JULY 2016 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

The question requires the applicant to discuss two main issues: (1) whether Paula can establish liability against Dave Defendant for noneconomic damages resulting from her temporary injuries and her scar, and (2) whether a judge or jury should decide these issues.

MCL 500.3135(1) & (2) provide in part as follows:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
> (a) The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is

> created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.
>
> * * *

I. Who Decides?

As the above statute makes clear, if there is no factual dispute concerning the nature and extent of Paula's injuries, or there is a factual dispute about them but the dispute is not material to the threshold injury issues, then a court must decide these issues. *McCormick v Carrier,* 487 Mich 180, 215-216 (2010). Consequently, the applicant must discuss whether there are any factual disputes about the nature and extent of Paula's injuries, and the reasonable conclusion is that there is no material factual dispute. The question contains no suggestion of differing evidence or facts about the nature and extent of the injuries, leaving just the application of those facts to the statutory criteria, i.e., a question of law for the court. As to the scar, the undisputed facts show that Paula had an eight inch scar that is still visible, even through makeup. Therefore, whether Paula's scar constituted a "permanent serious disfigurement," is also a question of law to be decided by the court.

II. The

Injuries A. Serious Impairment:

In *McCormick,* 487 Mich at 215-216, the Michigan Supreme Court summarized the applicable steps and standards for deciding whether an individual has suffered a serious impairment of body function:

> If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establiSh a "serious impairment of body function": (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects

> the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living).
>
> The serious impairment analysis is inherently fact--and circumstance--specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, "[t]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect." *Kreiner*, 471 Mich at 145 (CAVANAGH, J., *dissenting*). As such, the analysis does not "lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors," particularly where there is no basis in the statute for such factors. *Id.* Accordingly, because "[t]he Legislature avoided drawing lines in the sand ... so must we." *Id.*

A good answer will examine the three factors outlined in *McCormick*, and conclude that the broken leg and fractured hip constituted serious impairments of body function. Specifically, a broken leg and fractured hip are **objectively manifested impairments**, as they are both readily observable by the naked eye or through x-ray and other medical exams. A leg and hip are also **important body functions**, as they allow one to walk and be mobile for everyday activities. *Kern* v *Blethen-Coluni*, 240 Mich App 333, 343 (2000).

Finally, most of the analysis will be on whether these objectively manifested impairments of important body functions affects Paula's **general ability to lead a normal life.** The facts tell us that before her injuries, Paula lived an active life, both in and out of work. She was a RN, walking many miles during each shift. She frequently worked overtime, which necessitated more walking (and more income). She also was active in both summer and winter sports that required healthy legs and hips, and she also took care of her elderly parents and would occasionally babysit her grandchildren. This all came to an end after the accident. Paula was off work for over nine months, and when she returned, she could no longer perform her regular RN duties. She only returned to her normal RN duties just shy of two years after the accident. Additionally, although she resumed caring for her parents and grandchildren when she first returned to work, she was prohibited from playing golf or tennis until she was fully recovered, which was in the

summer of 2016. Under these facts, it is reasonable to conclude that Paula suffered a serious impairment of important body function.

Some may question that conclusion on the ground that the impairments lasted less than two years, and Paula returned to work (though not to her prior work) and caring for her parents and grandchildren after only nine months. But as the *McCormick* Court noted, the issue is how the impairments affected the person's life, and even temporary impairments could have a serious impact on one's general ability to lead a normal life. See also *Williams v Medukas,* 266 Mich App 505, 508 (2005). For this reason, it is important that the issue of temporary impairment be raised, but it is most reasonable to reject that factor as precluding relief.

B. Permanent serious disfigurement:

Paula's scar raises different standards. As for her scar, Michigan law provides that determining the "seriousness" of a scar is a matter of common knowledge and experience for the courts unless there is a question regarding the nature and extent of the scar. MCL 500.3135(2)(a); *Kern v Blethen-Coluni,* 240 Mich App 333, 338 (2000); *Nelson v Myers,* 146 Mich App 444, 446 (1985). As previously noted, there is no question regarding the nature and extent of the scar.

The seriousness of a scar "depends on its physical characteristics rather than its effect on [al plaintiff's ability to live a normal life." Myers, 146 Mich App at 446. The undisputed evidence reveals that Paula was embarrassed by the unusually long scar, that it was clearly visible on her forehead, and that it could not be covered up by makeup. People would even stare at the scar. There was also no suggestion that plastic surgery would be considered, or would even work. Given the scar's location and discoloration, it is reasonable to conclude that the scar was a permanent serious disfigurement.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

An "agency" is "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Logan v Manpower of Lansing, Inc,* 304 Mich App 550, 559 (2014), quoting *Breighner v Mich High Sch Athletic Assoc, Inc,* 255 Mich App 567, 582-583 (2003). Here, at a minimum, an express agency relationship was created by the contract between Reston (the principal) and Dennis (the agent) for the purpose of redecorating Reston's master bedroom and bathroom.

(1) **Reston's liability to Greg's Granite** - Reston will be required to pay Greg's Granite under a theory of agency by estoppel (ostensible agency).

Generally, a principal is not liable for the acts of an agent that occurred prior to the commencement of the agency. *Polly v Charouhis,* 253 Mich 363, 366 (1931). However, under the facts presented, the doctrine of agency by estoppel (ostensible agency) would apply. An agency is ostensible when the principal causes a third person to believe another to be his or her agent where no agency actually exists. *VanStelle v Macaskill,* 255 Mich App 1 (2003). "[T]hree elements . . . are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence." *Id.* at 10, quoting *Chapa v St Mary's Hosp of Saginaw,* 192 Mich App, 29, 33-34 (1991).

Regarding ostensible agency, it is clear that Greg's belief that Dennis was Reston's agent was based on *Reston's action* - the facts indicate that Reston called Greg, discussed the granite he desired and indicated that his interior decorator would follow up. When Dennis arrived and identified himself as Reston's interior decorator, Greg placed the order believing Dennis was who he said he was. The facts presented do not indicate that Greg's belief was anything other than reasonable.

Therefore, Reston will be liable to Greg under a theory of agency by estoppel (ostensible agency).

(2) **Reston's liability to Cal Carpenter -** Reston will be liable to Cal Carpenter under a theory of implied authority. "Actual authority may be either express or implied." *Afar v Mercy Mem Hosp,* 208 Mich App 518, 528 (1995). "Implied authority is the authority that an agent believes the agent possesses." *Id.* An agent's implied powers are coextensive with the business entrusted to his or her care, *Grossman v Langer,* 269 Mich 506, 510 (1934), and agents have the implied power to carry out all acts necessary to executing the principal's expressly conferred authority. *Smith, Hinchman & Grylls Associates, Inc v City of Riverview,* 55 Mich App 703, 706 (1974). See also Restatement (3d) of Agency, § 2.02(1) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.")

In permitting Dennis to undertake a "complete redecoration of Reston's master bedroom and bathroom," Dennis possessed the implied authority to take all actions necessary to accomplishing that goal, including procuring Cal Carpenter to take care of the carpentry needs of the project. Reston will be liable to Cal Carpenter.

An applicant can also reasonably argue that Reston is liable to both Greg and Cal through ratification. The Michigan Supreme Court, in *David v. Serges,* 373 Mich 442, 443-444 (1964), discussed ratification as follows:

> When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it. The Restatement of Agency 2d, § 82, defines ratification thusly:
>
> Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Affirmance is defined in section 83 of the Restatement:

> Affirmance is either
> (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
>
> (b) conduct by him justifiable only if there were such an election.

Here, because Reston accepted the work done by Cal and Greg at his agent's behest, it is reasonable to conclude that Reston ratified the acts of his agent. Thus, he could be liable on this ground as well.

(3) **Reston's liability to Pete Painter** - "A principal is generally liable for the torts of his agent committed in the scope of the agency." *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 109 (1998), citing *McLean v Wolverine Moving & Storage Co*, 187 Mich App 393, 400 (1991). Under these facts, it is unlikely that Reston will be liable to Pete for his injuries because Dennis's assault was not committed within the scope of the agency. The facts indicate that the assault occurred after hours, not on Reston's premises, and arose because of a dispute that had nothing to do with the redecoration project. Because the assault cannot be properly viewed as being in furtherance of the principal's business, Reston will not be liable to Pete Painter for injuries sustained as a result of Dennis's assault. *Cf. Cronk v Chevrolet Local Union No. 659*, 32 Mich App 394, 401402 (1971).

EXAMINERS' ANALYSIS OF QUESTION NO. 3

The examinee should recognize that, rather than a matter of substantive evidentiary proof, the fact that Perry and his lawyer knew, or should have known, they would bring a negligence claim against Dolen for failure to properly maintain the tires on his vehicle, yet failed to take any steps to notify Dolen of the need to preserve or inspect the tires, may create a spoliation of evidence issue for the court to grapple with.

I. Spoliation and the Preservation Duty

Initially, because this is a negligence case, the examinee can receive credit for recognizing the elements of a negligence claim. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co,* 489 Mich 157, 162; 809 NW2d 553 (2011). Likewise, because the procedural context is a motion to dismiss, the examinee should set forth the governing standards for such a motion. The general summary disposition rules of MCR 2.116 do not apply to dismissals as a sanction, Brenner v *Kolk,* 226 Mich App 149, 155; 573 NW2d 65 (1998), so the test to apply is simply whether the sanction was warranted under the facts and law.

Turning to the issue raised by the call, the examinee should recognize (1) the general rule that a party should not destroy evidence it knows to be relevant (or reasonably should), (2) that, because of the preservation duty, a failure to preserve crucial evidence can constitute spoliation even if the spoliation results from simple negligence rather than a deliberate act, and (3) that the preservation duty extends even to a party who is not in possession of the evidence at issue. The examinee should also recognize that the trial court's authority to sanction parties for spoliation is derived from the trial court's inherent powers.

"A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is

commenced." *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211 (2002). "[S]poliation may occur by the failure to preserve crucial evidence, even though the evidence was not technically lost or destroyed." *Id.* at 212. "Furthermore, regardless of whether evidence is lost as the result of a deliberate act or simple negligence, the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence even when no discovery order has been violated." *Brenner v Kolk*, 226 Mich App 149, 160 (1997). "Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action." *Id.* at 162. A party who is not in possession of the evidence, but is aware that the evidence is crucial to imminent litigation, has a duty to notify the party in possession of such evidence that it must be preserved or inspected before being discarded or destroyed. *Id.* ("At a minimum, plaintiff should have given defendants notice that they should preserve or inspect the tires and seat belt because she was contemplating a lawsuit.").

Here, at the time the vehicle was scrapped, Perry was aware that there would be a later lawsuit. Perry also was, or should have been, aware that the vehicle, and its tires, would be crucial evidence. Nevertheless, Perry failed to inform Dolen or Dolen's insurance company that they should preserve or inspect the vehicle, particularly its tires. Thus, the examinee should conclude that, because Perry failed to abide by his duty to notify Dolen regarding the potential for spoliation, Perry may be subject to sanctions.

The examinee may receive extra points by recognizing that, while Dolen's insurer, as a sophisticated participant in our courts of law, may have recognized the potential for Perry to consult a lawyer or subsequently bring a lawsuit alleging negligence by Dolen, it had no duty, statutory or in common law, to preserve the vehicle and its tires in anticipation of litigation, and under the facts here, made no promise to maintain the vehicle, and had no special relationship that would warrant the imposition of a duty to preserve the evidence. *Teel v Merideth*, 284 Mich App 660, 672-673 (2009). Thus, while Dolen through his insurer may have had the opportunity to preserve the vehicle and its tires in light of the potential for litigation, Dolen had no such duty and therefore, faces no sanctions for failing to do so.

II. Proper Sanction

The examinee should recognize that the appropriate sanction for spoliation falls within the sound discretion of the trial court. See *Bloemendaal,* 255 Mich App at 212, 214; see also *Citizens Ins Co of America v Juno Lighting, Inc,* 247 Mich App 236, 242 (2001) ("A trial court's imposition of sanctions for failure to preserve evidence will be reversed only upon a finding that there has been a clear abuse of discretion.") (quotation marks and citation omitted). The examinee should further recognize that "a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." See *Bloemendaal,* 255 Mich App at 212.

The examinee should note that, although dismissal is an appropriate sanction in certain instances, see, e.g., *id.* at 215, "[d]ismissal is a drastic step that should be taken cautiously," *Brenner,* 226 Mich App at 163. "Before imposing the sanction of dismissal, the trial court must carefully evaluate all available options on the record and conclude that dismissal is just and proper," and the trial court should consider whether a "lesser appropriate sanction" would suffice, such as "the exclusion of evidence that unfairly prejudices the other party or an instruction that the jury may draw an inference adverse to the culpable party from the absence of the evidence." *Bloemendaal,* 255 Mich App at 212, 214 (internal citation omitted). The focus of the sanction inquiry should be what steps, if any, are necessary to avoid unfair prejudice to one party arising out of spoliation caused by another party. *Brenner,* 226 Mich App at 163-164.

The examinee should recognize that, given the discretionary nature of the sanction remedy, the trial court might reasonably reach a number of different conclusions. Factors in favor of dismissal would include that Perry and his lawyer knew their theory of proximate cause was the bald tires, and it would have been very simple to preserve the tires and avoid having them scrapped by making a request to Dolen or his insurer to preserve the tires. But, despite the ease with which the request could have been made, no request was made despite the knowledge there would be a later lawsuit.

On the other hand, an examinee could argue that, although Dolen's insurer had no *duty* to preserve evidence, see Teel, *supra,* 284 Mich App at 672-673, nevertheless, Dolen's insurer had access to the vehicle for two months, and had more than ample opportunity to take pictures or otherwise anticipate that, because there had been an automobile accident, Perry would have at a minimum submitted claims for medical bills, and possibly brought a claim of some kind against Dolen as the owner of the vehicle. Thus, while it would not be appropriate to sanction Dolen for failing to preserve evidence, it may be appropriate not to dismiss Perry's action against Dolen due to Perry's failure to preserve evidence because Dolen's insurer had the opportunity to take some action to preserve the evidence or at least take pictures and keep a record of the condition of the vehicle. The examinee might also recognize that, in Dolen's defense, there are multiple possible theories of liability that may be pursued following any automobile accident, and it would be unreasonable to expect the insurer to try to anticipate each cause of action that could be pursued and investigate each possible defense without some kind of notice from the putative plaintiff as to a theory of a cause of action.

So long as the examinee recognizes the appropriate legal framework, and analyzes the question within that framework, the examinee's ultimate conclusion regarding the spoliation sanction is largely immaterial. The examinee may rationally conclude that (1) no sanction is necessary or appropriate, because both parties had the opportunity to avoid spoliation, (2) dismissal of Perry's suit is appropriate, despite the fact that it is a "drastic" measure, because Perry failed to timely notify Dolen of the imminent litigation and the fact that the tires would be crucial evidence, (3) some less drastic measure is appropriate in favor of either party (such as the exclusion of other evidence regarding whether the tires were bald), or (4) Dolen's motion should be denied because it was improperly framed as a motion for summary disposition rather than a motion for spoliation sanctions.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

(1) Is Katy entitled to a refund?

Katy contends that she is entitled to a refund based on the DDR representative's statement to her prior to signing the contract. The parol evidence rule precludes consideration of this statement.

"[T]he prerequisite to the application of the parol evidence rule" is "that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enters v All State Indus*, 407 Mich 407, 410 (1979) (footnote omitted); *see also Hamade v Sunoco, Inc*, 271 Mich App 145, 167 (2006). DDR's contract explicitly states that it "constitutes the entire agreement between the parties." "Where the parties have included an express integration or merger clause within the agreement, it is conclusive . . . ." *Id.* at 169 (quotation marks omitted). Consequently, the parol evidence rule applies to the contract.

Under the rule, "[p]arol 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, 480 (2013) (quotation marks omitted). Instead, "if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning." *Zahn v Kroger Co*, 483 Mich 34, 41 (2009). *See also Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 210 (1974) ("'Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express.'" (quoting Restatement of Contracts § 242)); *Universal Underwriters Ins Co v. Kneeland*, 464 Mich 491, 496 (2001) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement.").

The guarantee provision in DDR's contract unambiguously provides the remedy if a student's score does not improve: "student may repeat the course for free." An agreement allowing a student to receive a refund instead or in addition would "contradict or vary" this contract, which explicitly states that

it "constitutes the entire agreement between the parties." Consequently, parol evidence of such an agreement is inadmissible, and Katy is not entitled to a refund.

(2) Is Katy entitled to repeat the course for free?

This question raises two issues: the effect of Katy's failure to pay the full tuition, and the question of whether Katy's score "improved."

1. Katy's failure to pay the full tuition.

Breach Analysis:

"[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital* Mgmt *v Rentenbach,* 287 Mich App 589, 613 (2010) (quotation marks omitted); *see also Able Demolition, Inc v City of Pontiac,* 275 Mich App 577, 585 (2007). "However, the rule only applies if the initial breach was substantial." *Id.*

"There is no single touchstone" for determining whether an initial breach was substantial; "[m]any factors are involved." *Walker & Co v Harrison,* 347 Mich 630, 635 (1957). These factors are:

> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
> (e) The willful, negligent or innocent behavior of the party failing to perform;
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Id. (citing Restatement (First) of Contracts § 275). Courts have emphasized the first factor: whether the nonbreaching party obtained the benefit she reasonably expected to receive;

see Able, 275 Mich App at 285; *Omnicom of Mich v Gianetti Inv Co*, 221 Mich App 341, 348 (1997).

Applying these factors, one should conclude that Katy's failure to make the final tuition payment was not a substantial breach. As the nonbreaching party, DDR obtained "the substantial benefit which [it] could have reasonably anticipated" under the contract—$975 of the $1,000 owed by Katy—and it "may be adequately compensated in damages for lack of complete performance" by recovering the remaining $25. Katy has performed almost fully by paying $975; being denied the opportunity to repeat the course for free would presumably impose a significant hardship on her; her failure to make the last payment was not willful or negligent, since she mailed the payment but it was lost in the mail and she was unaware of this fact; and the court could ensure her performance of the remainder of her contractual obligations by ordering her to pay DDR $25.

Because Katy's breach was not substantial, it would not preclude her from bringing an action for breach of contract against DDR, and it would not relieve DDR of its obligations under the contract. Assuming Katy's score did not "improve" (discussed below), DDR must allow Katy to repeat the course for free.

Condition Analysis:

Alternatively, the contract language "To qualify for this guarantee, student must have paid the full $1,000 tuition by the last class" can be interpreted as a condition precedent to DDR's obligation to perform. "Whether a provision in a contract is a condition . . . depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." *Knox v Knox*, 337 Mich 109, 118 (1953) (citations omitted) . One can reasonably argue that the guarantee clause was intended to be a condition.

"If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Id.* If strictly applied, this would indicate that Katy's failure to pay the last $25 means her right to enforce DDR's guarantee "does not come into existence."

However, Section 229 of the Restatement (Second) of Contracts provides: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *See Wade v Merchants Bonding Co & Quicken Loans,* 392 B.R. 302 (ED Mich. 2008) (citing § 229). This supports an argument that Katy's failure to pay the last $25 should be excused. Because Katy paid $975 out of $1,000 owed, she would suffer a disproportionate forfeiture if the condition were strictly enforced. In addition, the remaining $25 Katy owes is likely not "a material part of the agreed exchange" (and she is clearly willing to pay it).

Moreover, by failing to notify Katy of the missing payment, DDR may have waived its right to enforce the condition. "Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event . . . and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability." *Mehling v Evening News Ass'n,* 374 Mich 349, 352 (1965) (quotation marks omitted). If DDR's failure to notify Katy of the missing payment prevented her from fulfilling the condition, then DDR waived its right to enforce the condition. *See id.* ("[T]he performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself * * * waives the performance." (quotation marks omitted)). Assuming Katy's score did not "improve" (discussed below), DDR should allow Katy to repeat the course for free.

2. *Did Katy's score "improve"?*

"A contract is ambiguous if its provisions may reasonably be understood in different ways." *Universal Underwriters Ins Co v. Kneeland,* 464 Mich 491, 496 (2001); *see also Raska v Farm* Bureau *Mut Ins Co,* 412 Mich 355, 362 (1982). "[I]f a contract . . . fairly admits of but one interpretation it may not be said to be ambiguous," id., and a court "will not create ambiguity where none exists," *Smith v Physicians Health Plan,* 444 Mich 743, 759 (1994).

Because the contract does not define "improve" and the parties reasonably have different understandings about what it

means, the term *is* ambiguous. Parol evidence is therefore admissible to interpret it. "The law is clear that where the language of the contract is ambiguous, the court can look to . . . extrinsic evidence." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470 (2003) (quotation marks omitted). "[A] written instrument is open to explanation by parol or extrinsic evidence . . . where the language employed is vague, uncertain, . . . or ambiguous, and where the words of the contract must be applied to facts ascertainable only by extrinsic evidence, a resort to such evidence is necessarily permitted." *Id.* (quotation marks omitted). In such a case, "[l]ooking at relevant extrinsic evidence . . . does not violate the parol evidence rule." *Id.* *See also Goodwin*, 392 Mich at 205, 209-10. Extrinsic evidence regarding Katy's and DDR's understanding of the meaning of "improve" is consequently admissible.

However, the parol evidence here does not resolve the ambiguity because both parties' interpretations were reasonable. In such circumstances, "it is . . . well established that ambiguous language should be construed against the drafter . . ." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62 (2003). *See also Klapp*, 468 Mich at 472 ("[I]f the language of a contract is ambiguous, and the [factfinder] remains unable to determine what the parties intended after considering all relevant extrinsic evidence, the [factfinder] should . . . find in favor of the nondrafter . . . ."). Under this rule, the term "improve" should be construed against DDR, the drafter of the contract. A court should therefore find that Katy's score did not "improve" and she is entitled to repeat the course for free.

(3) Is Katy's duress argument valid?

"Duress exists when one by the unlawful act of another is induced to make a contract . . . under circumstances which deprive him of the exercise of free will." *Lafayette Dramatic Prods, Inc v Ferentz*, 305 Mich 193, 216 (1943) (quotation marks omitted). "To succeed with respect to a claim of duress, they defendants must establish that were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Allard v Allard*, 308 Mich 551 App 536, (2014) (brackets and quotation marks omitted).

There is no indication that DDR acted unlawfully, deprived Katy "of the exercise of free will" or threatened "serious

injury" to her "person[], reputation[], or fOrtune[]." Katy's duress argument will fail.

EXAMINERS' ANALYSIS OF **QUESTION NO. 5**

Michigan Rule of Professional Conduct 8.3 deals with reporting professional misconduct and provides, in part, 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 that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission. [MRPC 8.3(a).]

The rule also provides that it "does not require disclosure of . . . information otherwise protected by Rule 1.6." MRPC 8.3(c)(1).

MRPC 1.6 provides:

> (a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
> (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
> (1) reveal a confidence or secret of a client;
> (2) use a confidence or secret of a client to the disadvantage of the client; or
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
> (c) A lawyer may reveal:
> (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
> (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
> (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

(1) Potential False Notarization Issue: Because the notary was required to witness the signature of the affiant signing the affidavit in person, a lawyer who directs or encourages a notary to notarize a document and represent that the affiant appeared before the notary when that is not true may be in violation of rules prohibiting dishonest conduct and conduct prejudicial to the administration of justice. See *Grievance Administrator v David S. Steingold,* 02-60-GA (ADB Hearing Panel 2002).

Several elements require analysis in deciding whether a lawyer is obligated to report misconduct under MRPC 8.3. First, the lawyer must have "knowledge" that another lawyer has committed a violation of the Rules of Professional Conduct. The Terminology section of the Preamble to Michigan's Rules states: "'Knowingly,"known, or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The question provides no information with respect to what actual knowledge Lawrence possesses. It does, however, state that he "suspects" that the affidavits were improperly notarized. Therefore, the "knowledge" element of the duty to report is likely missing.

Next, the violation must be significant. There is no indication here that the affiant's statements in the body of the affidavit were untrue or that any other fraudulent conduct was being committed or aided by opposing counsel. If dishonesty is involved, it may be the knowing encouragement by, or direction of, opposing counsel to have his assistant help "cut corners" and falsely attest that the affiant appeared before the notary. There is also the possibility that opposing counsel was simply careless and engaging in a poor practice. Encouraging false notarization has not always resulted in the attorney being found to have committed a violation of MCR 8.4(b) (dishonest conduct).

See, e.g., *Grievance Administrator v Bowman,* 462 Mich 582 (2000). On the other hand, the facts could lend themselves to an interpretation that opposing counsel knowingly directed his employee to swear falsely and commit a violation of notarial law.

Also, the misconduct by the other lawyer must raise "a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." In this hypothetical, and perhaps in all instances, this element overlaps with the previous one. The comment to Rule 8.3 notes that: "The term `substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." The discussion of this element may mirror the discussion of the previous one, but it should focus primarily on the fitness of opposing counsel. Again, the violation could be a serious one, or it could be one which, under the circumstances, does not warrant the heaviest of sanctions. For example, in *Steingold, supra,* the respondent was reprimanded. In *Bowman, supra,* an order of "no discipline" was imposed.

Finally, no matter how the foregoing elements are resolved, the client may veto the reporting. "A report about misconduct is not required where it would involve violation of Rule 1.6." MRPC Rule 8.3, Comment. The client, Greg, has requested that Lawrence not "tell anyone" so that the client's settlement objectives would not be interfered with. Thus, Greg has requested that the information (or suspected information) Lawrence possesses be "held inviolate" and has indicated that its disclosure would likely be detrimental to the client. It is, therefore, a "secret" as defined in MRPC 1.6(a). On these facts, it does not appear that any exceptions to MRPC 1.6 are applicable. Accordingly, Lawrence may not report opposing counsel's conduct to the AGC. See Michigan Ethics Opinion RI-314 (October 19, 1999).

(2) *Partner's Misappropriation.* The analysis of this part of the question is much more straightforward. Conversion of client funds meets all of the threshold criteria: Lawrence *knows* of the violation (his partner admitted it), *seriousness* of the violation (conversion is obviously serious), and the act is a *substantial reflection* on the partner's trustworthiness, honesty and fitness. Disbarment is the generally appropriate sanction for conversion and will be imposed absent "compelling mitigation," which has not been found even in instances of full restitution *Grievance Administrator v Frederick A. Petz,* 99-102-GA (ADB 2001) (balancing aggravating factor of dishonesty

against mitigating factors including repayment of funds). Accordingly, restitution does not eliminate or minimize much of the seriousness of the violation and the substantial reflection it has upon trustworthiness and honesty. Finally, the question mentions nothing which would implicate MRPC 1.6. Lawrence must report his partner's misconduct. See *Grievance Administrator v Ronald W. Crenshaw,* 97-43-GA (Hearing Panel Report 9/15/1997).

(3) *Andy's Drunk Driving* Matter. This may prove to be a more difficult question. Many writers may analyze this question under MRPC 8.3, touching on the same elements of the rule addressed in parts one and two of the question. However, in terms of getting the right result, these are all red herrings, and more points should be awarded for an answer recognizing that the dispositive rule is MCR 9.120(A)(1), which provides that:

> When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

Some answers may recognize the important principle reflected in the comment to Rule 8.3, which states, in part, that:

> The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

The comment does not directly apply because Lawrence is representing Andy in a criminal proceeding, not one in which Andy's "professional conduct is in question." (However, a criminal conviction may give rise to a disciplinary action.) The essence of the comment, is that "the rules applicable to the client-lawyer relationship," such as MRPC 1.6, ordinarily preclude the disclosure of confidences and secrets, and some credit may be appropriate for a good discussion of this principle. However, MCR 9.120(A)(1) trumps MRPC 8.3's deference to MRPC 1.6. Therefore, Andy's preference that his conviction not be reported is, like the other elements of MRPC 8.3, not relevant to the correct answer. Given that parts one and two of the question provided an opportunity to discuss the elements of

MRPC 8.3 in different settings, this part of the question is intended primarily to test whether the writer is aware that Lawrence must inform the AGO of Andy's conviction.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Police Report:

In this case, Montana is the declarant, and the prosecution wishes to offer his statement for its truth. The statement is therefore hearsay. MRE 801.

Montana's statement is not admissible under MRE 803(8) because it involves a criminal matter and is a statement to a police officer. MRE 803(8) provides:

> (8) **Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

People v Tanner, 222 Mich App 626, 629 (1997) (statement provided by witness to police officer not within scope of public records exception).

In addition, Montana's statement lacks the elements of trustworthiness that generally accompany reliance on a public report. *Solomon v Shuell,* 435 Mich 104, 131 (1990). While sworn, Montana lied - at a minimum - about his name and address, suggesting a motive to misrepresent.

The other hearsay exception argued by the prosecutor is MRE 803(6), record of regularly conducted activity. See *Latits v Phillips,* 298 Mich App 109, 114 (2012) ("police reports are `plausibly admissible' under MRE 803(6), though any secondary hearsay within the- documents would not be"). The exception therefore presents a "hearsay-within-hearsay" problem with a separate hearsay exception needed for the statement itself. The statement also would not be admissible as a business record because "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

MRE 803(6). Again, not only did Montana lie about his identity, he also had ample time to reflect on what to tell Officer Witherspoon since he did not provide the statement until noon the following day. If his role was anything other than that of innocent bystander, he would have a motive to misrepresent, after time for deliberation, what he actually witnessed in order to portray himself in a more favorable light. *Solomon,* 435 Mich at 127-128. Finally, although the facts do not identify the witness through whom the statement will be offered, there may be additional problems with whether the witness is the custodian or other qualified witness or whether there is appropriate certification.

Finally, the prosecution argues that the statement should be admitted under MRE 804(b), since Montana is now "unavailable." None of these exceptions apply, however. The statement is not former testimony or deposition testimony - even though sworn - since Barkey never had an opportunity to develop the testimony. There also is no evidence that Barkey caused Montana's unavailability or that what Montana said in his statement was against his interest. Nor can the statement come in under MRE 804(b)(7), for "other exceptions," because the statement could only be admitted under this provision if the prosecution provided Barkey with Montana's proper name and address, which it cannot do. Barkey's objection to entry of the police report should be sustained.

Conviction:

Barkey's objection to the use of his criminal conviction should be overruled. Determining whether Barkey's prior conviction can be used to impeach him is governed by MRE 609. This rule allows the use of some but not all prior convictions. Under MRE 609(a)(1), a prior conviction containing an element of dishonesty or false statement can be used to impeach a criminal defendant without regard to the length of punishment. False statement convictions, such as identify theft, also are not subject to the balancing required for convictions for regular theft under MRE 609(a)(2)(B). And, because plaintiff's conviction is only three years old, it does not exceed the 10-year time limit set forth in MRE 609(c). The court should overrule Barkey's objection to the use of his prior conviction for impeachment purposes.

It is possible some examinees will interpret identity theft as a "crime contain[ing] an element of theft," pursuant to MRE 609(a)(2). Identity theft formerly fell under the "frauds and cheats" sections of the Michigan criminal code and so is properly qualified as a false statement offense. See MCL 767.24(5) and former MCL 750.285. Some credit will be given, however, for a sound discussion of the conviction under MRE 609(a)(2), that includes discussing the length of the sentence and the balancing required by MRE 609(a)(2)(B).

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Clarence's defense that the court is precluded from modifying alimony is clearly incorrect. While parties to a divorce may stipulate to non-modifiability of an alimony award, see *Staple v Staple,* 241 Mich App 562 (2000), where alimony is awarded after a contested trial, a court is not so bound. *Id.* at 569. *Eby v Eby,* 274 Mich App 653 (2007). MCL 552.28 provides that either party may seek to amend or modify an award. While this ability to return to court may be waived, the waiver cannot be foisted on the parties to a divorce judgment.

Clarence's second argument presents a closer question. As stated, a party may petition the court for an alimony modification. "The party moving for modifications has the burden of showing sufficiently changed circumstances to warrant modification." *Crouse v Crouse,* 140 Mich App 234, 239 (1985). Moreover, changes contemplated in the original award are not particularly persuasive as a ground for modification. *Id.; Havens v Havens-Anthony,* 335 Mich 445, 451 (1953).

Grounds for modification include change in need, and change in ability to pay. *Loutts v Loutts,* 309 Mich App 203 (2015) (change in need); *Elbinger v Elbinger,* 33 Mich App 166 (1971) (change in income).

Applying these principles to Clarence and Kelli's situation first yields the conclusion that because the facts are silent on remarriage or cohabitation, the salient factors are the change in need and change in ability to pay. Kelli's petition does not appear to directly relate to her diminished health. The facts do not indicate she is working less and making less <u>because</u> of bad health. Moreover, her health was a consideration apparently when the award was made.

Rather, it is her straight reduction in income and increased need for funds to now pay for her health care coverage that is significant. The health care coverage goes hand in hand with her bad health. With the loss of income and greater demand on that diminished income, her need has demonstrably changed for the worse. Moreover, given her relatively modest income, any reduction and corresponding increase in financial obligations

magnifies the problem, as opposed to her suffering a $5,000 reduction and requirement to pay health care costs on far greater income.

Correspondingly, Clarence has a slightly increased ability to pay. While making $15,000 more a year on top of the $100,000 is not a tremendous increase, it is significant. Allowing Clarence to fully enjoy this increase in income while Kelli's life-style diminishes is what modification would likely seek to avoid.

On balance, although the court could reason its way to leaving things as they are, it is more likely Kelli would win an increase in alimony.

EXAMINERS' ANALYSIS OF QUESTION 8

Article 2 of the Uniform Commercial Code (UCC) applies because this is a sale of goods. MCL 440.2102. Goods are all things moveable at the time of the sales contract. MCL 440.2105(1). Liquid Freon was moveable at the time of the contract and therefore considered "goods." Furthermore, ABC, CSI, and XYZ would be considered "merchants" under MCL 440.2104(1).

With respect to the first question, the UCC provides that obligations and responsibilities under a contract can be delegated "unless otherwise agreed or unless the other party has a substantial interest in having . . . [his] original promisor perform or control the acts required by the contract." MCL 440.2210(1). Delegation does not require the consent of the other party unless it has a "substantial interest" in having the original party perform. *Id.;* Compare, *ISRA Vision, AG v Burton Industries, Inc,* 654 F Supp 2d 638, 648-49 (ED Mich 2009) (applying Michigan law); See generally, *Plastech Engineered Products v Grand Haven Plastics, Inc* (unpublished COA docket # 252532), 2005 WL 736519 (March 31, 2005). Similarly, "all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on the other party by that other party's contract, or impair materially the other party's chance of obtaining return performance." MCL 440.2210(2). The UCC "[g]enerally . . . recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods." MCLA comment (1) to MCL 440.2210.

Here there was no agreement between ABC and CSI that obligations under the contract could not be delegated. And there is nothing to indicate CSI had a substantial interest in ABC performing under the contract. Nor does anything ABC did materially change CSI's duties or risk. For example, XYZ is local and, in any event, bears the cost of delivery. There is also nothing to suggest an impairment of CST's change of payment. Instead, the "normal and permissible" allowance of assignment and delegation applies. MCLA comment (1) to MCL 440.2210.

However, ABC's delegation does not relieve it of liability for XYZ's breach. The UCC provides: "No delegation of performance relieves the party delegating of any duty to perform or any liability for breach." MCL 440.2210(1).

Therefore, ABC can legitimately assign and delegate, but that does not extinguish its potential liability in the matter.

With respect to the second question, CSI might argue there was no consideration for the contract modification and, therefore, it should fail. But, under UCC's Article 2, contract modifications made in good faith do not require consideration. MCL 440.2209 (1). "[S]uch matters as a market shift which makes performance come to involve a loss may provide" objectively demonstrable proof of good faith between merchants. MCLA comment 2 to MCL 440.2209.

Here, there is nothing to suggest ABC did not act in good faith in seeking the modification. To the contrary, a market shift was the rationale for the modification and CSI implicitly recognized its reasonableness by easily agreeing to it.

Therefore, in a suit against either ABC and/or XYZ, CSI would not recover the original contract price of $20 per pound, but instead, the modified price of $15 per pound.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Under Michigan law, "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1, 8 (2008)quoting *Kernen v Homestead Dev Co,* 232 Mich App 503, 509 (1998) quoting *Jeffrey v Clinton Twp,* 195 Mich App 260. In determining whether to grant a preliminary injunction, the court must consider four factors: "whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Assin, IAFF Local 344 v City of Detroit,* 482 Mich 18, 34 (2008).

"The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either." *Bratton v Detroit Automobile Inter-Insurance Exchange,* 120 Mich App 73, 79 (1982). "The status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy." *Id.*

Applying the preliminary injunction factors, the court should deny Peggy's motion. The focus of the analysis should be on factors (1) and (2), as the Michigan Supreme Court has held that "[a] particularized showing of irreparable harm" is "an indispensable requirement to obtain a preliminary injunction." *City of Pontiac,* 482 Mich at 9 (quotation omitted). Without such a showing, a plaintiff's likelihood of success on the merits is irrelevant. *Id.* at 13 n 21. To establish irreparable injury, a plaintiff must demonstrate "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp v Borzym,* 227 Mich App 366, 377 (1998).

Here, Peggy cannot show irreparable harm because she has an adequate legal remedy. Peggy's argument that she "will be

impoverished and unable to continue her lawsuit" will not be successful because if Peggy prevails in her lawsuit, the no-fault act provides not only for recovery of unpaid benefits, but penalty interest and attorney fees. See *Bratton,* 120 Mich App at 81. Moreover, any claimed harm to Peggy is outweighed by the potential of irreparable harm to D-Lux and disruption of the status quo. D-Lux stopped paying benefits only after receiving a medical evaluation indicating that Peggy can return to work. If D-Lux is required to pay benefits and is successful in defending against Peggy's lawsuit, there is a real risk that it would be unable to recover those benefits from Peggy. That would distort the status quo that existed before Peggy filed her lawsuit.

As for factors (3) and (4), they are either neutral or favor D-Lux. Regarding factor (3), there is no indication from the facts that Peggy is likely to prevail on her claim for benefits. At the very least, there is a factual dispute concerning whether Peggy is actually disabled. Regarding factor (4), issuance of an injunction would arguably be against the public interest because the no-fault act affords a remedy for an insurer's failure to pay benefits - including penalty interest and attorney fees - and does not provide for payment of benefits while an insured's action is pending. The court should refrain from ordering relief that goes beyond the statutory scheme. *Bratton,* 120 Mich App at 81.

While not necessary to achieve a perfect score, some credit may be given for also recognizing that it is inappropriate to grant a preliminary injunction "if it will grant one of the parties all the relief requested prior to a hearing on the merits." *Id.* at 79.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

(1) Benny created a bailment relationship with Cedric when he delivered his bike to the bicycle shop specifically for repair. A bailment is formed by "the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished. *In re George L Nadell & Co, Inc,* 294 Mich 150, 154; 292 NW 684 (1940); *National Ben Franklin Ins Co v Bakhaus Contractors, Inc,* 124 Mich App, 510, 512, n 2; 335 NW2d 70 (1983). Phrased another way, it is a relationship wherein a person gives to another the temporary use and possession of property other than money, the latter agreeing to return the property to the former at a later time. *Godfrey v City of Flint,* 284 Mich 291, 295-296; 279 NW 516 (1938)." *Goldman v Phantom Freight, Inc,* 162 Mich App 472, 479-480 (1987).

A bailee who is entrusted with the bailor's personal property is responsible for exercising a level of care over the bailed property that corresponds with the three categories of bailment that are distinguished according to who benefits from the relationship. *Godfrey v City of Flint,* 284 Mich 291, 295296 (1938). Thus, where a bailment is for the sole benefit of the bailor (property owner), the bailee who possesses the property as a favor to the bailor owes "the lowest degrees of responsibility in the triple division of neglects in bailments" and is liable for only gross negligence. *Caldwell v Peninsular State Bank,* 195 Mich 407, 412-413 (1917). A bailment which benefits both parties requires that the bailee exercise ordinary care in connection with the property and is liable for ordinary negligence. *Godfrey* at 297. A bailment that benefits only the bailee requires the highest duty of care by the bailee who could be liable for even the slightest negligence, 3 Michigan Civil Jurisprudence, Bailments § 6 (2016), but who at any rate is not an insurer of the property. *Beller v Shultz,* 44 Mich 529 (1880).

In the instant case, a commercial bailment was created for the mutual benefit of Benny and Cedric in connection with performance of a bicycle repair in exchange for compensation.

Accordingly, Cedric owed a duty of ordinary care with respect to Benny's personal property. Cedric breached that duty when he (a) failed to return the bike to Benny upon demand when the purpose of the bailment had been achieved, and (b) subsequently left the bike unattended and unsecured in public when it was stolen. *Columbus Jack Corp v Swedish Crucible Steel Corp,* 393 Mich 478, 486 (1975). Moreover, the fact that the bike was stolen by a third party does not necessarily operate to extinguish Cedric's liability where he failed to exercise ordinary care. *Eckerle v Twenty Grand Corp,* 8 Mich App 1, 9-10 (1967).

(2) In addition to possible broader claims of negligence and breach of contract, Benny could also bring a claim against Cedric for conversion of Benny's personal property. The law of conversion in Michigan is established both by common law and statute. Under Michigan common law, conversion is "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc,* 497 Mich 337, 346 (2015), quoting *Thoma v Tracy Motor Sales, Inc,* 360 Mich 434, 438 (1960), quoting *Nelson & Witt v Texas Co,* 256 Mich 65, 70 (1931). Here, Benny could argue that Cedric wrongfully exerted control over his bike when he refused Benny's requests to retrieve it despite Cedric having completed the repairs, causing Benny to suffer damages with the subsequent theft.

A separate statutory claim for conversion is created by MCL 600.2919a and, unlike a common-law conversion claim, allows recovery for treble damages, attorney fees and costs. It specifically states:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages, plus costs and reasonable attorney fees:
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

* * *

Benny could argue recovery under a statutory conversion theory because Cedric converted Benny's personal property to Cedric's own use by wrongfully conducting personal business with Benny's property. Cedric's wrongful use of the bike led to it being stolen by a third party when he failed to take reasonable precautions.

Benny is very likely to succeed on each of these theories for recovery against Cedric, although the most beneficial recovery would be under the statutory conversion claim with its attendant treble damages, costs and attorney fees.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

(1) Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et al. Pursuant to EPIC, the July 10, 2014 document that Mary signed constituted a valid will. All valid wills require that the testator be at least 18 years old and have "sufficient mental capacity." MCL 700.2501(1). The facts state that at the time the document was created Mary was 65 years of age and her mental health was strong. Therefore those requirements are met. In addition, generally a will must be (a) in writing, (b) signed by the testator, and (c) signed by at least two persons who witnessed either the signing of the will by the testator or the testator's acknowledgment of the signature or of the will. MCL 700.2502(1)(a)(b)(c). Although Mary's document does not constitute a valid will under the above provisions because it was not witnessed, it does qualify as a valid holographic will under MCL 700.2502(2) that requires no witnesses "if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting." Here, the document was completely in Mary's own handwriting, including her signature, and dated. Accordingly, Mary's sister Amanda would be entitled to Mary's house under the will.

(2) Since the will had no residuary clause, Mary's remaining asset, namely the 3 million dollars, would not be disposed of through the will but statutorily through intestate succession apart from the will. Pursuant to 700.2101(1), "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act, except as modified by the decedent's will." As Mary has no surviving spouse "the entire intestate estate . . . passes in the following order to the following individuals who survive the decedent: (a) the decedent's descendants by representation." MCL 700.2103. Under EPIC, an individual's descendant is defined as "all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this act." MCL 700.1103(k).

Under EPIC's intestate succession provisions, Mary's natural born child would be entitled to take money as a

descendant of Mary. MCL 700.2114(1). Mary's adopted child would have also been entitled to a share of the money since "[a]n adopted individual is the child of his or her adoptive parent or parents and not of his or her natural parents . . . " MCL 700.2114(2). However, pursuant to MCL 700.2104 "[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent's heirs are determined accordingly." Therefore, Mary's adopted child would take nothing because she is considered to have predeceased Mary since that child did not survive Mary by 120 hours, having passed away just 3 days after Mary.

Finally, Mary's stepchild is not considered a descendant of Mary and would therefore take nothing. Under EPIC, a child does not include "an individual who is only a stepchild, a foster child or a grandchild or more remote descendant." 700.1103(f). Accordingly, all of the intestate estate of 3 million dollars would pass to Mary's natural child.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

(1) Desmond could file an action against Pamela for wrongfully locking him out of the studio. Under Michigan law, MCL 600.2918 is commonly known as the anti-lockout statute and states in pertinent part:

> (1) Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, is entitled to recover 3 times the amount of his or her actual damages or $200.00, whichever is greater, in addition to recovering possession.
>
> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner is entitled to recover the amount of his or her actual damages or $200.00, whichever is greater, for each occurrence and, if possession has been lost, to recover possession. Subject to subsection (3), unlawful interference with a possessory interest includes 1 or more of the following: * * *
>
> (b) Removal, retention, or destruction of personal property of the possessor.
> (c) Changing, altering, or adding to the locks or other security devices on the property without immediately providing keys or other unlocking devices to the person in possession. * * * *
>
> (3) An owner's actions do not unlawfully interfere with a possessory interest if any of the following apply: (a) The owner acts pursuant to court order.
> * * * *
>
> (6) A person who has lost possession or whose possessory interest has been unlawfully interfered with may, if that person does not peacefully regain possession, bring an action for possession pursuant to section [600.]5714(1)(f) or bring a claim for injunctive relief in the appropriate circuit court. .
>
> (7) The provisions of this section may not be waived.

> (8) An action to regain possession of the premises under this section shall be commenced within 90 days from the time the cause of action arises of becomes known to the plaintiff. . .

Pamela could have pursued legal remedies against Desmond because of his failure to pay rent, namely employing the judicial process by filing a summary proceedings action in district court for either non-payment of rent or termination of the tenancy, both of which could ultimately result in Pamela obtaining a court order of eviction. MCL 600.5701 et al. The self-help that Pamela employed was not a legal option, however, and exposed her to liability to Desmond under the anti-lockout statute. *Deroshia v Union Terminal Piers,* 151 Mich App 715, 717 (1986). Absent a court order of eviction, both Pamela's removal of Desmond's personal property and her changing the locks to the property without giving Desmond a key constituted an "unlawful interference" with Desmond's possessory interest in the property. Additionally, nothing in the written lease agreement between the parties could shield Pamela from liability in this regard as the provisions of the anti-lockout statute cannot be waived. Desmond must act quickly, though, to pursue a cause of action for repossession of the property since the anti-lockout statute allows only 90 days to file an action under its provisions. MCL 600.2918(8).

(2) The law of fixtures governs whether Desmond is entitled to return of the overhead lights and acoustic speakers. Fixtures generally remain with the real property. "Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." *Wayne County v Britton Trust,* 454 Mich 608, 610 (1997). Even if an item is considered a fixture, however, an exception is made for trade fixtures which are considered to be the tenant's personal property to which the tenant is entitled and can remove from the realty. *Outdoor Systems Advertising, Inc v Korth,* 238 Mich App 664, 667-668 (1999). "A trade fixture is merely a fixture that has been annexed to leased realty by a lessee for the purpose of enabling him to engage in a business. The trade fixture doctrine permits the lessee, upon the termination of the lease, to remove such fixture from the lessor's real property." *Id.,* quoting *Michigan Nat'l Bank*

Lansing v Lansing, 96 Mich App 551, 555 (1980), *aff'd* 414 Mich 851 (1982).

In the instant case, while an argument could be made that the acoustic speakers mounted on the wall and overhead lighting might be considered fixtures under the general rule to which Pamela would be entitled as the real property owner, the facts do not show that Desmond had the intention to make those items "a permanent accession to the realty," supra, Britton at 610, especially given the relatively short 2-year lease term. In any event, a strong argument could be proffered that Desmond made those improvements to the real property specifically for the purpose of conducting his business as a music producer. Therefore, those items would be considered trade fixtures to which Desmond is entitled.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

(1) Miranda Rights

Under *Miranda v Arizona*, 384 US 436, 469-473 (1966), police interrogating an in-custody suspect must, prior to that interrogation, advise the suspect (1) that he has the right to remain silent, (2) that anything he says can be used against him in court, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney, one will be appointed for him. This litany of rights was established by *Miranda* to protect the accused's constitutional privilege against self-incrimination. The articulation of the right to counsel is correlative to the right against self-incrimination. Failure to advise an accused custodial person of his *Miranda* rights warrants suppression but so does an invalid waiver of the rights articulated.

Factors for Waiver

Miranda rights may be waived, but such a waiver must be voluntary, knowing and intelligent. In this vein, "voluntary" means that it was the product of a free and deliberate choice rather than through intimidation and coercion. The waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it (knowingly and intelligently). *Id.* at 475-479.

Application

The issue raised by Askins' motion is whether Detective Upton's failure to advise Tommy of Askins' pre-interrogation presence and desire to speak with him rendered his *Miranda* waiver unknowingly and unintelligently made. *Moran v Burbine*, 475 US 412 (1986), rejects this contention. *Moran* explained that all that was necessary for an accused to knowingly and intelligently waive his rights to silence and counsel is to understand those rights and be aware that the waiver of those rights and a subsequent statement opens for courtroom use the statement made. *Id.* at 420-423. Neither *Miranda*, nor its progeny, factors into the analysis the wisdom of such a waiver nor the advisability of waiver. Comprehension of the

articulated rights and awareness of the consequence of waiver is the focus. Why a suspect waives his rights is not the guiding principle. See *People v Daoud,* 462 Mich 621, 639-644 (2000).

Moran went on to hold that a suspect being kept unaware of an attorney's presence and availability does not impact the understanding of the rights nor the waiver of those rights as being knowing and intelligent. As *Moran* stated in pertinent part:

> Events occurring outside of the presence of a suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. . . . (W)e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was un-coerced, that he at all times knew he could' stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid.

Moran, 475 US at 422 (internal citations omitted).

Accordingly, Askins has not raised a valid reason for the court to determine Tommy's waiver was invalid. Suppression is not warranted.

(2) Michigan Law

The decision to deny suppression would not be different under Michigan law. While Michigan once accorded defendants more rights in this regard than did the United States Supreme Court, now such is not the case. In *People v Tanner,* 496 Mich 199 (2011), the Michigan Supreme Court overruled *People v Bender,* 452 Mich 594, 620 (1996), which had held that the failure of police to advise a suspect held in custody for interrogation that an attorney was available to speak with the suspect, violated the knowing and intelligent prong of the *Miranda* waiver factors, dooming any subsequent confession to inadmissibility.

Tanner, however, jettisoned that holding, bringing Michigan in line with the holding discussed above from *Moran.* Accordingly, the decision would be no different under Michigan law.

In sum, the police's failure to advise Tommy of Askins' presence does not impact his *Miranda* waiver.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

The constitutional provision common to all scenarios is the 8th Amendment's prohibition against cruel and unusual punishment. The amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis added.) The amendment's prohibition is made binding on the states through the 14th Amendment. See *Furman v Georgia,* 408 US 238, 239 (1972).

United States Supreme Court precedent has explained that juveniles do not stand in the same shoes as adults when either the death penalty or non-paroleable life sentences are imposed, nor more generally regarding sentencing in the broader view. See *Roper v Simmons,* 543 US 551 (2005), *Graham v Florida,* 560 US 48 (2010), *Miller v Alabama,* 567 US _____ ; 132 S Ct 2455 (2012). Points from this trilogy of cases include, first, that the 8th Amendment's prohibition applies with added force where the sentences imposed are the highest form of punishment under a state's sentencing law. Second, to be consonant with the 8th Amendment, a proper sentence must include an analysis of the nature of the offense and the circumstances of offender, and that a juvenile's attendant characteristics of youth are central aspects of the offender's circumstances. *Roper* summarized the distinction between juvenile and adult offenders as (1) juveniles, by way of lack of their maturity and an underdeveloped sense of responsibility, tend to engage in impetuous and ill-considered actions, (2) juveniles are more vulnerable or susceptible to negative influence and outside pressures, and (3) the character of the juvenile is not as well formed as an adult's. *Roper,* 543 US at 569-570. Relatedly, the cases noted that a sentence which precludes the natural maturation of the juvenile's mind and corresponding development and behavior as a sentencing or release consideration runs afoul of 8th Amendment precepts.

Applying these principles to the various scenarios yields the conclusion that none of the sentences imposed would be upheld.

Jimmy :

In *Roper, supra,* the Court held that the imposition of the death penalty on a defendant convicted of murder before that defendant' s 18th birthday violated the 8th Amendment's ban on cruel and unusual punishment. The Court explained that the 8th Amendment's prohibition has added force when the death penalty, obviously the most severe sanction, is in play. Placing a juvenile on par with an adult and then allowing the irrevocable sentence of death could not be countenanced. The facts presented state Jimmy was 16 when the crime was committed. This brings his sentence within the embrace of *Roper's* holding. Given his youth, the death penalty simply was not an option the court could employ in sentencing 16-year-old Jimmy. Such a sentence would not be upheld.

Betty:

In *Graham, supra,* following *Roper,* the Court invalidated on 8th Amendment grounds, a non-paroleable life sentence imposed for a non-homicide crime committed before the defendant's 18th birthday. Following *Roper,* the Court reasoned a non-paroleable life sentence, the second most severe sentence (and in some jurisdictions like Michigan, the most severe sentence), was tantamount to a death sentence for an adult in its preclusive nature. The *Graham* decision also discussed that the harshest sentence should be reserved for the worst combination of offense and offender, noting that a juvenile defendant would be hard-pressed to qualify as an irredeemable worst offender.

Harvey:

The Court continued the theme described in *Roper* and *Graham* in *Miller v Alabama,* 567 US _____ ; 132 S Ct 2455 (2012). *hailer* found wanting a state law requirement that one convicted of first-degree murder--no matter if adult or juvenile--was mandated to receive, absent the exercise of discretion, life imprisonment without parole. Harvey's scenario represents precisely that scenario condemned to unconstitutionality. Where, as here, a court is mandated to impose the same life imprisonment without parole sentence on adult or juvenile alike, the significant and attendant circumstances of youth are precluded from consideration by the sentence. This runs afoul of the 8th Amendment's command_____ as articulated in case law--to

tailor a particular sentence to the circumstances of the crime and the makeup of the offender, about whom age is a significant factor.

For the reasons stated, none of the sentences imposed would pass 8th Amendment muster and are therefore constitutionally invalid. Where, as in all three scenarios, consideration of a juvenile's diminished culpability and heightened capacity for change is foreclosed, the 8th Amendment is not satisfied.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

The three levels of homicide at issue in the facts presented are first-degree premeditated murder, second-degree murder, and voluntary manslaughter. Murder is distinguished from manslaughter in this context because the former contains malice, while in the latter, malice is negated by the killer's state of mind. First-degree murder is distinguished from second-degree by premeditation and deliberation.

The elements of first-degree premeditated murder are: (1) The defendant caused the death of the deceased. (2) The defendant intended to kill the deceased. (3) This intent was premeditated or thought out beforehand. (4) The killing was deliberate, where the defendant considered the pros and cons and thought about and chose the action taken. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill, and the killing cannot be the result of a sudden impulse without thought or reflection. (5) The killing was not justified, excused or done under circumstances that reduce it to a lesser crime. *People v Unger,* 278 Mich App 210 (2009), and Mi Crim JI 16.1

Second-degree murder's elements, for purposes of the question posed, are similar to first-degree murder with the marked distinction being the absence of premeditation and deliberation. *People v Goeke,* 457 Mich 442 (1998), and Mi Crim JI 16.5

Voluntary manslaughter's elements in this context (as a lesser offense of murder) are as follows: (1) The defendant acted out of passion or anger brought about by adequate cause and before the defendant had a reasonable time to calm down. (2) When defendant acted, his/her thinking must be disturbed to the point a reasonable person might have acted on impulse, without thinking twice, from passion or judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. -(3) The killing itself must be from this emotional excitement. The defendant must have acted before a reasonable time had

passed to calm down and return to reason. The test is whether a reasonable time passed under the circumstances. *People v Pouncey,* 437 Mich 382 (1991), and Mi Crim 31 16.9

The facts, as applied to the stated elements, leave no doubt that Carl killed his wife and friend intending to do so. Six gun shots at close range establish the point. The real issue pertains to Carl's state of mind, thereby allowing a lesser charge than first-degree premeditated murder.

The facts cut both ways. Certainly finding one's spouse engaged in infidelity could cause the blood to suddenly stir, robbing one of the ability to reason and calm down. Discovering his wife's lover is his close friend, in one's own marital home, would most probably intensify the realization one's wife is unfaithful.

But other facts go a different direction. Carl was already suspicious. He left work early to confirm or refute his suspicions. The drive home took 30 minutes, ostensibly enough time to cool his anger, if that is what he was feeling. Seeing the cars may have added to his anger or passion. Certainly hearing the voices, while he was in the kitchen, emanating from a bedroom would have contributed to that anger or passion. However, thereafter Carl grabbed a gun and ammunition before leaving the kitchen.

Moreover, Carl had the lucid mental awareness to walk slowly up an indirect stairway to avoid detection. And although he heard sounds confirming his fears, he nevertheless had the wherewithal to load six bullets into the gun.

These countervailing facts undercut the notion that Carl acted out of anger and passion brought about by adequate cause. Each case is unique and, while some facts are supportive of manslaughter, others are not. A case could be made that while on his way up the stairs, Carl knew all he needed to know and although that knowledge was upsetting--even traumatic--having a gun and loading it suggest his actions were more from planned vengeance than from anger and passion that were born from disturbed emotional excitement. While it certainly can be maintained, legitimately, that seeing <u>who</u> his wife was having an affair with made things worse, this fact alone may be insufficient to stem the tide of the other facts.

The factual scenario more likely supports a charge of murder with the element of premeditation and deliberation being at issue to make difficult favoring one degree over another. But not so difficult to conclude that Carl's state of mind suggests manslaughter is not the most supported charge under the facts. Second-degree murder seems most likely.