

Question 3

One day, Paul took his beloved dog hiking in Vermont. Enjoying the foliage, he and his dog wandered off the public trail, and, without realizing it, crossed onto Dan's property. In the past, Dan has had a problem with trespassers on his property, including trespassers with aggressive dogs that have frightened Dan and his family.

That day, Dan was walking his property carrying a gun for self-protection. Paul's dog ran out of Paul's sight and straight toward Dan. Paul had just caught sight of his dog fifty feet away from him when he saw Dan shoot the dog. Thinking his adored pet had been killed, Paul fainted from shock and fell down, striking his head on a rock.

Dan, who had not seen Paul before the shooting, ran over to him and asked if he was alright. Paul got up and punched Dan, giving him a black eye. Paul rescued his dog and quickly carried it back to his car.

Paul's dog survived the gunshot, but needed several surgeries and an extended stay at the clinic. By the time the dog went home, its care had cost \$12,000. Future treatment may be necessary.

Paul received stitches and pain medication for the cut on his head. This emergency medical treatment cost \$4,000. Paul also had night mares and trouble sleeping for weeks and no longer enjoys hiking. Paul spent \$2500 for therapy to address his anxiety.

1. Discuss the potential civil claims Paul might assert against Dan. For each potential claim, discuss the elements of the claim, the damages Paul could seek, and the likelihood that Paul would prevail.
2. Discuss the possible counterclaims or defenses Dan might assert and assess the merits of each.

1. Discuss the potential civil claims Paul might assert against Dan. For each potential claim, discuss the elements of the claim, the damages Paul could seek, and the likelihood that Paul will prevail.

Paul has several potential civil claims that he might assert against Dan, as follows.

Trespass to Chattels/Conversion

One potential claim is for trespass to chattels or conversion. Trespass to chattels is the intentional damaging of property and conversion is the intentional destruction of property. Restatement (Second) of Torts, §§ 217, 222A. The measure of damages is the property's value before the injury less the value after the injury. *Scheele v. Dustin*, 2010 VT 45, ¶ 8, 188 Vt. 36, 998 A.2d 697. Noneconomic damages are not available in property actions. *Id.* at ¶ 9. However, punitive or exemplary damages may be available if the plaintiff has suffered from an intentional and malicious tort. *Id.* at ¶ 11. Under Vermont law, animals, including pets are considered as a form of personal property. *Id.* at ¶ 8.

Here, Paul could argue that Dan committed a trespass to chattels by intentionally shooting his dog, which was Paul's personal property. (Paul would unlikely be able to bring a conversion action as the dog was alive and thus was not destroyed.) Paul could seek damages for the harm done to the dog, including the veterinary bills. If Paul could establish that shooting the dog was malicious, he could also seek punitive or exemplary damages.

Paul's cause of action of trespass to chattels, however, is unlikely to succeed given Dan's possible defense of privilege/justification (described below). Moreover, even if Paul succeeded on this claim, he may not be able to recoup the vet bills as a court would likely limit Paul's economic damages to the value of the dog (which, in addition, might be difficult to determine). Paul is also unlikely to succeed in establishing a claim for punitive or exemplary damages, given Dan's defense of privilege/justification.

Intentional Infliction of Emotional Distress

Another potential claim is for the intentional infliction of emotional distress. To establish such a claim, a plaintiff must demonstrate outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct. *Boulton v. CLD Consulting Engineers, Inc.*, 175 Vt. 413, 427, 834 A.2d 37, 49 (2003).

Here, Paul could argue that Dan's action in shooting his dog was outrageous, especially in light of the fact that Dan had had prior trespassers and as such the presence of Paul and his dog was not that surprising. Paul would also argue that Dan intentionally or at least recklessly caused him emotional distress in that he shot Paul's dog knowing that the dog's owner was likely nearby. If successful on this claim, Paul

would likely be able to recover the medical and therapy bills, as both stemmed from the emotional distress Paul suffered as a result of Dan's actions.

Paul, however, is unlikely to succeed on this claim, as it is unlikely that a court would find that Dan's actions were intentionally targeted at Paul, or that Dan acted recklessly, again in light of Dan's possible privilege/justification defense.

Negligent Infliction of Emotional Distress

A third potential claim is for the negligent infliction of emotional distress. To establish such a claim, a plaintiff must make a threshold showing that he or someone close to him faced physical peril. *Brueckner v. Norwich University*, 169 Vt. 118, 125, 730 A.2d 1086, 1092 (1999). If there has been an impact, the plaintiff may recover for emotional distress stemming from the incident during which the impact occurred. *Id.* If the plaintiff has not suffered an impact, he must show that: (1) he was within the "zone of danger" of an act negligently directed at him by defendant, (2) he was subjected to a reasonable fear of immediate personal injury, and (3) he in fact suffered substantial bodily injury or illness as a result. *Id.*

Here, Paul could argue that his dog was "someone close to him" and faced physical peril and that Paul was close enough to the dog to be within the zone of danger such that he was subjected to a reasonable fear of immediate personal injury. If successful on this claim, Paul would likely be able to recover the medical and therapy bills, as both stemmed from the emotional distress Paul suffered as a result of Dan's actions.

Paul, however, is unlikely to succeed on this claim, as: (1) he did not face physical peril; (2) his dog, as property, cannot be considered as "someone close to him"; (3) he was too far away from the dog to be within the zone of danger, since he was not in reasonable fear of immediate personal injury; and (4) Dan's actions were not directed at Paul.

Assault

A final potential claim is for assault, which is the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. Restatement (Second) of Torts, § 21.

Here, Paul could claim that Dan should be found to have willfully attempted to harm him by shooting his dog reasonably knowing that the dog's owner was likely nearby. This claim is unlikely to succeed, as the court is unlikely to find that Dan had any intentions towards Paul.

2. Discuss the possible counterclaims or defenses Dan might assert and assess the merits of each.

Besides the factual claims discussed above, Dan does a potential defense to Paul's claims which may be a complete defense to liability or at the very least support a reduction to damages awarded to Paul. Moreover, Dan has two counterclaims against Paul supporting potential damages due to Dan.

Privilege/Justification

Dan's primary defense for all of Paul's claims is that he was privileged or justified in shooting Paul's dog. A person is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another for the purpose of defending himself. Restatement (Second) of Torts, § 261. This defense is similar to a claim of self-defense, which applies when force is used against a person rather than against property. In examining this claim, a court would attempt to determine if the defendant believed he needed to act in order to defend himself, whether such belief was reasonable, and whether the extent of the defendant's actions was reasonably necessary under the circumstances.

The facts here support a claim of privilege/justification. The dog ran straight at Dan. Presumably, Dan had never seen this dog before so he would reasonably be at least unsure as to the dog's intentions. Further, Dan had a history of people trespassing with aggressive dogs on his property. Thus, a court may find that Dan reasonably believed he was going to be attacked by the dog and that Dan acted reasonably in shooting the dog. Paul could respond, however, that shooting the dog was not reasonable. Given the unknown threat of the dog and Vermont's treatment of dogs as property, it is likely that a court will come down on the side of Dan.

Trespass

One potential counterclaim is for trespass. A person who intentionally enters or remains upon land in possession of another without privilege to do so is subject to liability in tort for trespass. *Harris v. Carbonneau*, 165 Vt. 433, 437, 685 A.2d 296, 299 (1996); Restatement (Second) of Torts, § 158. Mistake is not a defense to trespass, as the only relevant intent is to enter the real property; the actor's subjective intent or awareness of the property's ownership is irrelevant. Nominal damages are presumed from a trespass even where the owner has suffered no actual injury to his or her possessory interest

Here, Dan could successfully argue that Paul trespassed on his property. The fact that Paul entered on the land by accident does not provide a defense, since the act of Paul's walking on to the land was intentional. Moreover, trespass would be proven if only the dog went on the property, not Paul, as the dog is his property and under Vermont law Paul is responsible for the acts of his animal. That said, there is no evidence that Paul caused any damage to Dan's land, and thus the only recovery for this claim would be nominal damages.

Battery

Another potential counterclaim is for battery, which is an intentional contact with another that is harmful or offensive. Restatement (Second) of Torts, §§ 13, 18.

In this case, Paul intended to commit bodily harm or injury to Paul knowingly aware of the consequences. The intent by Paul here is clear and while Paul may claim self-defense in fear of Dan shooting again, the facts demonstrate that the initial shot was taken at the dog within an area far from Paul. Thus, Dan is likely to receive damages for any claims related to this battery.

Contributory Negligence

Another claim that could reduce Paul's potential recovery is contributory negligence. Vermont's comparative negligence statute, 12 V.S.A. § 1036, bars recovery where the plaintiff's negligence exceeds fifty percent of total causal negligence, and further specifies that, even if recovery is not barred, it is diminished in proportion to the amount of negligence attributed to the plaintiff.

Here, Dan could argue that Paul was negligent in wandering off the public trail and in letting his dog run free without a leash. When faced with this argument, a court is unlikely to find that Paul's recovery is barred and but may decide that Paul's damages should be offset partially for his own negligence. *See, e.g., Altman v. City of High Point, N.C.*, 330 F.3d 194, 206 (4th Cir. 2003) (“[D]og owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and unsupervised, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance.”).

Question 4

Harry Homeowner purchased a two unit apartment building in Greentown, Vermont on January 2, 2012. At the time of the purchase, Harry gave a mortgage to Goliath National Bank as security for a promissory note in the face amount of \$100,000.00. Harry and Wanda, his wife of twenty years, immediately moved into one of the two units in the building. The second unit is occupied by tenants whose identity is unknown. Harry subsequently defaulted on the loan. With accruing charges, the current loan balance is \$110,000.00.

A title search of the Greentown Land Records identifies Harry as the sole owner of the property. The Goliath mortgage was recorded on January 3, 2012. Another mortgage, in favor of Greentown Community Bank, was recorded in the Land Records on July 7, 2012. The Greentown Community Bank mortgage is dated July 5, 2012 and was given as security for a loan in the amount of \$25,000.00. The title search also reveals delinquent real estate taxes in the amount of \$10,000.00 due and owing to Greentown. There are no other filings or recordings in the Greentown land records relative to the property. The title search indicates that the Town has assessed the property at \$140,000.00 for real estate tax purposes.

1. Does Goliath have a valid mortgage in the property allowing it to obtain clear title through a Court action? Discuss. Your answer should include a discussion of any interest in the property which may be held by Wanda.
2. Describe the different foreclosure actions available to Goliath and the advantages and disadvantages of each.
3. Who should Goliath name as defendants in its court action and why?
4. Is there a way for Goliath to obtain clear title to the property without bringing a court action and explain whether that would work here?

Model Answer 4

1. Does Goliath have a valid mortgage in the property allowing it to obtain clear title through a Court action? Discuss any interests in the property which may be held by Wanda. (20%)

Harry cannot unilaterally convey a mortgage interest in the property without his wife's consent and participation because this is a homestead property. Harry and his wife, Wanda, reside in one of the two apartment units. Although Harry purchased the apartment building and the Greentown Land Records identify Harry as the sole owner of the property, the property is the primary residence of both Harry and Wanda. 27 V.S.A. § 101 ("The homestead of a natural person ... not exceeding \$125,000.00 in value, and owned and used or kept by such person as a homestead ... shall be exempt from attachment and execution except as hereinafter provided."). See *In re Avery*, 41 B.R. 224 (D. Vt. 1984) (ownership and occupancy are the essential conditions of existence of a homestead right). The purpose of the homestead exemption in Vermont, as elsewhere, is to conserve family homes. *Girard v. Laird*, 159 Vt. 508, 510, 621 A.2d 1265, 1266 (1993); *Brattleboro Savings and Loan Ass'n v. Hardie*, 2014 VT 26, ¶ 9.

Consistent with this public policy, under Vermont law, the general rule is that both spouses must join in any conveyance of homestead property, including conveyance of a mortgage, unless the conveyance is by a purchase money mortgage. *In re Muther*, 479 B.R. 316 (D. Vt. 2012); 27 V.S.A § 141(a) (" A homestead or an interest therein shall not be conveyed by the owner thereof, if married, except by way of mortgage for the purchase money thereof given at the time of such purchase, unless the wife or husband joins in the execution and acknowledgment of such conveyance. A conveyance thereof, or of an interest therein, not so made and acknowledged, shall be inoperative so far only as relates to the homestead provided for in this chapter."). A purchase money mortgage is a mortgage given to a seller of real estate or to a third party lender to the extent that the proceeds of the loan are used to acquire title to the real estate or to construct improvements on the real estate, if the mortgage is given as part of the same transaction in which title is acquired. Restatement (Third) of Property (Mortgages) § 7.2 (1997).

Goliath has a valid mortgage interest in the property because this is a purchase money mortgage. The mortgage was given to Goliath at the time the property was acquired by Harry. This will allow Goliath to obtain title to the property through a foreclosure action.

Extra Credit

In *In re Ruggles*, 210 B.R. 57 (D. Vt. 1997), the bankruptcy court held that, under a plain reading of 27 V.S.A § 101, the debtor's claim of exemption in the equity of her entire duplex was not made in bad faith. The court found that the Legislature's desire to exempt rents derived from the homestead property to be instructive. The debtor and her tenants both used the property for residential purposes and the property was undivided. If the homestead exemption did not extend to the rented portion of the duplex, the court concluded that this would force a sale of the entire complex, effectively eliminating the debtor's homestead right.

2. Describe the different foreclosure actions available to Goliath and the advantages and disadvantages of each. (40%)

Foreclosure actions are brought in the Civil Division of the Superior Court for the county where the land lies. 12 V.S.A. § 4932(a). Goliath would file a copy of the foreclosure complaint in the town clerk's office in each town and the clerk would note on the margin of the record of the mortgage that a copy of foreclosure proceedings on the mortgage had been filed. 12 V.S.A. § 4932(b). This provides notice of the pendency of the action to all persons who acquire any interest or lien on the mortgaged premises between the dates of filing the copy of foreclosure and the recording of the final judgment in the proceedings. *Id.*

(a) Strict Foreclosure.

Goliath could file an action for strict foreclosure on the property, pursuant to 12 V.S.A. § 4941. If Harry does not request, and the court does not order, that the property be sold at a judicial foreclosure sale, 12 V.S.A. § 4941(b), then Goliath may obtain the property through strict foreclosure, *i.e.* without the sale of the property, if it can establish that Harry has no equity in the property. 12 V.S.A. § 4941(c). The court is required to make a finding (and include a summary of the evidence upon which its finding is based in its order) that there is no substantial value in the property in excess of the mortgage debt due to Goliath and any other lienholder, plus assessed but unpaid property taxes due on the property. 12 V.S.A. § 4941 (c).

Here, assuming that the Town's assessment of the property at \$140,000 is an adequate assessment of its value, Harry's equity in the property would be calculated by adding the debt due and owing to Goliath (\$110,000) on the first mortgage, including

accrued charges, with the debt due and owing to Greentown Community Bank (\$25,000) on the second mortgage, plus the delinquent real estate taxed due and owing to Greentown (\$10,000), less the value of the property (\$140,000). Based on this calculation, Harry has no equity in the property: $\$110,000 + \$25,000 + \$10,000 - \$140,000 = (\$5,000.00)$.

If the court were to issue a decree, Harry would be given a period of time (usually six months) in which to pay off or redeem the mortgage debt. 12 V.S.A. § 4941(d). If Harry failed to redeem the mortgage debt within the allotted time, the clerk of the court would issue a writ of possession allowing Goliath to take possession of the property. 12 V.S.A. § 4941(e). The writ of possession would be served on Harry, Wanda and the tenants and Goliath would not be able to take possession of the property until at least thirty days after the writ was served (or longer if so required by federal law). *Id.*

(b) Foreclosure by Judicial Sale.

Goliath could file an action seeking foreclosure by judicial sale. 12 V.S.A. § 4945. Upon entry of the decree, the court would give Harry a period of time in which to redeem the property. 12 V.S.A. § 4946(a). If Harry failed to do so within the allotted time, the court would order the mortgaged property to be sold at a public sale. *Id.* The public sale would be conducted on or before six months from the expiration of the last redemption date set forth in the decree, unless extended by the court or stayed by Harry filing for bankruptcy. *Id.* As the property is Harry's principal residence, the court would not enter judgment in Goliath's favor within seven months of the service of the foreclosure complaint, unless the court so ordered or Harry and Goliath mutually agreed to a shorter period of time in which to foreclose the mortgage. 12 V.S.A. § 4945(b).

Upon expiration of the redemption period, upon Goliath's request and approval of the court, the clerk of the court would issue a writ of possession. 12 V.S.A. § 4946(d). The writ of possession would be served on Harry, Wanda and the tenants. Goliath would not be able to take possession of the property until at least thirty days after the writ was served (or longer if so required by federal law). 12 V.S.A. § 4946(d).

Harry would be entitled to redeem the property prior to the public sale by paying the full amount due under the judgment order and such other amounts, including the costs and expenses of the sale, accruing post-judgment, as agreed to by the parties or ordered by the court. 12 V.S.A. § 4949(a). Harry and Goliath could also agree that Harry may redeem the premises at any time prior to the public sale by paying less than the full amount due under the judgment order. 12 V.S.A. § 4949(b). The parties could also

stipulate and move to vacate the judgment at any time prior to the public sale. 12 V.S.A. § 4951.

If Harry did not redeem the property, Goliath could move forward with a public sale of the property, after providing notice of the sale, as statutorily required. 12 V.S.A. § 4952(a)-(c). The public sale would be held at the mortgaged property unless the court directed it be held somewhere else. 12 V.S.A. § 4953(a). Following the sale, Goliath would file a report with the court, under oath, together with a request for confirmation of the sale. 12 V.S.A. § 4954(a). This would include an accounting of the sale proceeds and a proposed order confirming the sale. *Id.* Prior to the court's entry of a confirmation order, Goliath could request a deficiency judgment. If it fails to do so before the court issues a confirmation order, Goliath will be deemed to have waived any deficiency judgment it may otherwise be entitled to receive from Harry. 12 V.S.A. § 4954(d).

Advantages and Disadvantages: Strict foreclosure is a less cumbersome process than foreclosure by judicial sale but Goliath would have to establish that Harry has no equity in the property in order to use this process, which can be costly. The judicial sale process is more cumbersome but does not require proof that Harry has no equity in the property.

Extra Credit:

A mortgagee, such as Goliath, can also pursue foreclosure by non-judicial sale. 12 V.S.A. § 4961. This action is not available here, however, because the property at issue is a dwelling owned by a natural person. *Id.*

3. How would the transfer of the property from Harry to Goliath be recorded in the Greentown Land Records for each type of foreclosure action? (10%)

(a) Strict Foreclosure

If Harry fails to redeem the property within the allotted period of time, Goliath would have a certified copy of the judgment and the certificate of non-redemption recorded in the town's land records. 12 V.S.A. § 4941(g).

(b) Foreclosure by Judicial Sale

Following the public sale of the property, the court's confirmation order would be recorded in the town's land records, effectively transferring title to Goliath. 12 V.S.A. § 4954(b).

4. Who should Goliath name as defendants in its court action and why? (15%)

Goliath should name the following as defendants in its court action:

- Harry, as the mortgagor.
- Wanda, as Harry's spouse (marital interest)
- Greentown Community Bank, as holder of the second mortgage.
- Tenants, as occupants of the property. *See* 12 V.S.A. § 3932(c)(1) (providing that any person occupying the mortgaged property, pursuant to a residential rental agreement as of the date the copy of the complaint is recorded in the land records, shall be joined as a party defendant).

Extra Credit

Greentown's superior interest in recovering the \$10,000 in delinquent real estate taxes cannot be foreclosed by Goliath and, thus, Greentown should not be named as a defendant in the action.

5. Is there a way for Goliath to obtain clear title to the property without bringing a court action and explain whether that would work here? (15%)

Goliath could accept a deed in lieu of foreclosure from Harry. Harry may prefer to provide Goliath with a deed in lieu of foreclosure in order to avoid going through the foreclosure process and obtain a faster resolution. A deed in lieu of foreclosure transaction may be less damaging to the borrower's credit. A deed in lieu of foreclosure may also be appealing to Goliath as it is easier and faster than going through the foreclosure process. Goliath could take possession of the property immediately and list it for private sale. With a deed in lieu of foreclosure, Goliath would not be able to pursue any deficiency.

A deed in lieu of foreclosure will not extinguish Greentown Community Bank's second mortgage on the property, however, and so this option would not be available to Harry and Goliath here unless the Greentown Community Bank agrees to the transaction or its loan is discharged.

Question 5

Paula Patient, who lives in Vermont, found a lump in her abdomen which caused her persistent pain. After considering her options, she elected to have surgery to address the pain. She chose to have the surgery performed at Medical Hospital, incorporated in and solely located in Massachusetts. Then Paula began the recovery process. Several days after the surgery, Paula experienced severe pain in her abdomen, and a surgical sponge from her operation was discovered in her abdomen.

In January of the next year, Paula timely filed a civil action in Vermont Superior Court against both the Hospital and the surgeon for medical malpractice. The Hospital hired Clark as its attorney; the surgeon hired Larry. Clark filed a motion to dismiss on behalf of the Hospital arguing only that Paula had failed to allege sufficient facts to show the Hospital was negligent. The Court denied the motion, but the Hospital still did not file an answer to Paula's complaint.

In May, during the discovery phase of the suit, Paula sent Clark a request to produce any reports from the Hospital's internal investigation into Paula's operation. In July, when Clark sent his formal response to this discovery request, copied to all parties, the Hospital had not yet completed the internal investigation, so he stated that "No such report exists." Paula did not make any discovery requests from the surgeon.

In August, the Hospital completed its internal investigation and concluded in its written report that the surgeon was intoxicated during Paula's operation, and this inebriation directly caused the surgeon to leave the sponge inside Paula. After reviewing the completed report with Clark, the Hospital fired the surgeon immediately. Following her termination, the surgeon consulted with her lawyer, Larry, and provided him a copy of the Hospital's internal investigation report, including evidence that Clark had reviewed the report.

In December, discovery in Paula's malpractice action closed and Clark had not disclosed the Hospital's internal report to Paula.

Questions:

- 1) Did the Vermont Superior Court have personal jurisdiction over the Hospital? Discuss.
- 2) Was it proper for Clark, the Hospital's lawyer, to not have produced the Hospital's internal report during discovery? Discuss.
- 3) Did Larry, the surgeon's lawyer, have a duty to report Clark's conduct? Discuss.
- 4) Could Larry disclose the report to Paula as part of the lawsuit? Discuss.

1) Did the Vermont Superior Court have personal jurisdiction over the Hospital? Discuss.

Yes (qualified).

- Exercising personal jurisdiction over a nonresident defendant is a question of federal constitutional law requiring the court to decide whether the defendant has had sufficient minimum contacts with Vermont such that maintenance of suit does not offend traditional notions of fair play and substantial justice.
 - Purposeful availment of the privilege of conducting activities within Vermont thus invoking the benefits and protections of its laws.
 - *Schwartz v. Frankenhoff*, 169 Vt. 287 (1999).
 - *See also* 12 V.S.A. § 855 (long-arm jurisdiction predicated on minimum contacts (*see Brown v. Cal Dykstra Equip. Co.*, 169 Vt. 636, 636 (1999) (mem.))
- Unlikely that Massachusetts medical facility has conducted sufficient activities in Vermont to invoke benefits and protections of Vermont's laws.
- **HOWEVER**, objection to personal jurisdiction has been waived.
 - Hospital appeared in Vermont court by filing motion to dismiss and undertaking discovery.
 - *See Yanmar American Corp. v. Crean Equipment Co.*, 2012 VT 35. ¶¶ 9, 191 Vt. 620 (mem.) (where Vermont corporation filed a motion to dismiss in foreign jurisdiction, without raising personal jurisdiction, it waived defense of personal jurisdiction).
 - *See also Harvard Trust Co. v. Bray*, 138 Vt. 199, 203 (1980)
 - Even though no answer filed, Hospital availed itself of Vermont court's jurisdiction
 - Failure to timely raise personal jurisdiction as defense in either a motion to dismiss under Rule 12(b), or a responsive pleading, waives the defense
 - V.R.C.P. 12(h)
 - *Harvard Trust Co. v. Bray*, 138 Vt. 199, 203 (1980)

2) Was it proper for Clark, the Hospital's lawyer, to not have produced the Hospital's internal report during discovery? Discuss.

No.

- As a general matter, the scope of discovery is broad:
 - "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." V.R.C.P. 26(b)
- Requests to produce documents are governed by Vermont Rule of Civil Procedure 34.
- Rule 26(e) requires a party to supplement discovery responses:

- A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement or correct the response to include information thereafter acquired with respect to the following matters if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing:

....

(2) Any other prior response to an interrogatory, request for production, or request for admission.

- Clark's initial response to the request to produce the internal investigation report was complete when made, and he did not object to the request in any form. Thus, he is obligated under the rules to supplement his discovery response, but did not do so.

3) Did Larry, the surgeon's lawyer, have a duty to report Clark's conduct? Discuss.

Yes.

- Under Vermont Rule of Professional Conduct 3.4 (Fairness to Opposing Party and Counsel), a lawyer must not:
 - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; OR
 - (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
- V.R.Pr.C. 8.3(a) requires:
 - A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- Based on the discovery process in the malpractice case and the information Larry received from Denise, namely the report with Clark's comments, Larry knows that:
 - Clark was aware of the discovery request for the report,
 - Clark had not produced the report during discovery
 - Clark had read the report of the report and still not produced it
 - Clark knew it was material to Paula's legal claims
- But see Answer to #4 (and Comment [2] to V.R.Pr.C. 8.3 referencing interplay between Rule 8.3 and Rule 1.6).

4) Could Larry disclose the report to Paula as part of her lawsuit? Discuss.

Only with Denise's (unlikely) consent.

- Though under Rule 8.3, Larry may be obligated to report Clark's professional misconduct, Comment [2] to Rule 8.3 states:
 - A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to

disclosure where prosecution would not substantially prejudice the client's interests.

- V.R.Pr.C. 1.6 prohibits the disclosure of confidential client information.
 - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c).
- The provisions of (b) (mandatory disclosure to prevent crime or harm) are unlikely to apply to the facts in this case.
- Rule 1.6(c) states (in relevant part):
 - A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order
- Here, the best course would be to convince Denise to consent to disclosure; however, given how materially adverse disclosure of the report would be to Denise's interests, let alone her reputation, it may be difficult to obtain such consent. Indeed, counseling her to permit disclosure may violate Larry's duty as a zealous advocate.
 - That said, Larry also has a duty of candor toward the tribunal, Rule 3.3
 - MORE

Question 6

Barb was the sole owner of a retail gas station on Route 8 and a wholesale distribution station. On November 10, 2013, Barb sold the retail gas station to Joy, her long-time employee. The sale was accomplished through a Purchase & Sale Agreement, which allowed Joy to purchase the business and its assets for \$500,000. The agreement also included the following provisions:

- (e) The balance of the purchase price, \$100,000, shall be paid by Purchaser in Ten (10) equal installments of \$10,000 each, due each December 1 and June 1, for five years, beginning December 1, 2013.
- (f) This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Vermont.
- (g) All disputes of whatever kind between the parties based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration, the terms of which are governed by the Vermont Arbitration Act.
- (h) The provisions of this agreement are severable. If any provision is adjudicated to be invalid or unenforceable, such provision shall be deleted, but shall not affect the other provisions of the agreement, which shall continue to be given full effect.
- (i) This document is the entire agreement of the parties with respect to the subject matter hereof and may not be amended, supplemented, canceled, or discharged except by written instrument executed by both parties hereto.

The closing took place on November 10, 2013. At closing, Joy orally agreed to purchase all of her gasoline from Barb's wholesale business for a period of five years. Joy thought that Barb's pricing was the best in the region, and Barb did not want her wholesale business to lose the gas station account.

Joy made the first \$10,000 payment on time on December 1, 2013. She also purchased all of her fuel from Barb's wholesale business. That winter, the petroleum market experienced some tumultuous fluctuations, causing financial stress to all involved in the fuel supply business. On May 8, 2014, Joy advised Barb that she would not be able to make the next scheduled \$10,000 payment on June 1, 2014. Barb, in turn, refused to provide Joy with fuel from her wholesale business.

On May 12, 2014 Barb comes to you to evaluate her options. She wants to take immediate action against Joy.

1. Discuss the elements of a contract and whether the above-described agreements satisfy these standards.
2. What are Barb's remedies regarding the \$10,000 payment? Discuss each option and likelihood of success.
3. Discuss Joy's options to enforce the oral agreement, Barb's defenses, and the likely results.

Model Answer 6

1. Basic elements of a contract:

There must be an offer, an acceptance, and consideration to form a binding contract between parties. With respect to any contract, the parties must agree (having a meeting of the minds) on the material terms of the contract. The contract must be supported by consideration, which may be either a benefit to the obligor or a detriment to the obligee, and can include mutual promises. The parties must have the legal capacity to act, and the actions anticipated by the agreement must be legal. An exchange of promises that are mutually binding with consideration creates a binding bilateral contract. *Sisters & Brothers Inv. Group v. Vermont National Bank*, 172 Vt. 539, 542 (2001).

a. P&S:

All of the basic elements of a binding bilateral contract are present in the purchase and sale agreement. The fact pattern suggests that the written agreement specifies the material terms of the deal. The parties have exchanged bilateral promises with consideration: Joy receiving ownership of the gas station in exchange for Barb receiving \$500,000, with \$100,000 to be paid over time. The question does not suggest any lack of capacity or illegality.

The statute of frauds requires a written contract for the sale of real property. The question implies the sale of the business includes real property by its reference to the transfer of title, but since a written agreement is in place, this satisfies the statute of frauds regardless. 12 V.S.A. §181(5).

b. Oral Agreement:

In analyzing whether the oral agreement created a binding contract, two elements are worthy of closer review. It is appropriate to consider first whether the parties had a meeting of the minds, as this agreement was not reduced to writing, and there could be some areas not understood by both sides. "Vagueness, indefiniteness, and uncertainty of expression as to an essential contract term can preclude the creation of an enforceable contract." *Agway v. Marotti*, 149 Vt. 191, 194 (1988). For example, while a discount of fuel price has been agreed to, the price itself has not been specified. Also, the volume of fuel sold has not been specified. Despite these uncertainties, however, the parties have partially performed the contract to date. As the "terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other

conduct,” the conduct of the parties here suggests that they did have a meeting of the minds as to the material terms of this agreement. Restatement (Second) of Contracts, §5 comment a; *see also Sisters & Brothers*, 172 Vt. at 543 (fact that some details regarding means of carrying out contract were not included was “unimportant” in face of unambiguous agreement) (*citing Agway*, 149 Vt. at 194-195).

Second, is there sufficient consideration? Consideration is something exchanged for something else. To constitute consideration, a performance must be bargained for. *Lloyd's Credit Corp. v. Marlin Mgmt. Servs., Inc.*, 158 Vt. 594, 598-99, 614 A.2d 812, 814-15 (1992). “Either a benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract.” *Id.* at 598, 614 A.2d at 814.). A “mere expectation or hope of benefit is sufficient to serve as consideration.” *Kneebinding, Inc. v. Howell*, 2014 VT 51, ¶17. “Even in commercial transactions, a very slight advantage is sufficient to serve as consideration.” *Id.* Mutual promises, “in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another.” *H.P. Hood & Sons v. Heins*, 124 Vt. 331, 337, 205 A.2d 561, 565 (1964) (quoting 1 Williston on Contracts § 103, at 395-96 (3d ed. 1957)). Given that commercial transactions require only a slight advantage, i.e. in this case a 1% discount on fuel costs, there is likely sufficient consideration for a contract to be formed.

Finally, as with the P&S agreement, the facts do not suggest any illegality or lack of capacity.

The facts support the contention that the oral agreement is separate from the Purchase & Sale agreement, because it relates to the purchase of a product, not the purchase of the business.

This agreement may, however, run afoul of Vermont’s Statute of Frauds, where an “agreement not to be performed within one year from the making thereof” must be evidenced by a writing. 12 V.S.A. §181(4). An exception exists where complete performance is made within one year. *Mason v. Anderson*, 146 Vt. 242 (1985). Here, the terms of the agreement extend beyond one year, but an adjudicator would consider factors of complete performance or other equities, such as the parties’ actions in the months following the sale when evaluating the enforceability of the agreement.

2. Barb’s remedies regarding the \$10,000 payment.

a. Forum

The P&S agreement provides that the parties must submit all disputes to binding arbitration. If Barb brings an action in court, Joy may move to dismiss the lawsuit on the basis of this provision. Vermont law favors arbitration, as articulated in the Vermont Arbitration Act, 12 V.S.A. § 5652(a) (providing that a written arbitration agreement “creates a duty to arbitrate, and

is valid, enforceable, and irrevocable".) *See also Union Sch. Dist. No. 45 v. Wright & Morrissey, Inc.*, 2007 VT 129, ¶ 12 (mem.); *Lamell Lumber Corp. v. Newstress Int'l, Inc.*, 2007 VT 83, ¶ 9 ("Vermont law and public policy strongly favor arbitration as an alternative to litigation for the efficient resolution of disputes"). If Joy does not move to dismiss the action on the basis of the arbitration clause and defends in court, however, she will likely be deemed to have waived this objection. *Lamell Lumber Corp. at ¶ 9* (where defendant listed the arbitration agreement as an affirmative defense in its answer, but then proceeded to actively litigate the case over the next two years, trial court concluded that the defendant had waived the arbitration agreement, and the Supreme Court affirmed, rejecting defendant's argument that an arbitration agreement is jurisdictional and cannot be waived.)

b. Remedies

Whether in court or before an arbitrator, Barb has a number of options regarding the \$10,000 payment. First, no breach of the contract has occurred as the payment is not due until 06/01/14. It is appropriate, however, to consider whether Joy has repudiated the purchase and sale contract, which would allow Barb to bring an action for anticipatory breach of contract.

Repudiation occurs when one party to a contract makes a statement to the other indicating that they will breach, or when "a voluntary affirmative act [occurs] which renders" one party "unable to perform." Restatement (Second) of Contracts, § 250; *see also Record v. Kempe*, 2007 VT 39, ¶ 15, (explaining, "[w]hen one party repudiates a contract, the other party is discharged from her duties under the contract and may bring an action for breach" and defining repudiation in accordance with the Restatement). *Downtown Barre Development v. GU Markets of Barre, LLC*, 2011 VT 45. Repudiation may take the form of "express words or ... an act that makes performance by the repudiator apparently impossible or very improbable." 9 A. Corbin, Contracts § 977, at 815-16 (1979). Joy's unequivocal statement that she will not be making the 06/01/14 payment, i.e. that she will breach the terms of their agreement, constitutes a repudiation of the contract.

As a result of Joy's repudiation, Barb has a number of possible remedies. *See Carvage v. Stowell*, 115 Vt. 187, 192 (Vt. 1947) (rights of party to a bilateral contract of mutually dependent promises upon an anticipatory repudiation by the other party, are: (1) to rescind the contract altogether and proceed in quasi-contract to recover any damages incurred by the injured party for rendering performance to date; (2) to elect to treat the repudiation as a breach, either by bringing suit promptly or by making some change in position, or (3) to wait until the time for performance has arrived and bring suit for breach after that time); *see also* Restatement (Second) of Contracts, § 250, comment a; *see also* § 253 (where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone may give rise to a claim for damages for total breach.).

Barb has strong claims under all three theories. Joy's clear statement of repudiation will permit an action for breach, either now or at the time of failure of performance, and/or an action to rescind. Moreover, Barb is relieved from her obligation to transfer title to Joy based on Joy's repudiation of the contract. *Record v. Kemp*, 2007 VT 39, ¶ 15 (when one party repudiates a contract, the other party is discharged from her duties under the contract and may bring an action for breach). While one possible remedy is specific performance of the contract, Restatement (Second) of Contracts, § 357, because the appropriate remedy is damages, not performance of some other act or forbearance, specific performance is not an appropriate remedy for Barb. Restatement (Second) of Contracts, § 359 (specific performance will not be ordered if damages would be adequate). Rather, the appropriate approach would be to allege breach and seek damages. If Barb chooses to rescind the contract, she will have to be prepared to return some portion of the purchase price to Joy, less damages from the breach.

Note that Joy's breach does not give Barb the basis to breach the oral agreement to sell Joy fuel at a discount. Although it is fairly clear that the oral agreement has no real utility without the purchase and sale agreement, the two are separate and distinguishable. Indeed, Section (g) of the purchase and sale agreement makes this clear. Where there are "two separate contracts ... even a total failure of performance by one party as to the first has no necessary effect on the other party's duty to perform the second." This is significant in this case, as Joy's ability to perform on 06/01/14 (and cure any breach) may be hindered by Barb's decision to breach the oral agreement and deny Joy a supply of discounted fuel. You should advise Barb to continue to fulfill her obligations under the second agreement and seek a remedy if and only if Joy breaches that oral agreement by failing to pay for the fuel.

Although Joy has paid \$410,000 of the \$500,000 purchase price, this would not equate with substantial performance allowing for Joy to force a unilateral modification of the terms of payment, or a reduction in the purchase price. Substantial performance is often relevant in a construction contract, for example, but does not excuse one's duty to meet the payment terms of a purchase and sale. Such a result would reward Joy for her breach and is an inequitable result for Barb. See, e.g., *Fletcher Hill, Inc. v. Crosbie*, 2005 Vt 1 (Vt. 2005).

If there is any dispute about the terms of the P&S, the judge or arbitrator will first determine whether the contract language is ambiguous. An ambiguity exists if a writing supports a different reasonable interpretation from that which appears when it is read in light of the surrounding circumstances. *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 579 (Vt. 1988). If the contract terms are not ambiguous, they are applied and enforced strictly as written. If contract language is ambiguous, then other evidence including extrinsic evidence will be considered to determine the intent of the parties.

3. Joy's Options to Enforce Oral Agreement.

In considering the enforceability of the oral agreement, “[f]irst, we consider whether either party has expressly reserved the right not to be bound before the agreement is written down and executed; second, whether either party has partially performed the contract; third, whether all ‘substantive’ terms have been agreed upon; and, fourth, whether the agreement is of a sort that is typically committed to writing.” Each of these factors, while not independently dispositive, provides “significant guidance.” *Willey v. Willey*, 2006 VT 106, ¶12.

In this situation, all four factors appear to be satisfied. First, there is nothing to suggest that the two parties did not intend to be bound by the agreement (for example, reserving the approval of the final terms within a written document). Second, the parties’ partial performance further supports this conclusion, as Joy had been purchasing all of her fuel from Barb at the discounted price, and Barb had been supplying that fuel to Joy at the discounted price. Third, while it is true that not all of the substantive terms of the agreement (e.g. price) were agreed upon, the significant terms had been determined and the parties’ partial performance for a period of time suggests, that the central terms of the deal had been negotiated. Finally, while there is nothing in the fact pattern that suggests that this type of exclusive supply contract is typically accomplished through written agreements, this factor is not independently dispositive in light of the other factors. This conclusion is consistent with our analysis above, finding that the oral agreement constitutes a binding contract between the parties, notwithstanding issues relating to the Statute of Fraud. Barb’s best defense against the oral agreement is the statute of fraud. Should an adjudicator determine that the Statute of Frauds renders the agreement unenforceable, there may be other remedies in equity for Joy to consider, such as promissory estoppel and detrimental reliance. The facts do not provide us with information to determine if such actions would be successful.

Accordingly, if Joy brings an action for breach of contract against Barb for refusing to supply Joy with fuel at a discounted price, and successfully defends against the Statute of Frauds, she will seek damages in the amount of the discount. As a general matter, contract damages include (a) the loss in the value to her of Barb’s performance (in this case, the discount), plus (b) any other loss, including incidental damages or consequential loss, caused by the breach (like the cost of setting up a contract with another fuel provider or fuel sales for the period of time when Barb was in breach, if this impacted her retail sales), less (c) any cost or other loss that she has avoided (although in this instance, the fact pattern do not suggest any costs she has avoided).

While Joy might try and argue that Barb’s non-performance caused her to breach her obligations under the purchase and sale agreement, this would be tough to do given her anticipatory repudiation of that contract. Joy could bring suit in a Vermont civil court as this agreement does not contain an arbitration provision such as that contained in the P&S.