

**FEBRUARY 2013 MICHIGAN BAR EXAMINATION  
EXAMINERS' ANALYSES**

**EXAMINERS' ANALYSIS OF QUESTION NO. 1**

**A. General Principles:** "To recover civil damages for assault, plaintiff must show an 'intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.'" *VanVorous v Burmeister*, 262 Mich App 467, 482-483 (2004), quoting *Espanola v Thomas*, 189 Mich App 110, 119 (1991), citing *Tinkler v Richter*, 295 Mich 396, 401 (1940), and Prosser, Prosser & Keeton, Torts (5<sup>th</sup> ed.), § 9, p 39. To recover for battery, plaintiff must demonstrate a "willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *VanVorous, supra*, at 482-483, citing *Thomas, supra*, at 119, in turn citing *Tinkler* and Prosser. An assault is distinguished from a battery in that an assault does not result in the physical injury of another, while a battery does. *Mitchell v Daly*, 133 Mich App 414, 423 n 6 (1984).

**B. James v Smith:** James can successfully sue Smith for assault, but not battery. With regard to the assault claim, James will be successful because (1) Smith intentionally threw a stick at James, (2) James saw the stick thrown at him and had a well-founded apprehension that an imminent contact would occur (that apprehension likely caused him to duck), and (3) Smith clearly had the present ability to accomplish the contact because he threw the stick but simply missed hitting James. Finally, James can likely prove some form of emotional harm by being put in fear of injury when the big stick was thrown at him at close range. *Wise v Daniel*, 221 Mich 229, 234 (1922).

The missing element for the battery claim is that James was not hit by the stick, or stated differently, Smith did not create a harmful or offensive touching of James. For this reason, the battery claim would be unsuccessful.

**C. King v Smith:** King is in the opposite position of James, as King cannot successfully maintain an assault claim but he can succeed on a battery claim. With regard to the assault, the facts reveal that King was not looking when Smith turned and threw the stick at James. In fact, he never saw the stick coming towards him before he was hit by the stick. Thus, there are no facts to support the element that King had an apprehension of imminent contact with the stick.

However, King was hit by the stick, so the harmful or offensive touching element of a battery is satisfied. Additionally, it does not matter that the intended victim of the stick throwing was James, as opposed to King. It is well-settled that a person can be liable in tort for a battery against one person even though the intention was to batter another. "If an act is done with the intention of affecting a third person in the manner described in Subsection (1) [which details a battery that is intended but more severe in harm], but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended to affect him." Restatement of Torts 2d, § 16(2). See, also, *Talmage v Smith*, 101 Mich 370, 373-374 (1894). The fact that the stick ricocheted off the branch does not preclude King from maintaining the battery claim as he intentionally set in motion the object in an attempt to hit James. Finally, the facts reveal that King's head was cut by the stick, thus allowing him to at least recover damages for that physical injury.

## EXAMINERS' ANALYSIS OF QUESTION NO. 2

**(1) Validity and Enforceability of the Agreement:** A stock subscription, or a "subscription for shares," as it is referred to in MCL 450.1305, is a contract by which a subscriber agrees to purchase a certain number of newly issued shares of a corporation. Black's Law Dictionary. A subscription agreement may be made either before a corporation has been organized (called a preincorporation subscription) or after a corporation has been organized.

While a subscription agreement need not be in any particular form, *Gibson v Oswalt*, 269 Mich 300 (1934), a contract with a corporation to purchase its shares to be issued is a subscription agreement and not an executory contract unless otherwise provided. MCL 450.1305(3). General contract principles govern with regard to the elements of a subscription agreement (*Wheeler v Ocker & Ford Mfg Co*, 162 Mich 204 [1910]), in the absence of charter or statutory provisions to the contrary. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 1401. Thus, a stock subscription is an offer made by the subscriber, which requires acceptance by the corporation. *Peninsular R Co v Duncan*, 28 Mich 130 (1873); MCL 450.1305(2), the consideration for the subscription is mutuality of obligation. *Co-operative Telephone Co v Katus*, 140 Mich 367 (1905). Generally, stock subscriptions must be for a definite number of shares, *Wheeler, supra*, and must state the amount that the subscriber agrees to pay. Fletcher *Cyclopedia of the Law of Private Corporations*, § 1477. Moreover, preincorporation subscriptions must generally indicate the nature and main purpose of the corporation to be formed. *Menominee Community Bldg Co v Rueckert*, 245 Mich 38 (1928).

Pursuant to MCL 450.1305(2), preincorporation subscriptions are irrevocable and may be accepted by the corporation for a period of 6 months, unless otherwise provided by the subscription agreement or unless all the subscribers consent to its revocation. Additionally, subscription agreements are not enforceable unless in writing and signed by the subscriber pursuant to MCL 450.1305(1).

In this case, the facts indicate that the agreements are preincorporation subscriptions, as the agreements were made before Muscle Machine was incorporated. The subscription agreements provided for the price, number of shares and the nature and purpose of the corporation. The offers were accepted by Muscle Machine after its organization on March 1, 2012. There is consideration

because both parties to the agreement are bound to perform: the subscribers must deliver the financing and Chris must deliver the shares. Thus, it appears that valid subscription agreements were created. Because the subscriptions were irrevocable for a period of six months, Dan's effort to cancel his subscription before it was accepted by Muscle Machine had no effect. MCL 450.1305(2). Additionally, as noted above, MCL 450.1305(2) provides that "if all the subscribers consent to its revocation" a pre-incorporation subscription agreement can be revoked. However, Bob has not expressed any desire to revoke the agreement, just to modify it by paying a lower price. And, there is no suggestion that all of them have agreed (or even discussed the idea) to seek revocation. Thus, under the facts, the issue of all the subscribers consenting to revocation is not a valid defense. However, if an applicant raises the issue and makes a reasoned argument that this is a possible avenue depending on Bob's ultimate desire, or is not based on Bob's desire to lower the price but not revoke, a point or two should be awarded.

That said, the subscription agreements are not equally enforceable against Bob, Dan and Greg. Because Greg orally agreed to the subscription and did not sign the document, the agreement cannot be enforced against him. See MCL 450.1305(1). Thus, because Greg no longer wishes to purchase the shares, Chris has no recourse against him.

**(2) Remedies:** MCL 450.1306 provides that, "unless otherwise provided in the subscription agreement," a stock subscription "shall be paid in full at the time, or in installments and at the times, as shall be determined by the board." In this case, the subscription agreement clearly required Dan and Bob to tender \$10,000 to Muscle Machine on or before May 1, 2012 in exchange for the stock certificates. When the money was not paid, both men were in default.

Where a subscriber defaults in his performance of a subscription agreement, MCL 450.1307(1)(a)-(c) permits a corporation several remedies. The remedies are cumulative, entitling the corporation to a "full and single recovery." MCL 450.1307(2). The corporation may:

- (1) Collect the amount due in the same manner as any other debt;
- (2) Sell the shares in a reasonable manner, in good faith and after giving notice to the subscriber. Any excess proceeds over the amount due (plus interest) are paid to the subscriber. Any deficiencies (plus interest) may be collected from the subscriber.
- (3) Rescind the subscription and recover damages for breach of

contract. In the absence of special circumstances, the measure of damages is the difference between the market price at the time the shares were tendered and the unpaid contract price.

Because payment in full was an explicit condition of the issuance of the stock certificates to Bob and Dan, it can be inferred from the facts that Muscle Machine retained possession of the stock certificates. That being the case, remedies (1) and (2) are available to Muscle Machine. It could bring suit to enforce full payment pursuant to § (1), but must be ready and willing to deliver the stock certificates to Bob and Dan. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 1830.

Alternatively, Muscle Machines can sell Bob and Dan's shares pursuant to § (2). If Bob's assessment is correct, and the fair market value of the stock is \$50 per share, then Bob and Dan each would still remain liable for the \$5,000 difference (plus interest), provided the sale is made in good faith, in a reasonable manner and upon notice to Bob and Dan. If the stock sells for a higher amount, any excess amount is paid to Bob and Dan.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

This question pertains to whether the Michigan trial court can exercise jurisdiction over SBFC. A personal jurisdiction analysis involves a two-fold inquiry: (1) do the defendant's acts fall within the applicable general or long-arm statute, and if they do, (2) does the exercise of jurisdiction over the defendant comport with the requirements of due process. *Green v Wilson*, 455 Mich 342, 347 (1997) (opinion by Kelly, J.), 357 (opinion by Weaver, J.)

**General or Long-Arm Personal Jurisdiction:** The grant of personal jurisdiction comes from legislative long-arm statutes that invest courts with the power to exercise personal jurisdiction. MCL 600.711 grants general personal jurisdiction over corporations, and states as follows:

"The existence of any of the following relationships between a corporation and the states shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation.

"(1) Incorporation under the laws of this state.

"(2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.

"(3) The carrying on of a continuous and systematic part of its general business within the state."

Under these facts, a Michigan court would not be able to exercise general personal jurisdiction against SBFC since it was not incorporated in Michigan, there is no evidence of consent by the corporate entity, and there is no evidence that SBFC carried on "a continuous and systematic part of its general business in Michigan. Indeed, the evidence shows that this was an isolated transaction and there is no suggestion that SBFC has conducted any other business within the state. As such, the question is whether there is personal jurisdiction under Michigan's long-arm statute.

Long-arm statutes establish the nature, character, and types of contacts that must exist for purposes of exercising personal jurisdiction. *Id.* at 348. Michigan's long-arm statute, MCL 600.715(1) and (5), authorizes the exercise of personal jurisdiction over a nonresident corporate defendant if any of the following relevant circumstances exist regarding the defendant:

(1) The transaction of any business within the state.

(2) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

There is a better argument under the long-arm statute that the Michigan court could exercise jurisdiction over SBFC, as the facts reveal that SBFC engaged in the "transaction of any business within the state," MCL 600.715(1), which can be satisfied by "the slightest act of business in Michigan." *Sifers v Horen*, 385 Mich 1956, 1989 n2 (1971). The entering into a contract with a Michigan resident, the signing and completion of the contract in Michigan, which resulted in the delivery of a product into the state by an employee of SBFC, satisfies this broad provision, especially when one considers the fact that the cause of action arose from the transaction. See *Evans Tempcon Inc v Index Industries Inc*, 778 F Supp 371, 374-375 (WD Mich, 1990) and *Salom Enterprises LLC v TS Trim Industries, Inc*, 464 F Supp 2d 676, 683-684 (ED Mich, 2006).

**Can Personal Jurisdiction be constitutionally exercised?** Even if a defendant's conduct places it within one of the sections of MCL 600.715, a Michigan court still may not exercise limited personal jurisdiction over the defendant unless doing so would not offend constitutional due process concerns. *Green, supra* at 350-351.

In *W H Froh, Inc v Domanski*, 252 Mich App 220, 226-227 (2002), quoting from *Mozdy v Lopez*, 197 Mich App 356, 359 (1992), the Court of Appeals explained the law governing this constitutional inquiry:

"The Due Process Clause of the Fourteenth Amendment limits the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants. *Kulko v California Superior Court*, 436 US 84, 91; 98 S Ct 1690; 56 L Ed 2d 132 (1978). As a result, a valid judgment affecting a nonresident's rights or interests may only be entered by a court having personal jurisdiction over that defendant. *Int'l Shoe Co v Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 95 (1945). A court may acquire personal jurisdiction over a nonresident when the nonresident defendant's relationship with the forum is such that it is fair to require the defendant to appear before the court. *Id.*

"It is fair to require a defendant to appear before the court when the defendant possesses 'minimum contacts' with the forum. A defendant must 'have certain minimum contacts with [the forum] such that maintenance of the suit does not offend "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co* at 316. Whether sufficient minimum contacts exist between a defendant and Michigan to support exercising limited personal jurisdiction is

determined by applying a three-pronged test:

"First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable."

Here, the answer most consistent with Michigan case law is that the Michigan court could not exercise personal jurisdiction over SBFC consistent with the Due Process Clause of the 14th Amendment because SBFC did not have sufficient minimum contacts with Michigan.

Applying this three-part test, the applicant should first discuss whether SBFC "purposefully availed" itself of the privilege of conducting business in Michigan. When the defendant's contact with the forum state is based on a contract with one of its citizens, then the purposeful availment analysis requires an assessment of that contractual relationship. In *Burger King Corp v Rudzewicz*, 471 US 462, the Supreme Court held that "an individual's contract with an out-of-state party alone [will not] automatically establish sufficient minimum contacts in the other party's home forum." Instead, in such cases, the Court "recognizes that a 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction,' and [i]t is these factors - prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing - that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." 471 US 462, 478. See also, *L T Elsey & Son, Inc v American Engineering Fabrics, Inc*, 191 Mich App 146, 147-148 (1991). In doing so, facts that should be cited for concluding there is purposeful availment include: that the Florida defendant decided to take advantage of an opportunity to do business in Michigan; that the defendant agreed to the terms of a contract with the Michigan plaintiff and physically entered into Michigan to meet with the plaintiff; that while in Michigan, the defendant executed the contract with the plaintiff and physically transferred the boat to the plaintiff, thus completing the contract in Michigan.

In support of a finding of no purposeful availment, an applicant should argue that SBFC did not "purposefully avail" itself of the privilege of conducting business in Michigan because this was an isolated transaction. SBFC never before nor after

entered into any transactions in Michigan, did no advertising in the state, and did not reach out to a resident to engage in business. And, the SBFC president only came to Michigan because he was here on vacation, not to conduct business. Under this limited scenario, exercising personal jurisdiction over SBFC would be unconstitutional. *Gooley v Jefferson Beach Marina, Inc*, 177 Mich App 26 (1989).

Considering the second part of the test, it is clear that the cause of action arose from SBFC's activities in Michigan. With respect to the third part of the test, however, the applicant should argue that SBFC's activities are not substantially connected to Michigan. Again, except for this one transaction, SBFC has no involvement with Michigan, either in person (sales agents, boat shows, advertising, etc.) nor through contracts with other individuals or boat companies. This one transaction does not suffice to permissibly exercise jurisdiction over SBFC consistent with due process. However, it could also be argued that the facts that SBFC had never before nor after entered into any transactions in Michigan, did no advertising in the state, and did not initiate the business transaction are not determinative, as case law establishes that specific personal jurisdiction can be based on a single transaction or item of activity if the cause of action arose from that isolated transaction or activity, as long as the defendant can reasonably anticipate being haled into a Michigan court as a result of that contact. See e.g., *McGee v International Life Ins Co*, 355 US 220, 223; 78 S Ct 199, 201; 2 L Ed 2d 223 (1957), cited with approval in *Khalaf v Bankers & Shippers Ins Co*, 404 Mich 134, 146, n 11 (1978).

The grader should keep in mind that because an opposite conclusion is reasonable, the analysis is more important than the ultimate result.

#### EXAMINERS' ANALYSIS OF QUESTION NO. 4

**Disqualifying Warren as a Witness:** The prosecutor should argue that a criminal conviction does not disqualify a witness from testifying. While this may have been true under the common law, MRE 601 basically presumes a person is competent to be a witness. The test is not a conviction-free record, but rather whether the witness has sufficient physical and mental capacity and sense of obligation to testify truthfully and understandably, a test easily met.

**Warren's Quotation of Art:** The prosecutor should respond that Art's statement is not being introduced for the truth of its content and, therefore, is not hearsay under MRE 801(c). The statement is a command and commands are generally not susceptible to evaluation for their truth. Moreover, even if the command could be evaluated for its truth, the prosecutor could easily establish a non-hearsay purpose for the statement, i.e. to show its effect on the listener, Dan, who had a reason to be at the crime scene and had appeared frightened by the prospect of a meeting with Vic.

**Warren's Conclusion that Dan looked Scared:** The prosecutor should argue that Warren's testimony that he saw Dan's eyes widen and his throat tighten is not hearsay because Warren is simply testifying to behavior he perceived firsthand. While nonverbal conduct can sometimes make a statement, spontaneous expressions of fear are not regarded as hearsay because they are not intended by the declarant (here, Dan) as assertions. *People v Davis*, 139 Mich App 811, 812-813 (1984). And if Dan's conduct were an assertion, it would still be admissible because it is being offered against Dan and is therefore not hearsay under MRE 801(d)(2).

The prosecutor should also argue that Warren's conclusion is not being offered as an expert opinion under MRE 702. Rather, Warren's conclusion is lay opinion testimony under MRE 701. For this type of testimony to be admitted, the opinion must be (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Here, Warren could see Dan and hear Art. As such, he could rationally base his conclusion on his perception. Also his opinion that Dan seemed afraid of Vic, would aid in the determination of a fact in issue, i.e. that fear of Vic supplied the motive for Dan to kill him.

**The Use of the Assault Conviction:** The prosecutor should argue that the assault conviction, although a felony, does not meet the requirements of MRE 609(a)(1) or (2) and is, therefore, not useable for impeachment purposes. An assault is not a crime containing an element of dishonesty or false statement, or an element of theft, as required by the rule.

**Multiple Hearsay:** Some examinees may see the question as containing a multiple hearsay problem. (When multiple levels of hearsay are involved, each level of hearsay must fall within an exception to the hearsay rule. MRE 805.) This approach misses the basic point: Warren's testimony recounting Art's statement is not hearsay at all, whether the declarant is Art or Vic. The prosecutor is not offering the statement to prove anything about what Vic said to Art, or what Vic intended regarding Dan. The statement is being offered to prove that Dan heard something that might have given him a reason to be at the crime scene and/or a motive to harm Vic. No points should be awarded for a discussion of multiple hearsay.

## EXAMINERS' ANALYSIS OF QUESTION NO. 5

**Andy:** Andy's value billing violates MRPC 1.5, MRPC 1.4, and MRPC 8.4.

MRPC 1.5(a) provides that "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The same rule identifies factors usually involved in determining whether a fee is "reasonable," and not excessive. e.g., time and labor required and the experience of the attorney involved.

In this case, Andy's fee is governed by fee agreements under which he is to charge only for time actually expended. Under value billing, he is charging in excess of time actually expended and is billing multiple clients for the same time, so much so that he has on occasion billed in excess of 24 hours in one day. RI-150 instructs that charging more than one client at full rate for the same time period, rather than apportioning the time between or among the clients, is an excessive fee in violation of MRPC 1.5(a).

Moreover, even if Andy believed his fee was reasonable when he recorded his time, upon seeing how his hours had "soared" in just one month, and/or after receiving client voice mails questioning his time, he had a continuing duty to review the time entries for reasonableness. MRPC 1.5(a) prohibits not only "charging" an excessive fee but also "collecting" one. See also RI-150 ("The wording [of MRPC 1.5(a)] clearly indicates that, although a fee may appear reasonable at the outset of the representation, a lawyer has a continuing duty before billing the client or attempting to collect the fee to review the facts and re-examine the reasonableness of the fee").

MRPC 1.4 concerns client communications. It required Andy to explain to the clients involved any proposed change in billing so that the clients could make an informed decision about whether they wanted to accept the proposed change or seek other representation. See MRPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"). Not only did Andy fail to consult his clients prior to changing to value billing, he ignored their calls about invoices containing the value billing entries. MRPC 1.4(a) requires a lawyer to respond to client

inquiries, which Andy failed to do by not promptly responding to the client's request for information.

Andy also violated MRPC 8.4, which provides that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.4(b). Despite knowing the firm's fee agreements required him to bill only for actual time, Andy billed in clear excess of actual time expended, then lied to Peter when asked whether he had done so. MRPC 4.1 also requires truthfulness in statements to others. Andy arguably violated this rule by denying to Peter that he billed anything other than actual time worked. Andy likely has also violated MRPC 8.4(a) by violating other Rules of Professional Misconduct, specifically MRPC 1.4, MRPC 1.5, and MRPC 4.1.

**Fred:** Based on the facts given about Fred, there is no evidence he engaged in professional misconduct. Fred advised Andy that he had heard or read somewhere about value or block billing. While MRPC 8.4 provides that "It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another," nothing in the facts provide that Fred had adopted value billing himself or that he knowingly induced Andy to do so.

**Peter:** Peter will violate MRPC 5.1 and possibly MRPC 8.3 if he does not take prompt action.

Peter has an obligation under MRPC 5.1 to take action to correct Andy's fraudulent billings. MRPC 5.1 provides that "A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer is a partner in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action." MRPC 5.1(c)(2). Peter is both a partner in Andy's firm and Andy's direct supervisor. If he does not take action to correct Andy's time entries and refund any overpayments already made by firm clients as a result of those entries, Peter will himself have violated the Rules of Professional Misconduct. Points should also be given for a discussion of MRPC 5.1(b), which states that "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

The answer as to whether Peter has a responsibility to report Andy to the Attorney Grievance Commission is less clear. MRPC 8.3(a) provides that "a lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission." The Comment to MRPC 8.3 provides that whether a violation is significant is a judgment call because a rule that requires reporting of all violations has proved unenforceable. Thus, the Comment instructs that "this rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to report." Here, Andy violated several rules, not just one, which weighs in favor of finding that his misconduct is a significant violation.

There is also the issue of whether Andy's violation of the Rules "raises a substantial question as to [his] honesty, trustworthiness, or fitness as a lawyer," which, per the Comment to MRPC 8.3, "refers to the seriousness of the offense and not the quantum of evidence of which the lawyer is aware." The fact that Andy, a junior associate, implemented a billing scheme that violated the firm's fee agreements with its clients, without at least consulting with his supervisor and then lied about it when Peter confronted him, raises a serious question about his trustworthiness or fitness to practice that should be reported. Add to that Andy's failure to disclose to Peter the client voice mails in response to a direct question about client complaints, an omission Peter would certainly discover as he implemented corrective action on the fraudulent billings, and it appears a report to the Attorney Grievance Commission would be the more prudent exercise of judgment.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Insider has a claim for breach of contract and should recover the entire \$200,000.

A valid contract to build the mansion for \$3.1 million existed once Fantastic Homes selected Insider's bid without change. A bid made in response to a request for bids is a valid offer, and a contract is formed when that bid is accepted without change. Restatement Contracts, 2d, § 26, comment d.

An examinee could argue in the first instance that the contract contemplated cost overruns. The parties had a prior course of dealing on fixed bid contracts where Insider was paid for cost overruns. This contract did not expressly preclude overruns. Moreover, when Fantastic Homes offered the bonus for not exceeding the bid price, it arguably contemplated overruns. On the other hand, the examinee could argue that the bonus took the contract out of the prior course of dealings and was a warning to Insider not to overrun his bid. But this latter analysis relies on the bonus offer, which came after the initial contract was formed and appears only to be an incentive to stay within the initial bid price. The intent of this question is for the examinees to analyze modification principles, but a solid discussion of whether the initial contract itself contemplated cost overruns will be awarded points.

The better argument is that the contract was modified. When Insider realized the costs would exceed his bid, he advised Fantastic Homes of this fact. Had Insider not had a history with Fantastic Homes, Insider's notice that the bid amount needed to be modified may not have been enough to amend the contract. Moreover, the contract contemplated the possibility or even likelihood of a cost overrun by offering a bonus for not exceeding the bid. Fantastic Homes accepted the modification by not objecting and allowing Insider to proceed, as it routinely had done in the past. *Gorham v Peerless Life Ins Co*, 368 Mich 335, 342 (1962). See also, Restatement Contracts, 2d, § 69(1) (silence constitutes acceptance where because of prior dealing or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept). Indeed, Fantastic's statement "thanks for the heads up" can also be construed as an implied agreement. *Dolen v Continental Airlines/Continental Express*, 454 Mich 373, 383 (1997) (when parties manifest their agreement by conduct, the agreement is an "implied-in-fact" contract).

The Statute of Frauds is not an issue because the contract contemplated being completed in less than one year. Examinees may also discuss the application of the Parole Evidence Rule and conclude that it does not apply to subsequent modifications. *Quality Products v Nagel Precision Inc*, 469 Mich 362, 371 (2002). Minor credit is given for those points.

Under a breach of contract theory, Insider's recovery should be the contract price as modified by Fantastic Homes' acceptance by silence and past practice, i.e., payment of the additional \$200,000. Having exceeded the original \$3.1 million bid amount, Insider is not entitled to the \$100,000 bonus.

An alternative argument for which some credit should be given for a cogent analysis is that Insider cannot recover under a contract theory because Fantastic Homes' knowledge of the cost overrun coupled with its silence was not "clear and convincing" evidence of mutuality, which is a requirement under a waiver or modification analysis. *Quality Products and Concepts Co v Nagel Precision Inc*, 469 Mich 362 (2003). Where course of conduct (including silence) is the alleged basis for modification, a waiver analysis is necessary. Knowledge coupled with silence was not clear and convincing evidence of mutuality in *Quality Products*. But the original contract there contained express non-modification and anti-waiver language. The better answer under the facts presented here is that silence or failure to object meets the clear and convincing evidence of a course of conduct waiver because there have been prior affirmative expressions of assent (Fantastic Homes' prior waivers by paying Insider in full under the same circumstances), there exists no non-modification or anti-waiver language in the contract, and there is an expressed intent to reward Insider monetarily for not exceeding the contract bid. See *Cascade Elec Co v Rice*, 70 Mich App 420, 427-428 (1976).

In discussing modification, some examinees may also appropriately discuss the principle that oral modification of a contract requires additional consideration. MCL 566.1 provides that written modification of a contract is not invalid for lack of consideration. This section is not intended to invalidate all oral modification agreements, just those without valid consideration. *Minor-Dietiker v Mary Jane Stores of Mich Inc*, 2 Mich App 585 (1966). Consideration arguably exists here because Fantastic receives the benefit of no delay - however brief - occasioned by Insider having to locate and contract for substitute products. See *GMC v Department of Treasury*, 466 Mich 231 (2002) (courts do not examine the adequacy of consideration); *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6 (2005). In addition, Restatement of Contracts Second, § 89 provides modification where the contract has

not been fully performed by either party, does not require additional or new consideration.

Assuming the contract claim fails, the alternative theory of recovery that Insider could argue would be unjust enrichment/quantum meruit. If there is a breach of contract claim, a quasi-contract claim would be precluded. An applicant could observe that the original contract for \$3.1 million remains and that since there is a contract covering the same subject matter, it precludes a quasi-contract theory for recovery of the \$200,000. Points for this observation will be given, but the question expressly asks the applicant to argue an alternative theory and it is expected that they will do so. *Cascade Electric, supra*, at 426.

Elements of quantum meruit/unjust enrichment would arguably be satisfied in the absence of a contract. Fantastic Homes withheld payment of the \$200,000, even though Insider's total costs remained within parameters authorized by Mr. Money. Fantastic Homes' refusal to pay Insider the additional \$200,000 was--in addition to being a reversal of its past practice--based on Fantastic Homes' desire to keep that money for itself. The elements of a claim of quantum meruit/unjust enrichment are (1) the defendant (Fantastic Homes) received a benefit from the plaintiff (Insider), (2) without providing compensation for the benefit, and (3) it would be inequitable for the defendant to retain the benefit. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463 (2003); *Keywell v Rosenfeld & Bithell*, 254 Mich App 300 (2002). Here, Fantastic Homes paid only \$3.1 million of Mr. Money's allocated funds for a home it knew cost Insider \$3.3 million to build. The \$3.3 million total was within the range authorized by Mr. Money. And Fantastic Homes' offer of the \$100,000 bonus for not exceeding the bid demonstrated that Fantastic Homes always intended to pay Insider something in excess of the \$3.1 million bid. Nevertheless, Fantastic Homes did nothing to prevent Insider from incurring the additional costs, which he could have avoided by making substitutions had Fantastic Homes not been silent. Had Insider made the substitutions and stayed within the bid, he would have received the \$100,000 bonus for a total of \$3.2 million.

If analyzed under quantum meruit/unjust enrichment, the recovery also should be \$200,000 in restitution. *i.e.*, the additional value Fantastic Homes received by remaining silent when notified of the need for modification. *Morris Pumps v Centerline Piping Inc*, 273 Mich App 187 (2006); *Restatement Contracts*, 2d, § 371.

Some examinees may raise promissory estoppel as an argument. Promissory estoppel does not apply because it requires a clear and

definite promise on which the party relied to its detriment. *State Bank of Standish v Curry*, 442 Mich 76, 84 (1993). The same standard governs whether a promissory estoppel promise is sufficiently clear as governs whether a contract offer is sufficiently definite to enforce. *Id*, 88. No definite promise exists here, and silence as course of dealings is insufficient to support this element of the claim.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

1. The first question implicates the law of fixtures, and a court would likely hold that David could recover the chandelier and possibly the loom as well.

A fixture is an item of personal property (chattel) that becomes so affixed to real estate that the law treats it as part of the real property. Michigan utilizes a three-part test to determine whether an item has become a fixture: First, a court will examine the degree to which the item has been annexed to the realty. Second, a court will look to the extent to which the item has become adapted to use of the real estate. Third, a court will consider whether the parties intended to make the goods an accession to the real property. *Wayne Co v Britton Trust*, 454 Mich 608 (1997); *Morris v Alexander*, 208 Mich 387 (1919). If an item is a fixture, title to it passes with the conveyance of the real estate unless the seller reserves ownership of the fixture in the contract of sale. *Atlantic Die Casting Co v Whiting Tubular Products, Inc*, 337 Mich 414 (1953).

Because the contract and deed in this case only described the real property to be conveyed, David is entitled only to that which may be considered "real property," including the fixtures. David's claim is strongest with regard to the chandelier. The chandelier was affixed to the ceiling, connected to a house's electrical system, and serves both a necessary and decorative purpose in the home. The facts specifically note that the chandelier was chosen because it befit the house's character and style, thus indicating a more permanent intent for it to remain in the home once installed. These facts strongly suggest that the chandelier should be considered a fixture. If that is the case, Janet improperly removed the chandelier and David can recover it.

With regard to the loom, David will argue that the loom should be considered part of the realty, especially when considering the fact that the house is part of a llama farm. A loom that processes llama fleece is a unique machine clearly installed to be operated in conjunction with the adjoining farm. The loom was "assembled and installed" in the house, suggesting that it was affixed in some manner to the house. The facts also indicate that David specifically bought the farm to take over the llama business--an intent that Janet knew. While certain facts not disclosed (such as the extent to which it was attached to the house) leave some room for

debate, the stronger position is that the loom is a fixture connected to the realty, and accordingly, Janet wrongfully took it.

Note: The loom may be considered by some to be a "trade fixture," which is an item that is used in a trade or business, and these items are not considered part of the realty and thus may almost always be removed by the owner. However, in Michigan, the trade fixture doctrine only applies to leasehold estates, allowing a tenant, at the termination of his lease, to remove fixtures that he installed for his trade. Thus, while the loom may colloquially be considered a "trade fixture," because this case does not involve a landlord-tenant relationship, the traditional fixture test applies rather than any other rule regarding "trade fixtures." See *Britton Trust*, 454 Mich at 612, n2; see also *Wentworth v Process Installations, Inc*, 122 Mich App 452 (1983).

**2. The second question relates to priorities among multiple claims on a single property and implicates Michigan's notice statute. A court would hold that National Bank has a superior interest in David's home because National Bank recorded first and in good faith without notice of Local Bank's interest.**

The priorities among multiple interest in a single property are governed by Michigan's notice act. Michigan is a race-notice state, as set forth by statute:

"Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." MCL 565.29.

Generally, a person acquiring rights in realty with notice of the existence of a prior mortgage takes subject to the rights of the mortgagee. See *Boraks v Siegel*, 366 Mich 308 (1962). However, where the person does not have notice, if the subsequent mortgage is supported by actual present consideration and given in good faith, the mortgagee is regarded as a bona fide purchaser for value and as such, is protected against adverse claims of which the mortgagee lacked notice. MCL 565.29; see also *Piech v Beaty*, 298 Mich 535 (1941). Notice may be actual or constructive, and important here, constructive notice includes notice of all interests that are properly recorded. See *Lines v Weaver*, 220 Mich 244 (1922).

In this case, although Local Bank was granted a mortgage on

the home first, Local Bank did not immediately record its interest. When National Bank was subsequently granted a mortgage, it acted in due diligence and performed a title search, which revealed no prior mortgages or other encumbrances on the property. The facts further do not indicate that National Bank was apprised of any other circumstances from which it knew or should have known that a prior interest existed in the home, or that would have required it to inquire into the possible existence of another interest. National Bank acted in good faith, did not have notice, and gave consideration for a mortgage on the property. Accordingly, because National Bank recorded its mortgage first, National Bank's interest is superior to that of Local Bank.

## EXAMINERS' ANALYSIS OF QUESTION 8

(1) Validity of the Trust: In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, et seq. Michigan recognizes four methods of creating a trust: (1) the transfer of property to another person as trustee during the settlor's lifetime or by disposition taking effect upon the settlor's death; (2) a declaration by the owner of the property that the owner holds identifiable property as trustee; (3) the exercise of a power of appointment in favor of a trustee; and (4) a promise by 1 person to another person whose rights under the promise are to be held in trust for a third person. See MCL 700.7401(1)(a)-(d). No matter which method of creating a trust is chosen, a valid trust is created only if five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust either has a definite beneficiary, is a charitable trust, is a trust for a noncharitable purpose, or is a pet care trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. See MCL 700.7402(1)(a)-(e).

In this case, it appears that a valid trust was created. May transferred the two million dollars to Big Bank as trustee during May's lifetime, satisfying MCL 700.7401(a). Additionally, May exercised a power of appointment in favor of Big Bank as trustee, satisfying MCL 700.7401(c). The requisite requirements for the creation of a trust also appear to be satisfied. (1) Nothing in the facts calls into question May Moffman's capacity to create a trust. Courts presume capacity, and the burden is on a challenger to prove otherwise; here, no one is challenging May's original capacity. *Vollbrecht's Estate v Pace*, 26 Mich App 430 (1970). (2) May clearly indicated her intent to create a trust. (3) The trust is a charitable trust. Pursuant to MCL 700.7405(1), "[a] charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, any purpose described in section 501(c)(3) of the internal revenue code, 26 USC 501, or other purposes the achievement of which is beneficial to the community." See also *Scudder v Security Trust Co*, 238 Mich 318 (1927) (trust providing for welfare and comfort of the needy elderly is enforceable). (4) The trustee (Big Bank) has duties to perform: the duty to manage the trust assets in good faith and issue the yearly disbursement. (5) Lastly, the same person was not the sole trustee and sole

beneficiary. Therefore, MCL 700.7402(1)(a)-(e) appears to be satisfied, and a valid charitable trust with a possibility of reverter was created.

(2) **St. Mary's Entitlement to the Stipend:** Generally speaking, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy." MCL 700.7410(1). For charitable trusts, a trust may fail if "a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve." MCL 700.7413(1).

Thus, in the absence of the application of the doctrine of cy pres (discussed below), St. Mary is legally entitled to the continuation of the trust unless the particular charitable purpose articulated in the trust document has become "unlawful, impracticable, or impossible to achieve."

The particular charitable purpose expressed in the trust provides for the "Health, welfare and comfort of the Sisters of the Order of the Immaculate Heart at the St. Mary's Orphanage." Because the last sister died and the Order dissolved upon her death, the trustee would have a strong argument that the specific charitable purpose of the trust fails, and the trust is subject to termination, because the class specifically intended to receive the benefits has become nonexistent. See Bogert's Trusts and Trustees, Chapter 22, § 438.

(3) **Options Available to the Judge:** The cy pres doctrine is a saving device applied to charitable trusts when the specific purpose of the settlor cannot be carried out. Application of the cy pres doctrine permits a court to substitute another charity or modify the trust in a manner which is believed to approach the settlor's original purpose as closely as possible. *In re Rood's Estate*, 41 Mich App 405 (1972).

Although cy pres originated as a common law doctrine, it is now codified at MCL 700.7413. The statute provides that, if a particular charitable purpose has become unlawful, impracticable, or impossible to achieve, no alternative charity is named in the trust, and the court finds the settlor had a general, rather than a specific, charitable intent, then (1) the trust does not fail; (2) the trust property does not revert to the settlor or the settlor's successors in interest; and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's general charitable intent.

Thus, a court may only apply cy pres if the court finds that the settlor had a general rather than specific charitable intent. Charitable trusts should be read in a manner most favorable to upholding the trust, if at all possible. *In re Rood's Estate, supra*. There must be some manifestation of a general charitable intent that extends beyond the specific purpose which has now become impractical or impossible, such as intent to aid charity in general or some particular type of charity in general. *Id.* The absence of a reverter clause or gift over in the event that the particular purpose fails is evidence of a general charitable intent. Similarly, a general charitable intent will be implied where the bulk of the donor's property is given for charitable purposes. *Id.*

Even if the specific charitable purpose of the trust fails, and there is no finding that the settlor had a general charitable intent, cy pres may still be used to save the charitable trust. MCL 700.7413(3) states that a provision in a charitable trust that would result in the "distribution of trust property to a noncharitable beneficiary" prevails over the power of cy pres "only if" (1) the trust property reverts to the settlor, who is still living or (2) less than 50 years have elapsed since the trust was created.

The trust language above does not provide any indication that May Moffman had a general charitable intent. There was no indication that she wanted to aid nuns generally or promote health and comfort generally. May made her gift to the specific orphanage that had raised her as a child. The fact that the trust contained a reverter clause, as well as the fact that the bulk of May's fortune went to family and friends rather than charitable purposes, militates against the court finding that May had a general charitable intent. Additionally, while May is no longer living, it has been less than 3 years since the trust was created. Because it has been less than 50 years since the trust was created, the court cannot apply cy pres to modify the terms of the trust, and the four million dollars should be distributed to Amanda Avers according to the terms of the trust.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

(a) Carolyn will not be successful in recovering her vehicle until she pays Greg's bill. Although Carolyn is the owner of the convertible, Greg has a lien on it, which entitles him to retain possession of the vehicle until Carolyn's debt to him is paid.

A lien is "a right or claim against some interest in property created by law as an incident of [a] contract." *Cheff v Haan*, 269 Mich 593, 598 (1934). The Garage Keeper's Lien Act, MCL 570.301 et seq., outlines Greg's statutory right to a lien on Carolyn's vehicle. A garage keeper's lien requires a contract that is "expressed, implied, written, or unwritten" between a garage keeper and a vehicle's owner. MCL 570.303(1). The lien is in the amount of money due from the vehicle's owner "for the storage, maintenance, keeping, diagnosis, estimate of repairs, and repair of the vehicle and for . . . supplies furnished, expenses bestowed, or labor performed on the vehicle at the request or with the consent of the owner of the vehicle." The lien attaches to the vehicle as long as the vehicle remains in the possession of the garage keeper, *i.d.*, and attaches "the day the garage keeper performs the last labor or furnishes the last supplies for which a lien is claimed against the vehicle." MCL 570.303(2).

Here, the facts indicate that Carolyn and Greg entered into an oral contract for the repair of the vehicle. Greg repaired the vehicle and has kept it in his possession by storing it. Thus, he satisfies the statutory criteria for the creation and attachment of a lien for the amount due on those repairs and storage. As a result, Carolyn is not entitled to recover the vehicle until she pays the amount owed to Greg.

The Court of Appeals has also held that a common-law artisan's lien survived enactment of the Garage Keeper's Lien Act. *Nickell v Lambrecht*, 29 Mich App 191, 196-198 (1970). The common-law lien attaches when someone "who by labor, skill, or materials adds value to the chattel of another while under an express or an implied agreement." *Id.* at 196. The lien is "a possessory lien . . . for the value of his services and [the artisan] may retain the chattel in his possession until the same be paid." *Id.* The same facts that support Greg's entitlement to retain possession of Carolyn's convertible under the Garage Keeper's Lien Act also support his entitlement to retain possession of the convertible under the common law.

**(b) Greg is entitled to charge Carolyn \$5 per day as a storage fee.** The Garage Keeper's Lien Act allows the lienholder to include as part of the lien, "an amount of not more than \$10.00 per day for the storage of the vehicle," unless the parties otherwise agreed to something else in writing. MCL 570.304. As a result, absent an alternative agreement, Greg's daily \$5 storage fee is allowed under Michigan law. The facts here do not indicate whether the parties agreed to alternative terms, but the existence of an oral contract for the repairs strongly suggests that the parties did not contemplate an alternative arrangement in writing.

**(c) Greg cannot accept Laura's offer to purchase Carolyn's vehicle.** Greg does not have the authority to sell Carolyn's vehicle without her consent. The Garage Keeper's Lien Act provides Greg with the right to sell Carolyn's vehicle in order to recover the charges that Carolyn incurred. However, a lien under the Act "shall be enforced only as provided in MCL 570.305, which requires certain procedures for "a public sale" of the vehicle. MCL 570.305(1) & (2). Thus, to sell the vehicle, Greg must apply to the Department of State for a certificate of foreclosure within 105 days of the lien's attachment MCL 570.305(3), and provide notice to Carolyn, all lienholders, and the Department of State of the public sale date of the vehicle. MCL 570.305(4). The notice must contain an itemized statement of the lien, a demand for payment, a statement regarding the rights of other lienholders, a statement of daily storage fees, and a statement of the date, time, manner, and place that the vehicle will be sold. It also must give Carolyn not less than 30 days after the postmark date of the notice to satisfy the lien. MCL 570.305(4)(b). The sale may not be held less than 75 days after the date placed on the certificate of foreclosure, MCL 570.305(5), and Carolyn may redeem the vehicle at any time before the sale by paying the amount of the lien plus Greg's reasonable expenses. MCL 570.305(7).

Because Laura's offer to purchase Carolyn's vehicle is wholly inconsistent with the procedures outlined in the Garage Keeper's Lien Act, Greg may not lawfully accept Laura's offer to purchase Carolyn's vehicle.

Additionally, although the common-law artisan's lien survives enactment of the Garage Keeper's Lien Act, *Nickell v Lambrecht*, 29 Mich App 191 (1970), a common-law lien only allows the lienholder to retain possession of the property, not to sell it. *Aldine Manufacturing Co v Phillips*, 118 Mich 162, 164 (1898). Thus, Greg may not sell the convertible under his common-law right of possession. Also, under the UCC and the common-law doctrines of conversion and breach of contract, a bailee who sells something entrusted under the bailment agreement is liable for damages.

## EXAMINERS' ANALYSIS OF QUESTION NO. 10

1. The Constitutionality of Sobriety Checkpoints under the U.S. Constitution: The Fourth Amendment to the United States Constitution is binding on the states under the Due Process provisions of the Fourteenth Amendment. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and further provides that "no Warrants shall issue, but upon probable cause." Thus, the Fourth Amendment prohibits unreasonable searches and seizures in the absence of a warrant issued upon a showing of probable cause. A recognized exception to the warrant requirement permits an automobile to be searched or seized where there is probable cause to believe that evidence of a crime will be found in a lawfully stopped vehicle or that the vehicle contains or is itself contraband. *Florida v White*, 526 US 559 (1999).

A vehicle stopped at a highway checkpoint is a "seizure" within the meaning of the Fourth Amendment. *US v Martinez-Fuerte*, 428 US 543 (1976). Under these facts, no warrant was issued authorizing the sobriety checkpoint and no probable cause existed to justify it. Because the Fourth Amendment protects against "unreasonable searches and seizures," the dispositive issue regarding the constitutionality of the sobriety checkpoint is whether the seizure is reasonable. *Michigan State Police v Sitz*, 496 US 444, 450 (1990). A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, and the court has "recognized only limited circumstances in which the usual rule does not apply." *City of Indianapolis v Edmond*, 531 US 32, 37 (2000).

*Sitz, supra*, was one of those "limited circumstances" permitting a warrantless seizure without individualized suspicion of wrongdoing. In *Sitz*, the court employed a three-part balancing test derived from *Brown v Texas*, 443 US 47 (1979). Applying the *Brown* factors in the context of the facts presented, the court balanced (1) the state's interest in preventing accidents caused by drunk drivers; (2) the degree to which the sobriety checkpoint advances the state's interest; and (3) the level of intrusion on an individual's privacy caused by the checkpoints.

Regarding the first factor, the Supreme Court observed that states have a "grave and legitimate" interest in curbing drunk

driving, as thousands of deaths and billions of dollars in property damage are caused by intoxicated drivers. *Sitz, supra* at 451. Regarding the second factor, the Supreme Court concluded that sobriety checkpoints advanced the state's interests in diminishing drunk driving. The question of whether sobriety checkpoints are sufficiently "effective" was not synonymous with the question of whether sobriety checkpoints advanced the state's interest. So long as the chosen method was a "reasonable alternative law enforcement technique[]," deference must be given to local "governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz, supra* at 454. The Supreme Court also concluded that the level of intrusion imposed upon motorists passing through the checkpoint was "slight" -- less than one minute. The Supreme Court emphasized that "the circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints, the motorist can see that other vehicles are being stopped, he can see visible signs of the Officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Sitz, supra* at 453, quoting *People v Ortiz*, 422 US 891, 894-895 (1975).

Pursuant to *Sitz*, plaintiffs are unlikely to prevail in their claim that sobriety checkpoints violate the Fourth Amendment of the United States Constitution.

**2. Constitutionality of the Checkpoints under the Michigan Constitution:** That sobriety checkpoints do not violate the Fourth Amendment to the United States Constitution does not determine whether sobriety checkpoints are permissible under the Michigan Constitution. The Michigan Constitution of 1963 contains a provision prohibiting unreasonable searches and seizures. Specifically, Const 1963, art 1, § 11 provides in pertinent part:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

While the provision is similar to the Fourth Amendment of the United States Constitution, it is not identical. When there is a clash of competing rights under the state and federal constitutions, the federal right prevails under the Supremacy Clause of the US Constitution. However, individual states are free to interpret their own constitutions as providing greater

protections than does the Federal Constitution. *California v Ramos*, 463 US 992 (1983); *California v Greenwood*, 486 US 35 (1988).

In *People v Collins*, 438 Mich 8, 25 (1991), the Michigan Supreme Court held that Const 1963, art 1, § 11 should "be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." A compelling reason exists where there is a "principled basis in this history of [Michigan] jurisprudence for the creation of new rights." *Sitz v Dep't of State*, 443 Mich 744 (1993). (*Sitz II*).

In *Sitz II*, the Michigan Supreme Court specifically considered the constitutionality of sobriety checkpoints and concluded there existed compelling reason to interpret Const 1963, art 1, § 11, as providing greater protection than the protection afforded under the Fourth Amendment to the United States Constitution. The Michigan Supreme Court reviewed several cases as well as the constitutional history of Michigan in holding that "the history of our jurisprudence conclusively demonstrates that, in the context of automobile seizures," Michigan's constitution "extended more expansive protection to our citizens than that extended" by the Fourth Amendment to the United States Constitution. Thus, the Michigan Supreme Court held that sobriety checkpoints violate Const 1963, art 1, § 11. *Sitz II*.

Pursuant to *Sitz II*, plaintiffs are likely to prevail in their claim that sobriety checkpoints violate the Michigan Constitution of 1963, art 1, § 11.

**EXAMINERS' ANALYSIS OF QUESTION NO. 11**

At common law, the offense of robbery was defined as "the felonious taking of money or goods of value from the person of another or in his presence, against his will, by violence or putting him in fear." *People v Covelesky*, 217 Mich 90, 96 (1921). To constitute robbery, it was essential that there be a "taking" from the person. Thus, common law robbery required a completed larceny. Armed robbery required the same showing with the additional element that the robber was armed with a dangerous weapon.

Applying these principles to the facts at hand, Ray-Ray could not be convicted of common law armed robbery because the completed larceny element is missing. The facts clearly state that the clerk was put in fear by Ray-Ray's use of the gun (a dangerous weapon) and his demand for money. However, the facts are equally clear that the cash register did not open, no money or goods were taken by Ray-Ray, and he left with no more property than he possessed on entry. While Ray-Ray may have attempted a larceny, such an attempt does not satisfy the common law element of a completed larceny. There being no larceny, there is no robbery, armed or otherwise.

The answer, however, under Michigan law would be different. In 2004, the Michigan robbery statutes were amended. In defining robbery, the amended statutes state in pertinent part that:

"(2) As used in this section, 'in the course of committing a larceny' includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." (emphasis added)

In *People v Williams*, 491 Mich 164 (2012), the Michigan Supreme Court upheld the Court of Appeals' determination that the statute's amendment relieved the obligation to prove a completed larceny as an element of robbery. Rather, the Court held, the language chosen by the legislature intended to remove that element.

"We hold that the Legislature demonstrated a clear intent to remove the element of a completed larceny, signaling a departure from Michigan's historical requirement and its common law underpinnings. Accordingly, an attempted robbery or attempted armed robbery with an incomplete larceny is now sufficient to sustain a conviction under the robbery or armed robbery statutes,

respectively."

Applying the above principles to the facts presented in the question warrants the conclusion that, as opposed to the common law, Ray-Ray could be convicted of armed robbery under Michigan law. The same clear facts are in play here: the fear of the clerk, the use of the gun, and the demand for money. The only remaining issue is whether Ray-Ray attempted a larceny. He clearly did so. He undertook an act with the intent to acquire money but fell short of doing so. In total, those circumstances amount to an "attempt." *Williams* at 173-177. Because a complete larceny is unnecessary to a robbery conviction, Michigan law supports Ray-Ray's conviction of armed robbery.

Michigan law also supports conviction of at least two other gun crimes. Because Ray-Ray concealed the gun on his person, he violated the Michigan concealed weapons statute, MCL 750.227(2). Ray-Ray's carrying and/or use of the gun in the armed robbery exposes him to conviction for possession of a firearm at the time of commission of another felony under MCL 750.227b. Finally, because a gun is a weapon, Ray-Ray could be convicted of crimes where a weapon is an element of any of those crimes, for example, assault with a dangerous weapon. Credit will also be given for other crimes involving guns.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Defense counsel should argue that, while search incident to arrest is one of the many exceptions to the warrant requirement, the facts do not support that exception. The purpose of the exception is to primarily prevent a person arrested from reaching for and/or having access to either (1) a weapon that might be used against an arresting officer, or (2) evidence the arrested person may wish to destroy. As a result, an officer may search incident to arrest, only the space within an arrestee's immediate control, meaning the area from within he might gain possession of a weapon or destructible evidence.

Applying these principles to the facts at hand, yields the argument that the search of Driver's vehicle and the resultant seizure of the drugs and gun should not be justified by the search incident to arrest exception to the warrant requirement. Counsel should argue (1) the Camaro was a number of feet from Driver, (2) Driver was in handcuffs, (3) Driver was in the backseat of a locked police car, and (4) Jones stood by the car in which Driver had been placed. These facts, counsel should argue, eliminate for all practical purposes any concern that Driver had access to an area (the backseat of the Camaro) from which he could obtain the drugs or gun, thereby undermining the purpose of the exception. The same argument could be made by Driver regarding Patty.

The judge should sustain Defendant's position. The salient facts and issues are largely indistinguishable from the United State Supreme Court's decision in *Arizona v Gant*, 556 US 332 (2009). *Gant* returned the focus of the search incident to arrest exception to the limitations articulated in *Chimel v California*, 395 US 752 (1969), and rejected the broadened view espoused in *New York v Belton*, 453 US 454 (1981). Because neither Driver nor Patty had any real access to their car, the search incident to arrest exception will not advance the People's position. *Gant* controls the court's decision.

*Gant* allowed the search incident to arrest exception to satisfy the Fourth Amendment's dictates in two scenarios: (1) where--as stated--the area searched is within the "reaching distance" of the arrestee for weapons or destructible evidence, and (2) where in the automobile context it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

Because neither justification applies, this exception is inapplicable. Driver and Patty no longer had access to the vehicle and the facts are silent as to what possible evidence of either speeding or driving without a license could reasonably be believed to be in the Camaro.

Because the stop of the vehicle and the arrest of Driver (and the detention of Patty) were valid, does not make the warrantless search valid. After all, the evidence seized does not flow from the stop or arrest of Driver, but rather from the search of his jacket in this car. Without justification for that search and seizure, the evidence must be suppressed.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

With respect to the first question, Michigan law permits a person to receive both old age social security benefits and weekly workers' compensation for the same periods of time. MCL 418.354(1). That is, the receipt of the social security benefits will not preclude receipt of weekly workers' compensation benefits. *Id.* See generally, *Franks v White Pine Copper Division*, 422 Mich 636 (1985). Melissa's receipt of the social security benefits from YMO will, however, have an effect on the amount of weekly workers' compensation benefits she might receive. Any weekly workers' compensation benefits will be coordinated with her social security benefits under MCL 418.354(1)(a). Specifically, any obligation of YMO to pay weekly compensation benefits will be reduced by fifty percent of the amount of old age social security benefits. MCL 418.354(1)(a).

The examinee is expected to know that receipt of old age social security benefits does not preclude Melissa from also receiving weekly workers' compensation benefits. She can receive both benefits. The examinee is also expected to know that there is, however, an offset between the two benefits.

With respect to the second question (which is given more weight in scoring than the first), Melissa's ability to continue working at available lesser paying supervisory jobs will have an effect on any claim for weekly wage loss benefits. MCL 418.3091(4)(a) and (8). It will mean that any disability is, at most, partial; she will therefore be limited to, at most, partial disability benefits. "A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training." MCL 418.301(4)(A). See also, MCL 418.301(4)(b) and MCL 418.301(9); *Lofton v Autozone, Inc*, 482 Mich 1005 (2008). And, the term "wage earning capacity" means "the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned." MCL 418.301(4)(b). The facts say that Melissa retains the ability to earn, at least, the lesser wages payable at available non-typing supervisory positions in her locale. If Melissa showed interest in procuring such work and had made an unsuccessful good faith effort to obtain such work, then she would be entitled to total disability benefits because: "a partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits . . .

as if totally disabled." MCL 418.301(8).

The examinee is not expected to, but may undertake a more extensive analysis of "disability" and "wage loss" requirements under Michigan workers' compensation law. MCL 418.301(4)-(7); see also, *Stokes v Chrysler LLC*, 481 Mich 266 (2008) and *Sington v Chrysler Corp*, 467 Mich 144 (2002) [regarding "disability"] and *Sington and Lofton*, both *supra*; *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1 (2008) [regarding "wage loss"]. As part of any such discussion of whether there is any "disability" at all, the examinee might point out that Melissa may not be entitled to any weekly benefits unless she is prepared to demonstrate that all maximum paying jobs suitable to her qualifications and training--taking into consideration her transferrable skills--are now foreclosed by her carpal tunnel syndrome. *Stokes, supra*; MCL 418.301(4)(a) (second sentence) ["A limitation of wage earning capacity occurs only if a personal injury covered under this act results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills."]. Melissa's inability to do her job at YMO does not necessarily mean she is "disabled." *Stokes* and *Sington, supra*. And finally, in discussing the "wage loss" requirement, an examinee may discuss whether Melissa's decision to separate from her employment precludes Melissa from receiving any weekly wage loss on the basis that she chose to exit the labor force by leaving YMO. *Sington* and *Romero, supra*. The examination question is deliberately designed, however, to not solicit exploration of this subject matter, as opposed to the partial disability question. But, recognition of these contextual and latent issues should not be penalized but considered favorably.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

This factual scenario implicates Article 9 of the Uniform Commercial Code, which applies to all transactions that create a security interest in personal property. MCL 440.9109(1)(a). The restaurant equipment identified in the question, including the stand-mixer, are "goods" identified in the personal property categories. MCL 440.9102(1)(rr).

With respect to the relative interests of the parties, examinees might imply from the facts that K Co has a purchase money security interest. The general rule is that a perfected purchase money security interest has priority over a conflicting security interest in the same goods. MCL 440.9324(1). However, this rule would not apply here because any purchase money security interest held by K Co was unperfected. By contrast, the security interest of F Co was perfected. The applicable rule would give F Co priority as a perfected security interest over K Co. MCL 440.9322(1). More specifically, K Co may be considered to have a purchase money security interest because the value given to X enabled him to acquire the stand-mixer and he in fact so used the value given for that purchase. MCL 440.9103. The facts of the question do not suggest the stand-mixer can be characterized as a "consumer good" so as to result in automatic perfection of K Co's interest. And, the facts do not indicate that K Co filed a financing statement or otherwise perfected its security interest. Therefore, any purchase money security interest in the stand-mixer held by K Co is unperfected. On the other hand, the facts state that F Co properly filed a Financing Statement so as to perfect its security interest. MCL 440.9302.

An examinee might also conclude that F Co's interest is paramount on the basis that F Co does not have a security interest in the stand-mixer at all and merely has an unsecured extension of credit.

Besides demanding payment, after Xavier defaulted on his obligations, F Co had the statutory right under Article 9 to repossess the collateral pursuant to judicial process or via self help so long as they do not breach the peace. MCL 440.9609. Conflicting rights to possession are determined by Article 9's priority rules. MCL 440.9609, comment 5. Because F Co had priority under those rules as explained above, the right of repossession is in F Co. Once F Co repossesses the stand-mixer, F Co may then sell or otherwise dispose of it in a commercially

reasonable manner and apply the proceeds to the satisfaction of its obligations and any subordinate security interests such as K Co. MCL 440.9610; 440.9615.

Besides discussing the primary issues above, the examinee could be awarded points for also explaining that the security agreements reasonably identify the collateral in which a security interest is being claimed and are authenticated by Xavier. MCL 440.9108(1). The examinee may also be awarded points for discussing attachment, i.e., both K Co's and F Co's security interests properly attached because value was given, Xavier had rights in the collateral, and Xavier authenticated the security agreements that reasonably identified the collateral. MCL 440.9203(1) and (2). Attachment is a prerequisite to perfection (MCL 440.90302[1]); however, for purposes of discussing perfection and priority as is the call of the question, attachment may be assumed.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

With respect to modifying the custody status of Tim, there must be a preliminary determination of whether there is proper cause or changed circumstances to modify a custody order. MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152 (2009). To meet this preliminary determination, the moving party must establish an appropriate ground by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003). An "appropriate ground" should include consideration of at least one of the "best interests of the child" factors and must concern matters having a significant effect on the child's life. MCL 722.23; *Mitchell v Mitchell*, 296 Mich App 513 (2012). Only after a moving party establishes proper cause or change of circumstance does the court review the statutory best interest factors with an eye to possibly modifying a prior custody order. *Id.* MCL 722.27(1)(c).

The twelve best interests of the child factors are set out in MCL 722.23(a)-(1):

"(a) The love, affection, and other emotional ties existing between the parties involved and the child.

"(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

"(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

"(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

"(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

"(f) The moral fitness of the parties involved.

"(g) The mental and physical health of the parties involved.

"(h) The home, school, and community record of the child.

"(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

"(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

"(k) Domestic violence, regardless of whether the violence was

directed against or witnessed by the child.

"(1) Any other factor considered by the court to be relevant to a particular child custody dispute."

The courts may not modify custody from an established custodial environment unless there is clear and convincing evidence that a modification is in the best interest of the child. MCL 722.27(1)(c), *Mitchell and Parent, supra*.

The examinee should display some familiarity with this type of inquiry in judging Jack's claim for custody after the end of the Christmas vacation. Jack will likely have difficulty in proving by a preponderance of the evidence an appropriate ground to justify the court taking action and, even more so, proffering clear and convincing evidence that a change in the established custodial environment (established over a lengthy period of time) would be in Tim's best interest. Merely having more time to spend with Tim would not meet these criteria, particularly because Diane has been able to manage working and caring for Tim in the past. The fact that Jack's injury is temporary (with recovery anticipated in the middle of next year) also weighs against his custody claim. If Jack were successful with his claim, it would appear the custody issue would need to be revisited again in a short time when Jack resumes work. Frequent custody changes are not favored.

With respect to Diane's claim for physical custody during the Christmas vacation and permanently thereafter, Diane's claim would similarly appear unconvincing. Jack's health as a result of his injury is a best interest factor to be considered, but given Tim's age and ability to care for himself and the fact Jack is not entirely incapacitated, it would not appear to have a significant effect on Tim's life and, even more so, not amount to clear and convincing evidence that any change in the custody order is in Tim's best interest. Jack's foregoing of the benefits raises the question of his ability to provide Tim with food and other material needs, which are best interest factors, but the Christmas holiday is not that long and there is no suggestion Jack is destitute. Also, Jack is scheduled to return to work by the following summer when he again assumes custody of Tim. Therefore, this factor would not warrant a change in the custody.

Therefore, neither Jack nor Diane is likely to prevail on their requests to change the current custody arrangement.

With respect to Jack's request for child support over the Christmas vacation and afterwards (if he were successful with his current custody claim), he would not likely be successful either. Also, even if custody is changed, he appears to be voluntarily

foregoing the monies that are afforded him via workers' compensation, disability insurance, and/or unemployment benefits, and that money may be imputed to him. See *Clarke v Clarke*, 297 Mich App 172 (2012), and Michigan Child Support Enforcement Manual § 2.01. Jack's concern about retaliation for seeking workers' compensation benefits should be ameliorated by the anti-retaliation provision in the workers' compensation statute, MCL 418.301(13). An examinee may discuss Jack's reasoning for deferring receipt of such money (unwillingness to possibly offend the employer) but ought to conclude that this is an insufficient reason so as to require child support. Contrast, *Clark, supra*. In a sense, Jack is voluntarily reducing his income and correspondingly requesting Diane to supplement it over the Christmas vacation--and if Jack's additional custody request was granted--until he returns to work in the middle of the next calendar year. Also, the divorce judgment provided that child support was not allowed unless there was a significant departure from the custody schedule. Jack was already scheduled to have physical custody of Tim over Christmas vacation so there cannot be said to have been a significant departure from the custody schedule, and thus there is no basis for Jack to receive child support for that period if there is no change in custody. If Jack were successful with his custody claim, he would have a stronger child support argument; but, overall Jack's child support argument is unlikely to be successful. The ultimate conclusion here is less important than the quality of the examinee's analysis.