

**FEBRUARY 2015 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES**

EXAMINERS' ANALYSIS OF QUESTION NO. 1

The first issue is whether Polly can establish a prima facie case of slander. The elements are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24 (2005).

Polly will have no trouble proving the elements of slander. First, Dan made a statement about Polly--that she was a prostitute, with the not so subtle accusation that her husband was her pimp. Although the second clause of Dan's statement was somewhat in the form of a question, overall the statement was about Polly working as a prostitute. The statement was therefore defamatory because it tended to harm Polly's reputation in the estimation of the community. *Rouch v Enquirer & News*, 440 Mich 238, 251 (1992). Additionally, there is nothing to suggest that this was at all true, *Wilson v Sparrow Hosp*, 290 Mich App 149, 155 (2010) (truth is an absolute defense to defamation claim), and the facts show that Dan tried to come up with the most outrageous accusation. Second, Dan's statement was not privileged, and it was communicated to many people on the sidewalk, including two of Polly's friends. Third, because Polly is a private individual, she must prove that Dan was negligent in publishing the statement. MCL 600.2911(7). She can easily do so, as the facts indicate that Dan simply created an outlandish story about Polly for the sole purpose of revenge and embarrassment. Finally, because Dan accused Polly of lack of chastity, she does not need to prove special harm, as the statement is actionable by itself. MCL 600.2911(1); *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 338-339 (1993). The fact that she may have laughed off the incident at first is therefore irrelevant. Some applicants may raise the possibility

that Dan's statement might not be defamatory because it is "rhetorical hyperbole", on the basis that it could only be seen as loose language or something not meant as an actual assertion of fact. *Ghanam v Does*, 303 Mich App 522, 545-546 (2014).

Thus, the applicant should conclude that Polly can establish a prima facie case of slander.

The second question is whether Polly can recover punitive damages. She cannot. According to several statutory provisions, in this private plaintiff slander case Polly is not entitled to an award of punitive damages. MCL 600.2911(2)(a) states that, except as described in (2)(b) (involving libel claims only), a libel or slander plaintiff is only entitled to recover actual damages. Although a private plaintiff can recover actual damages under this subsection if she proves actual malice, *Glazer v Lamkin*, 201 Mich App 432, 436-437 (1993), the subsection does not list punitive damages as being recoverable. Additionally, MCL 600.2911(7) provides that recovery for a successful private plaintiff is limited to economic damages. Consequently, despite the evidence of Dan's malice in publishing the statement, Polly is not entitled to an award of punitive damages. *Peisner v Detroit Free Press*, 421 Mich 125, 130-133 (1984).

To the extent that applicants may assert that Polly is not entitled to punitive damages because she never requested that Dan issue a retraction, Michigan law has been construed such that retractions only apply to libel committed by media defendants. See *Brantley v Zantop International Airlines*, 617 F Supp 1032, 1035-1036 (ED Mich, 1985), interpreting MCL 600.2911(2)(b).

EXAMINERS' ANALYSIS OF QUESTION NO. 2

In Michigan, plaintiffs must satisfy all of the prerequisites set forth in MCR 3.501(A)(1)(a)-(e) in order for their suit to proceed as a class action. "These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Duskin v Department of Human Services*, 304 Mich App 645, 652 (2014) quoting *Henry v Dow Chemical Co*, 484 Mich 483, 488 (2009). "The party's pleadings will only be sufficient to support certification if the facts are uncontested or admitted by the opposing party." *Id.* (citation and quotation marks omitted). However, the court "may not simply accept as true a party's bare statement that a prerequisite is met" without making an independent determination that the facts are adequate. *Michigan Association of Chiropractors v Blue Care Network of Michigan, Inc*, 300 Mich App 577, 587 (2014), citing *Henry, supra*. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry*, at 503. The question as presented permits argument both for and against certification.

The following prerequisites for certification should be analyzed by the examinee:

(a) **Numerosity:** The analysis should recognize that there is no particular number of class members necessary to meet the numerosity requirement, *Duskin*, 304 Mich App at 653, but that the class should be adequately defined "so potential members can be identified" and a plaintiff must offer a reasonable estimate of the number of class members. *Id.* This showing permits the trial court to determine whether joinder would be impracticable. *Zine v Chrysler Corp*, 236 Mich App 261, 288 (1999). Finally, "the proponent must establish that a sizable number of class members have suffered an actual injury." *Duskin*, 304 Mich App at 653.

Here, the analysis could identify that 1,000 residents of the Mills' subdivision have suffered an actual injury, making a sufficiently large class to make joinder impracticable.

(b) **Commonality:** The analysis should note that commonality establishes "that issues of fact and law common to the class predominate over those issues subject only to individualized proof." *Duskin*, 304 Mich App at 654 (citation and quotations marks omitted). The raising of common questions is not enough. *Id.* Rather, the common contention must be such that a

"determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* In other words, "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Duskin*, 304 Mich App at 654-655 (citation and quotations marks omitted).

Here, the analysis could identify that the silver maple trees were planted during a discreet window in time, and that Muni City identified a problem being caused by the trees at a discreet period of time. All of the class members share in common sidewalk and landscaping damage, and a significant number of the class members share sewage and water damage. However, because it is less clear when each of the proposed class members suffered property damage, whether the value of the property damage claims is sufficiently common, how many of the residents suffered personal injuries, and whether the extent of the personal injuries suffered by each resident is common, the issues may be too unique to satisfy the commonality prerequisite. The purported class members all have a common legal theory, i.e. whether there was a governmental taking.

(c) **Typicality:** The question to be identified here is "whether the claims of the named representatives have the same essential characteristics of the claims of the class at large." *Duskin*, 304 Mich App at 656 (citation and quotation marks omitted). In other words, "the class representatives share a common core of allegations with the class as a whole." *Id.* at 656-657.

Here, the class members share the same legal theory of a governmental taking because of the intrusion of the tree roots into the residents' private property.

(d) **Adequacy:** This prerequisite tests whether the "class representatives can fairly and adequately represent the interests of the class as a whole . . . [by showing] that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin*, 304 Mich App at 657 (citations omitted).

Here, the plaintiff's attorney is inexperienced, having just become licensed, and he is a family friend who only consulted with the Mills about the possibility of filing a class action lawsuit, potentially calling into question whether he would advocate zealously for all class members and not just the Mills. However, the analysis can also properly assert that the attorney, while inexperienced, took the proper steps to

investigate the number of residents impacted by the tree planting as well as the nature of the damages they incurred, and that he also identified an apparently viable legal theory to pursue. As to the second prong, applicants should discuss whether the Mills claims and damages, being different in some form than those of some of the other proposed members, have sufficiently conflicting interests to be the class representatives. For example, there is a range in amount of damages for repair, and some only had lawn repairs, others also had flood damage.

(e) **Superiority:** This factor examines "whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action." *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 601 (2002). In making this determination, "the court may consider the practical problems that can arise if the class action is allowed to proceed [, the] relevant concern . . . [being] whether the issues are so disparate that a class action would be unmanageable." *Id.* pp. 601-602 (citations and quotation marks omitted).

Other factors noted in MCR 3.501(A)(2) include whether there might be inconsistent adjudications, whether the resolution as to an individual member of the class would as a practical matter be dispositive of the interests of other class members, whether final equitable or declaratory relief might be appropriate for the class, whether there is any incentive for any individual to bring a separate action, and whether the amount recoverable is sufficient in relation to the expense and effort required to undertake the administration of a class action.

Here, the analysis might offer that there is the potential to increase the efficiency of the legal process—reduce repetition of witnesses, exhibits, and courtroom time, for example, lower the costs of litigation, overcome the problem that some of the recoveries would be so small as to not warrant bringing an action against Muni City. It is unlikely that there would be inconsistent judgments on Muni City's liability for a governmental taking given Muni City's abrupt discontinuance of the tree planting program, and its creation of a cost-sharing plan for sidewalk replacement.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

General Statutory requirements:

MCL 450.1487(2) provides that "[a]ny shareholder of record, in person or by attorney or other agent, shall have the right during the usual hours of business to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records," provided that "the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose." (Emphasis added.)

A "proper purpose," for the purposes of the statute, is "a purpose reasonably related to such person's interest as a shareholder." The demand is required to be delivered to the corporation at its registered office in Michigan or at its principal place of business. Where a shareholder exercises his or her rights via an attorney or other agent, "the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder." MCL 450.1487(2). (Emphasis added.)

If the corporation does not permit an inspection within 5 business days after a proper demand has been received, or if the corporation imposes unreasonable conditions upon the inspection, the shareholder may apply to the county circuit court in which the principal place of business or registered office of the corporation is located to seek a court order to compel the inspection. MCL 450.1487(3).

The burden of proof depends upon the type of document sought. If the shareholder seeks to inspect the stock ledger or list of shareholders and has established compliance with the statutory requirements, the burden of proof is on the corporation to show that the demand was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose. MCL 450.1487(3).

If the shareholder seeks records other than the stock ledger or list of shareholders, he or she is also required to establish compliance with the statutory requirements. The burden then lies with the shareholder to establish that the inspection is for a proper purpose and that the documents are directly connected with the proper purpose. MCL 450.1487(3).

"The right to inspect records" includes the right to copy records and, if reasonable, the right to require the corporation to supply copies. However, the corporation "may require the shareholder to pay a reasonable charge, covering the costs of labor and material, for copies of the documents provided to the shareholder." MCL 450.1487(6).

Vicky's claim:

It is debatable whether Vicky will prevail in her attempt to compel MMC to provide the records sought because she may not have complied with the statutory requirements. Vicky's demand precisely described the record she desired to inspect (MMC's stock ledger) and the purpose for the demand (to solicit other shareholders in order to buy additional shares of MMC stock). The stock ledger is likely to be deemed to be directly connected with the stated purpose. Vicky's purpose is likely to be deemed a proper purpose, as it is reasonably related to her interest as a shareholder. See *North Oakland County Bd of Realtors v Realcomp, Inc*, 226 Mich App 54, 59 (1997) (a proper purpose "under § 487 is one that is in good faith, seeks information bearing upon protection of the shareholder's interest and that of other shareholders in the corporation, and is not contrary to the corporation's interests.")

The more debatable point is whether Vicky's designation of Corts as her agent satisfied Michigan law. Vicky's demand letter indicated that her agent, Carl Corts, was to inspect MMC's stock ledger. In other words, both the demand and the appointment were in the same document. The statute provides that "[i]n every instance where an attorney or other agent shall be the person who seeks to inspect, the demand shall be accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder." It can be argued that because Vicky failed to submit separate documents—a demand "accompanied by" a document authorizing the agent—she cannot establish that she complied with the statute regarding the form and manner of making a demand for the inspection of the documents and therefore the corporation's obligation to show the demand was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose does not arise.

However, an applicant can also reasonably argue that Vicky complied with the statute because she made a demand and authorized in writing (and at the same time) Corts to be her agent. Thus, the demand was "accompanied by," though not separate from, the written authorization for Corts to act for Vicky. Under this understanding of "accompanied by," Vicky did satisfy the statute and the burden was on MMC to show the demand

was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose.

The important aspect of this part of the question is for the applicant to recognize that Michigan law requires a demand and a written power of attorney or other authorization for Courts to act for Vicky, and that the answer to the question discusses the burden of proof issue.

Paul's claim:

Whether Paul is likely to prevail is dependent upon whether the \$150 "labor and material" charge is determined to be reasonable.

The statute provides that a shareholder may apply to the circuit court of the county in which the principal place of business or registered office of the corporation is located for an order to compel the inspection if, relevant to this question, the corporation "imposes unreasonable conditions upon the inspection."

Here, Paul's demand wanted MMC to provide copies of particular financial records. Paul's "right to inspect records" includes, if reasonable, the right to require the corporation to supply copies. MMC takes no issue with the substance or purpose of Paul's demand, nor does it claim that it is unreasonable to require MMC to supply copies of the material sought. MMC simply required Paul to pay a \$150 "labor and material" charge before the materials were provided. Section 1487(6) provides that MMC "may require the shareholder to pay a reasonable charge, covering the costs of labor and material, for copies of the documents provided to the shareholder."

If the \$150 fee is determined to be a reasonable charge that covers the cost of labor and material, MMC will prevail, and Paul will not be able to obtain the financial records until the fee has been paid.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

Issue 1:

Unless an exception to the duty of confidentiality applies, Attorney may not tell Craig's parents what he has learned from Craig or any other "secret" gained in Attorney's professional relationship with Craig. MRPC 1.6; MRPC 1.8(f)(3). Moreover, even if Craig were to consider consenting to disclosure of some information, Attorney must avoid disclosures that may waive the attorney-client privilege.

Further, Attorney's representation of Craig may not be influenced by Craig's father's view that it might be better for Craig to suffer the consequences of his actions. MRPC 1.8(f)(2) (and other rules referenced below). MRPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Additionally, MRPC 5.4(c) states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

MRPC 2.1 also sets forth a lawyer's core duty to exercise independent professional judgment on behalf of a client and 1.2(a) requires a lawyer to "seek the lawful objectives of a client through reasonably available means permitted by law and these rules."

In light of the father's pecuniary and parental interest, it would be appropriate to analyze the situation under MRPC 1.7(b), which provides:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Any attempt by the father to condition payment upon control of the case or the receipt of information raises serious questions about whether Attorney may accept the representation, i.e., whether Attorney could reasonably believe that the representation would not be adversely affected, notwithstanding Craig's actual or purported consent to his father's terms. See Michigan Ethics Opinion RI-293 (June 2, 1997), citing the comment to MRPC 1.7 ("when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.") In light of the primary importance of providing independent professional judgment to one's client, ceding control of the case to the father would not be permissible.

Issue 2:

Under MRPC 7.1, Attorney may "use or participate in the use of any form of public communication that is not false, fraudulent, misleading, or deceptive." One question here is whether the website's offer of a free initial consultation violates MRPC 7.1, which also states that, "A communication shall not . . . (a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading." MRPC 7.1(a). The statement on the website is not inherently false or misleading, but a reasonable client could conclude that the initial consultation was not, in fact, free under the circumstances here. Further, the attorney's policy by which he charges for his time once he has been retained, while not in and of itself improper, was not communicated to the client before the time was expended. Thus, the representation on the website could be considered false, misleading, or deceptive, and the

failure to communicate the policy (on the website) arguably rendered it materially misleading.

MRPC 1.5(b) is also applicable. It provides: "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Cindy is a new client. Arguably, Attorney should have explained that he would be charging her to continue the initial conference regarding her case before she incurred the charge. But, it might also be argued that once Cindy agreed to pay an hourly rate, she should have reasonably understood that her free consultation had ended. Perhaps some might contend that the explanation of the policy, even after the first (and only) bill came, was "within a reasonable time after commencing the representation." An answer which correctly identifies the issue regarding the need to communicate the basis or rate of the fee before or within a reasonable time after the representation has commenced, and cogently applies the rule, should receive credit for this aspect of the question.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

Yo's Suit Against Charles

The issue is whether the damages provision in the contract between Yo and Charles is a valid liquidated damages clause or an invalid penalty.

It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at [the] time [the] contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation.

Curran v Williams, 352 Mich 278, 282 (1958); see also *Barclae v Zarb*, 300 Mich App 455, 485 (2013). However, "[c]ourts will not permit parties to stipulate unreasonable sums as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable." *Curran*, 352 Mich at 283.

Here, a court should find the clause to be an unenforceable penalty. Damages resulting from Charles' breach were not "uncertain and difficult to ascertain at time contract is executed," because Yo was able to calculate such damages based on its experience. In addition, the amount stipulated was not "reasonable with relation to the possible injury suffered." Yo calculated that Charles' breach would cause lost profits of \$2,000, but the "liquidated damages" clause set damages at \$6,000—three times the actual loss.

Purported damages may constitute an invalid penalty "notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages." *Id.* at 284-85. See also *Moore v St Clair County*, 120 Mich App 335, 341 (1982) (Of course, use of the terms 'liquidated' or 'stipulated' damages does not necessarily mean that the clause is valid and not a penalty. *Nichols v Seaks*, 296 Mich. 154, 161-162 (1941)). Consequently, the fact that the contract between Yo and Charles describes the \$6,000 as "liquidated damages" does not make the clause enforceable.

Charles' Suit Against Jazzamatazz

"[D]amages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 414 (1980). Courts apply an "objective standard" of foreseeability, under which damages are recoverable if "the defendants reasonably knew or should have known that in the event of breach," such damages would result. *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 13, 14-15 (1994) (internal quotation marks omitted).

Here, no facts indicate that Jazzamatazz knew or should have known that Charles was relying on Jazzamatazz's provision of concert tickets in order to perform under a separate contract with another magazine, or that Jazzamatazz's failure to provide such tickets could expose Charles to a potentially costly breach of contract action by another magazine. Thus, the \$1,000 for lost income from Yo was not objectively foreseeable and is not recoverable. As explained above, the \$6,000 was an invalid penalty, but even if it were a valid liquidated damages stipulation, it would be even less foreseeable to Jazzamatazz and therefore also unrecoverable.

"[I]t is generally held that damages for mental distress cannot be recovered in an action for breach of a contract." *Kewin*, 409 Mich at 415. See also *Valentine v Gen American Credit, Inc*, 420 Mich 256, 261-62 (1984) (stating "the general rule" that "mental distress damages for breach of contract are not recoverable"). Breach of "almost any agreement . . . results in some annoyance and vexation. But recovery for those consequences is generally not allowed, absent evidence that they were within the contemplation of the parties at the time the contract was made." *Kewin*, 409 Mich at 417. "Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish." *Id.* at 419. Given that Jazzamattazz did not know of Charles' contract with Yo, Jazzamatazz consequently could not have contemplated Charles' mental distress resulting from breach of such contract. Under the general rule, then, Charles cannot recover mental distress damages from Jazzamatazz.

"[T]he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-26 (1996) (footnote omitted). "[A]bsent allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." *Kewin*, 409 Mich at 420-21 (citation and footnote omitted); see also *Valentine*, 420 Mich at 263 (same). Punitive

damages in the absence of a statutory authorization are not recoverable in Michigan. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400 (2006). Here, there is no evidence of tortious conduct by Jazzamatazz independent of its breach, so Charles cannot recover exemplary/punitive damages.

"Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Barclae v Zarb*, 300 Mich App 455 (2013) (quotation marks omitted); see also *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998) (same). "[A]n integration clause nullifies all antecedent agreements" *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 413 (2002) (quotation marks omitted). See also *UAW-GM Human Resource Ctr*, 228 Mich App at 494 ("If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties . . . this declaration is conclusive as long as it has itself not been set aside by a court" (quotation marks omitted; first ellipses in original.)). Because the contract between Charles and Jazzamatazz contains an explicit integration clause indicating that the contract "constitutes the entire agreement between the parties," Jazzamatazz's purported agreement with Charles regarding the Justin Bieber concert tickets would "vary the written contract" by adding a new term. Evidence of this purported agreement is therefore inadmissible.

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl*, 450 Mich at 625 (footnote omitted). Damages for breach of a commercial contract are thus generally limited "to the monetary value of the contract had the breaching party fully performed under it." *Kewin*, 409 Mich at 414-15. Here, if Jazzamatazz had fully performed under its contract with Charles, it would have given Charles two tickets worth \$100 each. Consequently, a court should award Charles \$200 damages in his action against Jazzamatazz.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Evelyn's Testimony:

"Other Acts" evidence is admissible per MRE 404(b)(1):

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Michigan Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000):

MRE 404(b)(1) does not require exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b)(1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting the use of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. This list is not, however, exhaustive.

Evidentiary safeguards employed when admitting "Other Acts" evidence:

The state has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose in the non-exclusive list contained in MRE 404(b)(1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) even if it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant

solely to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010) (emphasis in original).

For "other acts" evidence to be admissible, the state has the burden of establishing that the evidence: (1) is relevant under MRE 401 for a proper purpose (not propensity) see *Sabin*, 463 Mich at 55; *People v VanderVliet*, 444 Mich 52, 74, (1993); and *Crawford*, 458 Mich at 385 (1998)); (2) is relevant under MRE 402, as enforced through MRE 104(b) to an issue or fact of consequence at trial; and (3) the danger of unfair (undue) prejudice does not substantially outweigh the probative value of the evidence under MRE 403 in view of the availability of other means of proof and other facts. *Sabin*, 463 Mich at 55-56.

The state must establish the evidence is relevant under MRE 401 for a proper (i.e., non-propensity) purpose:

The state argues that the "other acts" evidence is admissible to show Carl's scheme, plan, or system in doing an act and, thereby, Carl's identity as the perpetrator. Since the grounds articulated by the prosecution establish a permissible purpose for admission, the state's initial burden is satisfied and the next inquiry is whether the evidence is relevant to the theories identified by the prosecution.

The state must establish that the evidence is admissible under MRE 402:

The fact that the prosecution has identified a permissible theory of admissibility does not automatically render the "other acts" evidence relevant in a particular case. *Sabin* at 60. The trial court must determine "whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence," *id.*, so as to make it admissible under MRE 402.

Under the facts presented here, an examinee could appropriately conclude that the prior acts evidence will be deemed relevant under a theory that Carl had devised a plan that he used previously to carry out separate but very similar crimes, wrongs, or acts. Such acts of similar misconduct have been held by the Michigan Supreme Court to be logically relevant and admissible if the charged and uncharged acts are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin* at 63. With respect to the two burglaries, the following facts support the prosecution's theory: (1) the victims were both

Carl's former fiancées after recent break-ups; (2) both burglaries were Monday break-ins while the victims were away; (3) the items stolen were the same - cash and the victims' engagement rings; and (4) the burglar left behind a fresh Gerber daisy - a gift Carl routinely gave to both victims.

Because the prosecutor's theory is to use Carl's plan to prove identity, the court must find that the circumstances in both instances bear "such unique, uncommon, and distinctive characteristics as to suggest the handiwork or signature of a single actor, the defendant." *People v Golochowicz*, 413 Mich 298, 319 (1982). Here, there are uncommon and unique characteristics - a special flower and the theft of a single special piece of jewelry" - so as to render the testimony admissible under MRE 402.

The state must establish that the evidence is not inadmissible under MRE 403:

Unfair prejudice is defined as the "danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence in view of other means of proof and other facts. Here, while there are unique and compelling similarities, there is also a substantial potential for prejudice.

Carl was never charged with Evelyn's break-in nor is there evidence an official record was created. Thus, without Evelyn's testimony, the evidence against Carl is purely circumstantial evidence in Francine's theft: with nothing to connect Carl other than a special piece of jewelry he gave her and a special flower left behind. Indeed, the lack of proof of the act undermines or weakens its probative value. Moreover, the only individual who professes to know the alleged facts of the earlier crime - Evelyn - could be the culpable one in the Francine theft. The defense likely has the stronger argument under MRE 403 against admission of Evelyn's testimony. However, an examinee could also argue - and deserve credit for - reaching the opposite conclusion.

The Flower Vendor:

The vendor's testimony is admissible under MRE 406, as evidence of habit:

Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eye

witnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit[.]

Because Carl routinely purchased from the vendor a pink Gerber daisy every Monday for years, the vendor's testimony concerning Carl's habit, based on his personal knowledge of the habit, is admissible regardless of whether the vendor can testify as to the particular Monday in question. *Laszko v Cooper Laboratories Inc*, 114 Mich App 253, 256 (1982).

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Federal Constitutional Law: The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In *District of Columbia v Heller*, 554 US 570 (2008), under very similar facts, the United States Supreme Court rejected the argument that the Second Amendment protected only the right to possess and carry a firearm in connection with military service. Rather, the Court held that the Second Amendment conferred an individual right to keep and bear arms unconnected with militia service, and to use those arms for traditionally lawful purposes, such as self-defense within the home. The Court further held that the Second Amendment is not limited to those types of weapons in existence during the 18th century. Rather, the Second Amendment extends "to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. Subsequently, in *McDonald v City of Chicago*, 561 US 742 (2010), the United States Supreme Court held that the Second Amendment right to keep and bear arms was applicable to the States via the Fourteenth Amendment.

Handgun ordinance -- Under *Heller*, statutes that entirely ban handgun possession in the home violate the Second Amendment. Banning handguns prohibits an entire class of arms "that is overwhelmingly chosen by American society" for the lawful purpose of self-defense in the home. Rational basis scrutiny was not applicable to a specific, enumerated constitutional right. And, under any of the standards of scrutiny applicable to enumerated constitutional rights, banning handguns from the home to use for protection "would fail constitutional muster." *Id.* at 628-629. Thus, Barker would be successful in having the Portertown ordinance struck down under the federal constitution.

Trigger lock requirement - *Heller* further held that laws requiring firearms in the home be kept inoperable at all times violated the Second Amendment. Requiring that firearms be kept in an inoperable state "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630. Rather, Barker is entitled to have "any lawful firearm in the home operable for purpose of immediate self-defense." *Id.* at 635. Thus, Barker would be successful in having the trigger lock requirement struck down as well.

Michigan Constitution: Art 1, § 6 of the Michigan constitution explicitly states that "[e]very person has a right to keep and bear arms for the defense of himself and the state." Thus, there is no question that the Michigan constitution plainly confers an individual right to keep and bear arms for self-defense. See *People v Brown*, 253 Mich 537, 540 (1931) ("The protection of the Constitution is not limited to militiamen nor military purposes, in terms, but extends to 'every person' to bear arms for the 'defense of himself' as well as of the state.")

Handgun ordinance: Barker will prevail under the Michigan constitution. In *People v Zerillo*, 219 Mich 635 (1922), the Michigan Supreme Court held that the Michigan constitutional provision includes handguns. "[W]hile the legislature has power in the most comprehensive manner to regulate the carrying and use of firearms, that body has no power to constitute it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property." *Id* at 638. (Emphasis added.)

EXAMINERS' ANALYSIS OF QUESTION 8

Defense counsel's motion is unpersuasive and the Court should deny counsel's request.

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification. Only the third element, the presence of malice, is at issue on the facts presented.

Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464 (1998) citing *People v Aaron*, 409 Mich 672, 728 (1980). Only the third formulation of malice is presented by the facts at hand.

Malice in this form may be inferred from the evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Roper*, 286 Mich App 77, 84 (2009).

The issue is whether these elemental requirements for malice are established by RB's intoxication and negligent driving and other facts. The Court should deny defense counsel's motion for the following reasons. First, RB had a significantly elevated blood alcohol content, reflective of considerable ingestion of alcohol. Second, he drove at almost double the posted speed limit. Third, he ran a red light in an area where he was familiar with the roads and traffic lights. Fourth, he passed other vehicles slowing down for the upcoming intersection.

In sum, the prosecution's case should not be dismissed for elemental deficiency of malice. Driving an oversized, high-powered vehicle while drunk, at double the speed limit through a visible red light amounts to doing an act in a wanton and wilful disregard of the likelihood such behavior will cause death or great bodily harm. As such, RB is properly charged with second degree murder.

The facts of the case scenario are based on *People v Richard Allen Baker* which was decided with *Goecke, supra*.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Counsel's Argument:

More specifically articulated, counsel's argument is that Dwight is being denied his right to equal protection under the 14th Amendment because the prosecutor used peremptory challenges to remove African American jurors solely based on their race. In *Batson v Kentucky*, 476 US 79 (1986), the Supreme Court held that the equal protection clause forbids a prosecutor to peremptorily challenge potential jurors solely on account of their race. See *People v Bell*, 473 Mich 275, 278 (2005) and *People v Knight*, 473 Mich 324, 335 (2005). Rather than counsel's generalized argument, it should be anchored to 14th Amendment principles of equal protection and should seek reseating of the challenged jurors.

Procedure the Court Should Follow:

Batson delineated a three-part process by which the Court must resolve a so-called "Batson challenge." *Batson*, at 87-88; accord *Bell* and *Knight*. Employment of this process is mandatory. First, there must be a *prima facie* showing of discrimination based on race. To establish a *prima facie* showing of discrimination based on race, the opponent of the challenge must show that (1) the defendant is a member of a cognizable racial group, (2) peremptory challenges are being exercised to exclude members of a certain racial group, and (3) the circumstances raise an inference that the exclusion was based on race. All relevant circumstances are to be considered.

Second, the peremptory-challenge maker must, in response to a *prima facie* showing, come forward with a race neutral explanation for the challenge(s). The neutral explanation must be related to the particular case being tried and must provide more than a general assertion to rebut the *prima facie* showing. Failing to do so will invalidate the peremptory challenge.

Third, the court must decide whether the defendant in this matter has met the burden of establishing purposeful discrimination. Stated differently, are the race-neutral explanations credible? If the race neutral explanation, based on consideration of various factors related to credibility, is simply a pretext for discrimination, the peremptory challenge(s) should be vacated.

Prosecutor's Argument:

Although other arguments are possible, the prosecutor should focus on the race-neutral explanations contained in the facts of the *voir dire*. Removed juror Alice White had been the lone hold-out in a previous deadlocked murder case. That she endured an acrimonious deliberations process and stuck to her position may be noble, but wishing to challenge her for these reasons seems disconnected to her race, the only real test in a *Batson* challenge. Similarly, the prosecutor should note that juror Ellen Scott's preoccupation with her children's situation might make her less attentive. Given the burden of proof is on the People, an advocate who questions whether a juror will have the ability to concentrate on the courtroom presentation evinces a legitimate concern about retaining the juror. Finally, juror Frank Field's comment, while arguably nebulous, could be argued as an indication that more would be demanded of the prosecutor (better bring your A-game) than proving the case beyond a reasonable doubt. Moreover, calling the defendant "my man" arguably suggests a curious connection between Field and Dwight, maybe based on their similar ages.

As stated in *Batson*, "the second step does not demand an explanation that is persuasive, or even plausible." Rather, the focus is whether it is facially valid and based on something other than race. *Knight*, at 337.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

1. Validity of the will: As a general matter, a will is only valid in Michigan if it is (1) in writing, (2) signed by the testator, and (3) signed by at least two witnesses within a reasonable time after witnessing either the testator signing the document or acknowledging the will. MCL 700.2502(1). Here, because Paul Perry's document was not witnessed, it is not valid under the general provisions concerning a will. However, a will that does not comply with the abovementioned requirements may be deemed valid as a holographic will if the document is dated, signed by the testator, and the material portions of the document are in the testator's handwriting. A holographic will need not be witnessed. MCL 700.2502(2). Here, because the facts indicate that the document was "written in Paul's handwriting," and was both signed and dated, it is valid as a holographic will.

2. Shares of Acme stock to Carey: Carey will be entitled to receive all 250 shares of Acme stock. MCL 700.2605 provides that, if a testator executes a will that devises securities, and the testator then owns securities described in the will, the devise includes additional securities owned by the testator at the time of death to the extent that the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of one of the following types:

(a) Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options.

(b) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization.

(c) Securities of the same organization acquired as a result of a plan of reinvestment. (emphasis added)

It is clear that stock is a type of security. See MCL 700.1107(c). The facts indicate that Paul's will devised the stock to Carey and that Paul owned the stock described in the will at the time. The facts also indicate that the additional shares of stock were acquired by Paul after the will was executed as a result of his ownership of the original 100 shares of stock and was "[s]ecurities of the same organization acquired as a

result of a plan of reinvestment." MCL 700.2605(c). Thus, Carey's devise will include all 250 shares of Acme stock.

3. **Mortgage discharge for 1414 Mockingbird Lane:** Wesley will not be entitled to have the mortgage paid on the property devised to him. MCL 700.2607 provides that a specific devise "passes subject to any mortgage or other security interest existing on the date of death, without right of exoneration, regardless of a general directive in the will to pay debts." The provision in Paul's will "direct[ing] that all of [his] debts be paid" would most likely be considered a general directive to pay debts, and does not extinguish the remaining mortgage debt under the plain language of the statute.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

While Jerry made a gift to Ella of an engagement ring, engagement rings are considered "conditional gifts given in contemplation of marriage," and "[b]ecause the engagement ring is a conditional gift, when the condition is not fulfilled the ring or its value should be returned to the donor no matter who broke the engagement or caused it to be broken." *Meyer v Mitnick*, 244 Mich App 697, 702-703 (2001). Thus in this regard, Michigan is a "no-fault" state. See *id.* Here, the donor (Jerry) is entitled to return of the ring because the condition—the marriage—was not fulfilled. The fact that Jerry was unfaithful and caused the condition to not be fulfilled is not legally relevant.

The damage to Jerry's car involves the issue of bailment. A bailment is created when personal property is delivered by one person to the possession of another in trust for a specific purpose. *In re George L. Nadell & Co*, 294 Mich 150, 154 (1940). Jerry's loan of his car to Phil for keeping/use until Jerry could recover from the engagement breakup, created a bailment even though this was an informal arrangement, made without documentation. *Godfrey v City of Flint*, 284 Mich 291, 297 (1938).

There are three general classifications of bailment that govern the level of the care a bailee must exhibit during the bailment: (1) Those for the sole benefit of the bailor; (2) those for the sole benefit of the bailee; and (3) those for the benefit of both parties. *Godfrey*, 284 Mich at 295. The bailment here is certainly not for the sole benefit of Phil (the bailee), as it was an arrangement initiated by Jerry as a favor to Jerry (the bailor).

If the bailment was for the benefit of both parties, the bailee is "bound to exercise ordinary care of the subject-matter of the bailment, and is liable for ordinary negligence." *Godfrey*, 284 Mich at 298. If the bailment could be characterized as one for mutual benefit, Jerry will likely be able to succeed in an action in negligence because Phil owed only a duty of ordinary care which he arguably breached by "not paying much attention" to the contents of the shelf which contained heavy objects, even though Jerry's car was parked nearby.

However, it is more likely that Jerry solely benefitted from the bailment. A gratuitous bailment exists where the

bailment is for the sole benefit of the bailor and the bailor's goods are cared for without charge and as an accommodation. *Cadwell v Peninsular State Bank*, 195 Mich 407, 413 (1917). First, Phil already had a car, and the car from Jerry was of the same make and model. Phil did not receive use of a nicer, newer car that would be considered a benefit. Moreover, there is no evidence that Phil was going to drive the car or charged for keeping it. Finally, the arrangement was, as Jerry described it, a "favor," or, an accommodation to Jerry. If the bailment is properly characterized as a gratuitous bailment, Phil is only responsible for damage caused by gross negligence—the "lowest degrees of responsibility in the triple division of neglects in bailments." *Cadwell*, 195 Mich at 413. Phil did not commit gross negligence by merely failing to account for the heavy weights on the shelf. Therefore, Jerry is not likely to succeed in a suit against Phil for damages to the car.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

1. Prescriptive Easement: Michigan allows for the creation of easements by prescription. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676 (2000). A prescriptive easement may arise in a manner similar to adverse possession resulting from "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118 (2003) (citations omitted). Use need not be exclusive. *Plymouth Canton Community Crier*, 242 Mich App at 679-680. Generally, prescriptive easements benefit only particular properties (an easement appurtenant) or individuals (an easement in gross). See *St. Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576-577 (1921); *Greve v Caron*, 233 Mich 261 (1925). Easements appurtenant can be created by tacking previous possessors' usage to that of current possessors, though some form of privity is required. *Matthews v Natural Resources Dep't*, 288 Mich App 23 (2010).

It is clear that Billy has used the path for at least 15 years. Billy apparently has walked on the path openly and notoriously during football season. The path is also visible from the street and the ground is worn down. He had not received any official permission from YDC, at least until YDC built the fence a year ago, which would have been far too late to block the creation of his easement since his use goes back decades. Finally, because his usage need not be exclusive, it does not matter that others, the students and residents of Peaceful, have also used the easement. Therefore, Billy's usage meets the requirements for a prescriptive easement, and he could legally prevent Peggy from building over the path.

Examinees could debate whether Billy's use is in fact "continuous." If Billy has only used the path to attend football games, he has not used it more than about seven times a year. That said, seasonal use can be enough to establish a prescriptive easement. *von Meding v Strahl*, 319 Mich 598, 613-614 (1948) ("it is not required that a person shall use the easement every day for the prescriptive period. It simply means that he shall exercise the right more or less frequently, according to the nature of the use to which its enjoyment may be applied.") (quoting *St Cecelia Soc v Universal Car & Service Co*, 213 Mich 569, 577 (1921)). Therefore, as long as Billy has used the path continuously for football games for at least 15 years, his use is probably continuous enough to satisfy the requirement for an easement.

2. Gordon's Defenses: With respect to Peggy's money claim for back rent, Gordon could claim that he was lawfully withholding rent under *Rome v Walker*, 38 Mich App 458 (1972). It is clear that his apartment is in substantial disrepair and, indeed, may not even be habitable, violating the statutory covenant of reasonable repair. MCL 554.139. This defense is therefore very likely to succeed.

With respect to Peggy's claim to recover possession of the property, Gordon could allege that the termination of tenancy is retaliatory. There is a rebuttable presumption in favor of the defense of retaliatory eviction if a tenant shows that s/he officially complained about conditions to a "court or other governmental agency" within 90 days of the beginning of proceedings. MCL 600.5720(2). The landlord must show by a preponderance of the evidence that the eviction was not retaliatory. *Id.* Gordon complained to the housing commission within 90 days. However, Peggy could present evidence that her decision to evict Gordon was not retaliatory but connected to her recent purchase of the property and desire to develop it. She sought possession from other tenants as well, and she acted promptly. It is therefore unlikely that Gordon will succeed in this defense.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. The issue is whether the contract modification is valid when there was no consideration. Before an analysis can be provided, it must be determined whether the UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of the contract. MCL 440.2105. Here the contract pertains to the sale of shovels. Shovels are moveable and therefore considered goods. Therefore, Article 2 of the UCC applies.

Under Article 2, contract modifications made in good faith are binding without consideration. However, if a modification is effectuated from the other party in bad faith, it is unenforceable. MCL 440.2209.¹ Consideration is defined "as a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58 (2005) quoting *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239, 644 (2002) (internal quotes omitted). Here, the facts indicate that the cost of materials

¹ MCL 440.2209 (Note 2) states that modifications must be made in good faith.

Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103) and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

Good faith is defined by MCL 440.1201(19) as "honesty in fact in the conduct or transaction concerned."

increased and that Sampson Shovel, Inc. asked Bailey Landscape Supply to agree to an increased sale price of \$12.00 per shovel for the remaining deliveries and Ms. Bailey, an agent for Bailey Landscape Supply, agreed to the new term. Sampson Shovel Inc.'s obligations under the contract have not changed at all. The company is simply doing what it was already legally obligated to do. But since no new consideration is required, Bailey Landscape Supply cannot avoid the contract modification for lack of consideration.

However, in order to effectuate the modification, Sampson Shovel Supply must have been acting in good faith. Here, the facts simply indicate that the material costs increased. There is no indication from the facts that Mr. Sampson extorted this modification in bad faith. Therefore, the contract modification is valid.

2. The next issue is whether the Statute of Frauds applies when the contract as modified falls within its provisions. The rule is that contracts for the sale of goods at a price of \$1,000 or more are not enforceable unless there is some writing made that is signed by the party to be charged or such party's agent. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable beyond the quantity of goods shown in the writing. See MCL 440.2201(1) and MCL 440.2209(3).

Here, the original contract was for \$15,000 and thus had to be in writing in order to comply with the State of Frauds. The modification of the contract increased the contract price by \$2,250. Therefore, the contract as modified still remained within requirements of the Statute of Frauds and must be written and signed by Ms. Bailey, the agent for Bailey Landscape Supply, the party to be charged. The facts indicate that Mr. Sampson telephoned Ms. Bailey and asked if she would agree to pay an increased cost per shovel. The modification was not reduced to a written form and Ms. Bailey did not sign any documentation assenting to the change. Therefore, strictly speaking, the modification of the contract is not in compliance with the Statute of Frauds.

Some examinees may argue that if the term modified is not a term required to be in writing, then the modification does not need to be in writing. Here, the term modified was price. Price is not a term required to be in writing. Therefore, under this reasoning, the modification does not fail per the Statute of Frauds. MCL 440.2204, MCL 440.2305. Should an examinee so argue, credit is to be awarded.

3. The last issue is whether Ms. Bailey's assent to the new price term operates as a waiver of her right to enforce the contract as written when Sampson Shovel, Inc. has not materially changed its position in reliance on her oral assent to the price change. "A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver." MCL 440.2209(5).

Here the facts indicate the increased cost in materials would in no way affect Sampson's ability to perform under the original terms of the contract. The facts further indicate that although Ms. Bailey orally agreed to the price change, Sampson Shovel Inc. has not done anything to materially change its position in reliance on the waiver. Thus, the retraction would not be unjust. Ms. Bailey needs to retract the waiver by notifying Mr. Sampson that strict performance under the original terms of the contract will be required. The next delivery date was three weeks away. If she notifies Mr. Sampson promptly, the notification would be considered reasonable provided that Sampson Shovel, Inc. does not materially alter its position before the notification. Therefore, Bailey Landscape Supply will not be held to the modified price terms of the oral agreement.

In conclusion, Bailey Landscape Supply can avoid the oral modification to the original contract provided she promptly notifies Sampson Shovel, Inc. of her retraction.

Although this question is designed to elicit an answer on waiver, if an examinee stated that an enforceable contract modification is not retractable and gave enough reasoning to support the answer, full credit was awarded on this issue.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

Under Michigan law, a party to a divorce judgment awarding a spousal support after trial may seek to amend that award. MCL 552.28. *Staple v Staple*, 241 Mich App 562, 569 (2000). The party seeking the amendment must demonstrate at a hearing a change of circumstances since entry of the order or judgment sought to be amended. *Ackerman v Ackerman*, 197 Mich App 300, 301 (1992); *Crouse v Crouse*, 140 Mich App 234, 239 (1985); *Thornton v Thornton*, 277 Mich App 453 (2007). The burden to establish entitlement to a modification of his obligation to pay spousal support will therefore be on Mr. Baker.

The court must first be persuaded that there has been a material change in circumstances since entry of the divorce judgment. This would seem to be the case since Mr. Baker's income has been cut in half, he has in essence lost his greatest financial asset, no longer has a retirement account, and is approaching social security benefits age. In addition, aside from the financial circumstances, his health has deteriorated.

On the other hand, Mrs. Baker continues to enjoy considerable retirement and other income, as well as excellent health; although it should be noted that her total income from all sources (other than spousal support) is less than what she made while working.

The change in financial income provides the court with the sufficient change in circumstances to allow the court to revisit the spousal support award at Mr. Baker's request. *Pohl v Pohl*, 13 Mich App 662, 665 (1968), citing *Bailey v Bailey*, 352 Mich 113 (1958), and more recently *Jacobsen v Jacobsen*, 113 Mich App 473 (1982), holding the sale of a spousal support paying spouse's business and reduction in income could provide the requisite change in circumstances.

The deterioration of a party's health might also be a factor in allowing a party to seek amendment. See generally *Yanz v Yanz*, 116 Mich App 574 (1982). However, the facts are far less substantial in this regard and his deteriorating health, alone, may not be sufficient to satisfy his burden. Nevertheless, connected to his diminished benefits, his deteriorating health could be a persuasive argument when viewed in the context of his diminished earning capacity and additional drain on his income.

In sum, the court had a sufficient change in circumstances to consider Mr. Baker's claim.

Consideration of that claim is guided by the purpose of a spousal support award. The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either. *Moore v Moore*, 242 Mich App 652, 654 (2000), citing *Ackerman*, supra. While the spousal support award need not make incomes equal, it must be based on what is just and reasonable under the circumstances of the case. *Moore*, at 652, citing *Maake v Maake*, 200 Mich App 184, 187 (1993), and at bottom is an equitable decision.

At the time of entry of the divorce judgment, both parties were doing well and their respective financial futures looked solid. The original spousal support award of \$36,000 per year allowed Mrs. Baker to live a financial lifestyle corresponding to Mr. Baker's, putting her income at \$93,000 and his at \$114,000. Continuing to supplement her income by \$36,000 in spousal support would produce a total income of \$86,000, a slight drop. But with Mr. Baker making now only \$75,000, the spousal support award would cut his income nearly in half with Mrs. Baker having an income over double his. Additionally, Mrs. Baker's income seemed solid while Mr. Baker's, if not tenuous, would certainly be limited. Moreover, Mr. Baker had to pay for health care benefits while Mrs. Baker enjoyed a premium policy at no cost. Mr. Baker's 401k was gone, hers remained intact. While it might be noted that Mrs. Baker's financial situation lacked upside potential, Mr. Baker's was likely heading downward. Finally, the divergent health condition of the parties, as well, puts them on unequal footing.

The changed financial circumstances would warrant the court to eliminate or at least significantly reduce Mr. Baker's spousal support obligation.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

With respect to the first question, Patrick's injury crossing the street leaving the employer parking lot is covered by Michigan's workers' compensation statute. While as a general rule injuries sustained going to or coming from work are not covered, the most prominent exception is the one presented here. *Simkins v GMC*, 453 Mich 703, 712 (1996). Michigan courts have consistently held that injuries sustained crossing a public street on the way to the workplace are work-related for workers' compensation purposes so long as the employee is traversing directly from an employer owned, leased, or maintained parking lot to the workplace. *Simkins, supra* at 722-26; *Smith v Greenville Products Co (On Remand)*, 185 Mich App 512 (1990); *Jean v Chrysler Corp*, 2 Mich App 564 (1966). The rationale is that the employer has, in effect, created a necessary path between two parts of its premises and must, therefore, assume some responsibility over the area it anticipates its employees will travel. *Simkins, supra* at 722-24. An examinee might also note: "An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment." MCL 418.301(3) (first sentence). For these reasons, Patrick's injury is one considered to be "arising out of and in the course of employment." MCL 418.301(1).

The result would be different if Patrick were traversing from a private, non-employer parking area to the workplace. *Beneteau v Detroit Free Press*, 117 Mich App 253 (1982). And, an exceptional examinee would note that Patrick's possible fault in being struck by the car (his "neglect" in noticing the car) does not bar recovery. Workers' compensation is a no-fault system. MCL 418.141(a); *Nemeth v Michigan Building Components*, 390 Mich 734, 737 (1973).

With respect to the second question, there are workers' compensation ramifications flowing from Patrick's termination due to his post-injury conduct. He would not be entitled to weekly wage loss benefits.

An employer can extend to an injured employee "a bona fide offer of reasonable employment" in order to mitigate its liability for wage loss benefits. MCL 418.301(9)(a). "Reasonable employment," once called "favored work," is statutorily defined; it is work an injured employee is able to perform in a disabled state. See, MCL 418.301(11);

compare, *Bower v Whitehall Leather Co*, 412 Mich 172 (1981). Absent a good and reasonable reason to refuse the job, the injured employee is obliged to accept the offer or sacrifice his/her right to weekly wage loss benefits. MCL 418.301(9)(a). If the employee is laboring at such "reasonable employment" and later "is terminated...for fault of the employee, the employee is considered to have voluntarily removed himself or herself from the work force and is not entitled to any wage loss benefits..." MCL 418.301(9)(b).

Here, ABC offered Patrick "reasonable employment" and Patrick accepted it. The post-injury work by every indication was within his capacity to perform (and met all other "reasonable employment" requirements). Patrick simply did not like the job and was terminated "for fault," i.e., excessive tardiness and absences in contravention of a company policy of which he was aware. Therefore, Patrick would be considered to have voluntarily removed himself from the work force and "not entitled to any wage loss benefits." (He would still receive medical benefits related to his injury).

Prior to December 11, 2011, the law on this point was different. At that time, an employee terminated "for whatever reason" within the first 100 weeks of "reasonable employment" was still entitled to receive compensation. MCL 418.301(5) (as it read prior to 2011 PA 266).

The second question does not invite a disability/wage loss analysis under MCL 418.301(4)-(8), but if an examinee undertakes one accurately, some consideration of such will be given in grading.