand, is expressly exempt from disclosure. All “Personal documents relating to an individual including . . . information in any files relating to . . . medical or psychological facts” are exempt. 1 V.S.A. § 317(c)(7); *cf. Herald v. City of Rutland*, 2012 VT 26 (this case could support a balancing test approach, but the facts of the prompt do not

suggest any broad public interest in the request and a significant privacy interest). Likewise, there is no evidence that the Board even has the requested records. *See* 1 V.S.A. § 318(a)(4) (requiring records custodian to “certify in writing that the record does not exist”). The Board could properly withhold documents relating to Mr. Monata’s mental health, but must inform Ms. Smith of the basis of its withholding.

One additional potential basis the Board could raise in defending its failure to produce the requested records is the exemption for “records relevant to litigation to which the public agency is a party of record.” 1 V.S.A. § 317(c)(14). Arguably the records Ms. Smith requested are relevant to the first suit she instituted with regard to the alleged open meeting violation. That said, the Court must undertake an analysis of “relevance” in applying this exception. *Shlansky v. Burlington*, 2010 VT 90, ¶ 9; 188 Vt. 470 (“The meaning of relevance is different under this exemption than under the rules of evidence; documents may be exempt if they have been ruled not to be discoverable and are ‘related or pertinent’ to the ongoing litigation.”). Still, it is unlikely the Court would withhold the otherwise publicly available documents (i.e. the meeting minutes and salary and benefit information) simply because Ms. Smith has another suit against the Board. *See id.* ¶ 10.

4. Is Ms. Smith legally entitled to bring her second suit? Discuss.

MS. SMITH FACES A SIGNIFICANT PROCEDURAL HURDLE IN BRINGING HER SECOND SUIT.

Ms. Smith’s haste in bringing her second suit may have cost her any possible relief she could receive for the Board’s likely violation of the Public Records Act. The Public Records Act requires the requesting party to appeal any denial or withholding of documents to the agency head to make a determination before judicial review is appropriate. 1 V.S.A. § 1 318(a)(3); *id.* § 319(a). By bringing an action against the Board without appealing to the agency head, Ms. Smith has failed to exhaust her administrative remedies. *See Bloch v. Angney*, 149 Vt. 29, 31 (1987) (must exhaust appeal to agency head prior to suit in court).

Ms. Smith may argue that the Board’s failure to inform her in writing of her appeal rights negates the requirement that she exhaust the administrative remedies before appealing to the Superior Court. *See* 1 V.S.A. § 318(a)(2). While this argument has some merit, it is likely unavailing as Ms. Smith’s reliance on the administrative assistant’s oral denial of her request over the phone as a final agency determination, without any additional attempt to obtain the documents, could be considered unreasonable. *Cf. Bain v. Clark*, 2012 VT 14; 191 Vt. 190.

Model Answer 5 - February 2014

1. Can you represent Ben? Discuss.

In any ethical issue, one needs to consult the Vermont Rules of Professional Conduct. Here, you formerly represented Ben and Julie in a matter several years ago, and now Ben wants you to

represent him in a case against Julie. This presents a potential conflict of interest. The Vermont Rules of Professional Conduct have several rules relating to conflict of interest. Rule 1.9 specifically governs conflict of interest issues with a former client.

The initial consideration is whether the proposed current representation of Ben is “the same or a substantially related matter” in which Ben’s interest are “materially adverse to the interests” of Julie. *See* Rule 1.9(a). According to Comment [3] to Rule 1.9: “Matters are ‘substantially related’ for purposes of this rule if they involve the same transaction or legal dispute *or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s [here, Ben’s] position in the subsequent matter.*” (Emphasis added.) However Comment [3] also notes that “information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.”

Representing Ben at a hearing seeking a permanent Relief From Abuse Order is not the same transaction or legal dispute as your prior representation of Ben and Julie in the 2010 eviction matter.

However, you did learn about Julie’s mental illness in the prior representation. You must determine if the information you acquired was confidential and whether Ben knows about it, and you must evaluate whether there is a substantial risk that the information you learned about her mental illness would materially advance Ben’s position in this instance. Given the limited facts presented, there is a strong argument to be made that such a substantial risk exists, unless Ben is aware of all the same facts that you learned during the prior representation.

Assuming a substantial risk exists, you may still represent Ben if Julie gives her consent. *See* Rule 1.9(a). One would presume Julie would not give her consent. However, the facts presented do not provide enough information to evaluate the likelihood of Julie giving her consent.

If Julie does consent, you are nonetheless prohibited from using information relating to your representation of her to her disadvantage unless the information has become generally known. *See* Rule 1.9(c)(1). Again, there are insufficient facts to make that determination in this case.

Generally speaking, this issue turns on what you learned during the prior representation and if that information is relevant to this case. If you only learned generally that Julie has a mental illness, then that likely would not be a problem because that information is not confidential. However, if you obtained copies of Julie’s medical records which Ben never saw, for example, then this information would be considered confidential and may be considered “substantially related.”

2. Assuming you can represent Ben, what threshold issues does Ben need to establish at the hearing to get a Relief From Abuse Order (“RFAO”) for himself, Mary and Luke against Julie? How likely is he to succeed? Discuss.

Relief From Abuse Orders are governed by Title 15. There is a dual threshold issue to be established: (1) that Julie has abused Ben and the children, and (2) that there is a danger of

further abuse. *See* 15 V.S.A. § 1103. The court will issue a RFAO where it finds the defendant has abused the plaintiff *and* there is a danger of further abuse. *See* 15 V.S.A. § 1103(c)(1)(A). The relevant definitions of “abuse” are: “attempting to cause or causing physical harm”, “placing another in fear of imminent physical harm,” or “abuse to children as defined in Title 33.” 15 V.S.A. § 1101(1).

Ben: It is true that Julie pushed Ben during their argument, which could be seen as causing harm or attempting to cause physical harm. *See* 15 V.S.A. § 1101(1)(A). However, it does not appear from the facts that he actually suffered physical harm or that Julie placed Ben in imminent fear of serious physical harm. Further, Ben also told you he is not afraid that Julie will hurt him, which suggests there is not a danger of further abuse. If in fact Julie has gone back on her medications then the adverse symptoms caused by her mental illness might be under control. Given the facts presented, it is unlikely the court will issue Ben a RFAO against Julie.

Mary & Luke: For the children, whether there was “abuse” will be determined under 33 V.S.A. § 4912, which defines an “abused or neglected child” to mean “a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parents or other person responsible for the child’s welfare.” (Emphasis added.) “Harm” includes “physical injury or emotional maltreatment” as those terms are further defined. 33 V.S.A. § 4912(3); *see also id.* at § 4912(6), (7).

Ben can establish “abuse” by showing harm or substantial risk of harm to the children’s (1) physical health, (2) psychological growth and development, or (3) welfare. Arguably, Ben will be able to demonstrate a physical harm to Mary, because of the cut she suffered even though the harm was minimal. There is no evidence of any physical injury to Luke. Ben may also be able to show that Julie’s going off her medication is a form of abuse or neglect because it put both children’s “psychological growth, development or welfare” at “substantial risk of harm.” The court would look at what happened when Julie went off her medication. How did Julie behave? How out of control was she? Did she know how out of control she could get? It is difficult to evaluate the likely outcome with the minimal facts presented about the incident. Ben can also try to establish abuse by showing emotional maltreatment of the children. Generally, this will require establishing a pattern of such behavior on Julie’s part.

Assuming Ben can demonstrate past abuse, he will also have to show a likelihood of future abuse to the children. He has indicated his concern that Julie might hurt the children in the future. Under the applicable statute, an “abused child” includes one who “is at substantial risk of harm by the acts or omissions of his or her parent . . .” 33 V.S.A. § 4912(2). In turn, “risk of harm” means “*a significant danger* that a child *will* suffer serious harm other than by accidental means . . .” § 4912(4) (emphasis added). Here, Ben’s best chance of demonstrating a significant danger of further abuse to the children will be establishing a history of or pattern of behavior of Julie going off her medications and her subsequent dangerous behavior.

The fact pattern illustrates only one incident where Julie endangered the children when she was off her medications. Other than Ben’s representation to you that when Julie does go off her medications she can be erratic and unstable, there is no evidence that the children have been exposed to such circumstances. The outcome will depend on whether there were prior incidents,

and whether Julie is in fact back on her medications. If there were other incidents, or if Julie is not back on her medication, Ben will probably be successful in meeting the future abuse prong of the threshold showing.

3. Assume that the Family Court grants a Relief From Abuse Order for Ben, Mary and Luke. Discuss and analyze whether the Court would grant the following types of relief as part of the Order:

a. Order prohibiting all contact with Ben, Mary, and Luke;

b. Order awarding Ben parental rights and responsibilities of Mary and Luke;

c. Order requiring Julie to vacate the apartment;

d. Order requiring Julie to pay the rent for the apartment: and

e. Order awarding Ben child support for Mary and Luke.

a. Order prohibiting all contact with Ben, Mary, and Luke: i. Ben: There does not appear to be a necessity for such an order. *See* 15 V.S.A. § 1103(c)(2)(A).

ii. Mary: If deemed to be necessary (*e.g.*, Julie is not back on her medications), the court can fashion an order which restricts Julie from all contact with Mary. This would include a restriction keeping Julie from contacting Mary at the daycare center. *See* 15 V.S.A. § 1103(c)(2)(A).

iii. Luke: Because Julie is still breastfeeding Luke, the Court may feel Julie should have contact with him. Therefore, the Court can fashion an order permitting appropriate supervised visitation in order to make sure Luke is properly nourished. *See* 15 V.S.A. § 1103(c)(2)(D).

b. Awarding Ben parental rights and responsibilities of Mary and Luke: The Court can order a temporary award of parental rights and responsibilities to Ben. *See* 15 V.S.A. § 1103(c)(2)(C). It will make that determination in accordance with the criteria of 15 V.S.A. § 665, the statute pursuant to which the family division of the Court issues a “rights and responsibilities” order, and for which it is required to consider certain factors when considering the best interests of the child. Evidence of abuse is one of the required factors to be considered. Ben may be able to make such a showing warranting his being awarded temporary custody of Mary and Luke to ensure that Julie, indeed, is back on her medications and she is now stable and no longer erratic or volatile. The primary caregiver is given preference. While it appears Ben is the primary caregiver, it is not clear from the fact pattern. As mentioned above, because of the breastfeeding issue, Julie will probably be awarded some sort of supervised visitation, assuming she has resumed taking her medication.

c. Requiring Julie vacate the apartment: Section 1103(c)(2)(B) authorizes the Court to order a defendant [Julie] to immediately vacate the household and award the plaintiff [Ben] sole possession of a residence. Therefore, the fact that Ben and Julie’s apartment is leased in Julie’s name only is irrelevant. Since Ben and the children were forced to leave the apartment because

of Julie's erratic, volatile behavior, seeking temporary shelter elsewhere, and considering their young age and that Ben appears to be the children's primary caretaker, it is likely the Court will direct Julie to immediately leave the apartment to allow Ben to return there with the children.

d. *Requiring Julie pay the rent for the apartment*: Where the court finds that the defendant has a duty to support the plaintiff, it has the authority to order that, for a period of no more than three months, the defendant pay the plaintiff's living expenses. The facts suggest that Julie is the primary earner for the family and is planning to return to work full-time. It seems likely, then, that if an order is issued under 15 V.S.A. § 1103, it will include a provision that Julie pay the rent for the apartment. *See* 15 V.S.A. § 1103(c)(2)(E).

e. *Child support for Mary and Luke*: Similarly, if the court finds the defendant [Julie] has a duty to support the children, it may temporarily order child support payments. *See* 15 V.S.A. § 1103(c)(2)(F). The Court will analyze the incomes of Ben and Julie in setting the support amount for a three-month period. *See, e.g.,* 15 V.S.A. § 659. Both Ben and Julie will likely be required to submit Affidavits of Income and Assets (Form 813), among other documentation regarding income and expenses. Again, the facts suggest that Julie's income is greater than Ben's, but more information will be necessary before a final determination can be made on this issue.

Model Answer 6 - February 2014

1. Was the Court's denial of Jones's motion to suppress the pills correct? Discuss.

The Court's denial of Jones's motion to suppress the pills was incorrect. To be admitted into evidence the pills had to be obtained by the officer through a legal search and seizure, which did not occur in this instance. While the officer had the authority to stop Jones, his search for the pills exceeded his authority under the circumstances of the search. Therefore, the Court should have granted the motion and suppressed the pills.

A police officer may conduct a *Terry* stop (a brief investigatory stop) of a person if the officer has a reasonable suspicion based on articulable facts that the person is or is about to be involved in criminal behavior. *Terry v. Ohio*, 392 U.S. 1 (1968). However, if the totality of circumstances indicates that the encounter has become too intrusive to be classified as an investigative detention, the encounter becomes a de facto arrest, and the government must establish that the arrest is supported by probable cause. *State v. Chapman*, 173 Vt. 400 (2002). In assessing whether the degree of restraint is too intrusive to be classified as an investigative detention, courts have considered a number of factors, including the amount of force used by police, the need for such force, the extent to which the individual's freedom of movement was restrained, the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used. *Id.*

In this instance, the initial stop was a permissible *Terry* stop. The officer observed someone leaving the sporting goods store through a broken window in the early morning, thus providing

reasonable suspicion that a burglary had occurred. The only person in the area was Jones, which at a late hour provided reasonable suspicion to stop Jones for investigation. This is true even though Jones did not have a red hat on. Moreover, given that the officer found a loaded gun magazine near the broken window, he was justified in believing that the suspect was armed. Thus, he was justified in handcuffing Jones to check for weapons. Moreover, the duration of the stop was short and there are no other factors that would support finding that this was an arrest.

To prevent suppression, the search resulting in identification of the pill bottle must also be within the scope of the officer's authority. During a *Terry* stop, an officer may search and pat down an individual for purposes of identifying weapons that may put the officer or others in harm or to identify evidence related to the circumstances leading up to the stop. However, if, during such a frisk, the officer feels an object that he realizes is not a weapon, he may continue his search for it only if he can immediately identify the object as contraband during the frisk. *State v. Ford*, 182 Vt. 421 (2007); *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

Here the officer was investigating a burglary and it is reasonable to believe that the individual committing the burglary could be armed, especially given the loaded magazine found by the window. Thus, the officer's patdown was permissible and within the scope of his authority. In this frisk, however, the officer did not identify weapons, but instead felt what he believed to be a pill bottle. Given a lack of evidence pertaining to stolen pills, the further search for and seizure of the pills exceeded the scope of a permissible search pursuant to the *Terry* stop. Therefore the motion should have been granted and the pill bottle suppressed.

2. Was the Court's denial of Jones's motion to suppress his statements to the police correct? Discuss.

The Court properly denied Jones's motion regarding to his statement to the police about possession of narcotics without a prescription but should have suppressed Jones's admission to the burglary.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held that police officers must advise suspects of their right to remain silent and to have an attorney present before engaging in a custodial interrogation. Whether police action rises to the level of a custodial interrogation requires an objective inquiry based on the totality of circumstances. Factors pertinent to this inquiry include (1) the location of the questioning; (2) the questioning officer's belief of the suspect's guilt, if that belief is communicated to the suspect; (3) whether the suspect came to the interview voluntarily; and (4) whether a reasonable person would have felt free to leave.

Jones's statement admitting to possession of narcotics without a prescription was properly admitted as evidence as Jones was not in custody at the time of the statement. Jones was asked to go to the police station for a statement and, while brought to the station in the police car, he was not handcuffed and voluntarily went along. During the questioning, Jones was told the room was unlocked, he was not under arrest, and he did not have to speak. At the time Jones made the admission regarding the pills, the officer had asked him only general questions and had not confronted him with any inculpatory evidence. As Jones was not in custody at the time he made

the admissions regarding the pills, the officer did not need to read him his *Miranda* rights and thus these statements should not be suppressed.

The same cannot be said for the admission to the burglary. This admission was made after a two-hour delay and then three hours of questioning. As the second interview continued, the officer's questioning became more aggressive, and the officer eventually confronted Jones with evidence of guilt. The officer also imposed restrictions on Jones, such as ordering Jones to turn over his cell phone and preventing him from smoking. Jones was also only allowed to go to the bathroom with an escort. Given the totality of the circumstances, a reasonable person would not have felt free to leave or decline to answer the officer's questions. As such, the admission was made during custodial interrogation and, as Jones had not been advised of his *Miranda* rights, should have been suppressed.