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QUESTION ONE

Attorney Philander S. Podsnap of Foulhaven, Massachusetts, incurred the wrath of his community after a criminal trial at which he successfully defended the serial arsonist known as the Foulhaven Firebug ("Firebug"]. With the aid of expert testimony Podsnap convinced the jury that Firebug was unable to control his actions on account of his Irritable Bowel Syndrome. Podsnap was shunned by his neighbors in Foulhaven, denounced in the pulpits of Foulhaven, and raked over the coals by the editorialist of the Foulhaven Fowl newspaper. Fearing that his career was at an end, Podsnap wrote a letter to the editor of the Fowl that stressed his ethical duty to defend his client zealously, even though (wrote Podsnap) the client was a psychopath, a liar, and a no-good dirty rotten piece of slime. Podsnap's letter was published in the Fowl.

Firebug sued Podsnap for libel (written false statement that is injurious to reputation). Podsnap notified his malpractice liability insurer, Old Faithful Insurance Co. ("Old Faithful"). Old Faithful told Podsnap that his malpractice insurance covered only attorney negligence. Libel, said Old Faithful, is an intentional tort and so not within the scope of attorney malpractice coverage.

Podsnap decided to leave the dispute about insurance coverage to another day. Representing himself, he answered the complaint in Firebug v. Podsnap, denying all allegations of liability and

asserting the affirmative defense that his statements in the Fowlhaven Fowl were true.

Although Old Faithful had denied coverage, Old Faithful's attorneys realized that Old Faithful's legal position on the issue of Podsnap's coverage was very weak. Old Faithful projected a possible scenario in which Firebug would win a big judgment against Podsnap who then would turn around and sue Old Faithful for the amount of the judgment, plus multiple damages for unfair insurance practices.

Hoping to protect its interests, Old Faithful files a motion to intervene in Firebug v. Podsnap. Both Podsnap and Firebug oppose Old Faithful's motion to intervene.

Part A.

Old Faithful's motion demands intervention as of right under Rule 24(a). How should the judge decide the motion to intervene as of right? Why?

Part B.

Old Faithful's motion also requests permissive intervention under Rule 24(b). Assume that the judge denied intervention as of right (regardless of your actual answer to Part A). How should the judge decide the motion to intervene permissively? Why?

PART "A" COUNTS AS TWO-THIRDS OF THIS QUESTION.
PART "B" COUNTS AS THE REMAINING ONE-THIRD.

QUESTION TWO

Terry sued her former employer, Jumpstart Battery Corp. ("Jumpstart"), alleging sex discrimination in that she had been wrongfully terminated from her job. Jumpstart had introduced a new policy forbidding women of childbearing age from working in positions where they came into contact with lead, citing studies showing adverse effects of lead exposure upon the human fetus. Terry was told that she would have to give up her job as a battery assembler. She refused the company's offer of transfer to a lesser-paid secretarial job, and was terminated. She seeks substantial damages for lost earnings and emotional distress.

You represent Jumpstart. Another Jumpstart employee, Milo, comes to see you. Milo asks you to promise that everything he tells you will be kept confidential, and you agree. Milo tells you that he and Terry were lovers who quarreled and broke up in the recent past. Furthermore, he says, Terry is not a woman at all but is a male cross-dresser. You are sufficiently skeptical to ask Milo to see a psychiatrist on the staff of the company's health plan. The psychiatrist sends you a written report saying, in substance, that Milo is a compulsive liar but that there is no way to know if what he is saying about Terry is true or not.

Part A.

You file a motion under Rule 35 for a physical examination of Terry. At oral argument on the motion you advise the judge that you have reason to question Terry's gender identity but that the

attorney-client privilege prevents you from furnishing any more details. How should the judge rule on the Rule 35 motion?

Part B.

Terry files interrogatories under rule 33 asking Jumpstart to identify its informant. Terry also files a Request for Production of Documents under rule 34 asking for all documents in Jumpstart's possession having anything to do with the allegation of Terry's gender identity. If you refuse to identify Milo and to produce the psychiatrist's report, how should the judge rule on Terry's Motion to Compel Discovery under Rule 37(a)?

PART "A" AND PART "B" OF THIS QUESTION WILL BE WEIGHTED EQUALLY.

QUESTION THREE

How much safety should a person expect when he or she knowingly and voluntarily engages in an activity that is hazardous, such as skiing?

Kate Kielbasa was injured while skiing at a commercial ski area in Massachusetts called Picayune Peak. Near the end of an open trail, while returning to the chairlift, Kate was injured when her skis came into contact with a bare spot on the trail causing her to fall. Kate sued Picayune Peak, claiming that the ski area was negligent in failing to provide adequate man-made snow cover for an open, heavily travelled, trail.

Safety in the sport of skiing, and the economic interests of ski area operators as well, have come to the attention of the Massachusetts legislature. In 1978 the legislature enacted legislation found at section 71N(6) of chapter 143 of the

Massachusetts General Laws [correct citation: G. L. c. 143, s. 71N(6)], which provides as follows:

A ski area operator shall be responsible for the maintenance and operation of ski areas under its control in a reasonably safe condition or manner; provided, however, that ski area operators shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing.

Picayune Peak's answer to Kate's complaint admitted that she fell, admitted the existence of a bare spot on the trail, and denied any negligence. Along with its answer, Picayune Peak filed a motion for summary judgment. Picayune Peak did not file affidavits with its motion, but instead argued that the above-quoted section of statute law required the judge to enter summary judgment for it.

Kate responded to the motion for summary judgment with an affidavit which repeated, under oath, the facts about her accident that are set out above.

How should the judge decide Picayune Peak's motion for summary judgment? Why?

END OF EXAMINATION