FEBRUARY 2020 MICHIGAN BAR EXAMINATION
EXAMINER'S ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

1. Yes, the court is bound by statute to consider a party's request for joint custody. MCL 722.26a provides in part that "[a]t the request of either parent, the court shall consider an award of joint custody and shall state on the record the reasons for granting or denying a request." Because the facts indicate that Jonathon has made a joint custody request, the court was statutorily bound to consider that request. *Mixon v Mixon*, 237 Mich App 159, 162-163 (1999). See also *Wilcox v Wilcox*, 108 Mich App 488, 495 (1981).

2. In considering whether to grant joint custody, the court is guided by two factors specified in MCL 722.26a (Joint Custody).

> "(a) the factors enumerated in section 3" (the best interest factors);
>
> "(b) whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child."

The two factors are of importance as the decision is more than just an evaluation of the best interest factors. See *Molloy v Molloy,* 243 Mich App 595, 607 (2000); *Wright v Wright*, 279 Mich App 291, 299-300 (2008); *Fisher v Fisher*, 118 Mich App 227, 232-233 (1982).

3. Joint legal custody, while not unattainable, is also not likely. These parents apparently have no ability to converse about

such important decisions as schooling, dental needs, and involvement in sports. Moreover, their own discord has spilled over into the exchanges of the children who have been enmeshed into these parents' battles. Therefore, joint legal custody, which would foist on these near-dysfunctional parents more of the same, is unlikely. The acrimonious behaviors of the parents have spilled over to impact the children's best interests. Under MCL 722.23, a myriad of factors must be considered. But in the instant situation, at least the following factors are significant. Schooling and extracurricular activities impact factor (b)(the capacity and disposition the involved parties to provide the children love, affection, and guidance and to continue the education and raising of the child in his/her religion, if any). The children have become upset, sullen and withdrawn, and Tyler is skipping meals due to nausea. These relate to factors (h) (the home record of the children) and (b). Finally, factors (a)(the love, affection and emotional ties existing between the involved parties and child) and (j)(the willingness of the parties to facilitate and encourage a close and continuing relationship with the other parent) are also involved in these parents' disputes.

Consideration of both factors under MCL 722.26(a) yields the conclusion that these parents cannot get along and their continuing squabbles negatively impact the children's best interests.

4. No, Jennifer being awarded sole physical custody would not give her any greater say than Jonathon if the two were awarded joint legal custody. Decision-making authority would still be shared "as to the important decisions affecting the welfare of the children." See MCL 722.26a(7). If shared decisions produces impasse, the court, not the sole physical custodian, would resolve any remaining dispute. See *Lombardo v Lombardo*, 202 Mich App 151, 159 (1993).

EXAMINERS' ANALYSIS OF QUESTION NO. 2

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 v City of Pontiac*, 482 Mich 1, 8 (2008) (citations and internal quotation marks omitted).

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 Ass'n v City of Detroit*, 482 Mich 18, 34 (2008).

Applying the preliminary injunction factors, the court should deny P.T.'s parents' motion. The analysis begins and ends with the first factor — irreparable harm. P.T.'s parents cannot show that they would suffer irreparable harm because while they fear prosecution *if* they remove P.T. from school again, a hypothetical threat of prosecution is not an immediate, irreparable injury. See *Pontiac Fire Fighters*, 482 Mich at 9 ("The mere apprehension of future injury or damage cannot be the basis for injunctive relief."). The claimed injury "must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998). Here, any future prosecution is inherently uncertain. It would only potentially occur *if* P.T.'s parents chose to disenroll him again, *if* they failed to re-enroll him at a state-approved school, and *if* the Declan Board of Education chose to pursue truancy charges again. That theoretical series of events does not give rise to irreparable harm.

The inability to show irreparable harm is fatal to P.T.'s parents' request for preliminary injunctive relief because the Michigan Supreme Court has held that this requirement is "an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters*, 482 Mich at 9 (quotation omitted). Without such a showing, a plaintiff's likelihood of success on the merits is irrelevant. See *id*. at 13 n 21 (declining to address the

plaintiff's likelihood of success on the merits because it failed to demonstrate irreparable harm).

The remaining factors do not change the analysis. Since P.T.'s parents cannot show irreparable harm, a balancing of the equities (factor (2)) is not called for. In no event would their mere apprehension of future prosecution justify a prior restraint on the Declan School Board's ability to seek enforcement of Michigan's truancy law. Even if P.T.'s parents are likely to succeed on their claim that IDEA preempts Michigan law (factor (3)), it still does not warrant entry of a preliminary injunction. The issue is one of timing. *Preliminary* injunctive relief should only be granted to avoid irreparable harm. Without such a showing, P.T.'s parents must first prevail on the merits of their claim, and then they can ask the court to issue a permanent injunction. Finally, the public interest factor (factor (4)) is either neutral or weighs in favor of denying preliminary injunctive relief, as the public interest arguably favors enforcement of valid state laws concerning compulsory school attendance.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

For an injury to come within the workers' compensation statute, the injury must be an injury "arising out of and in the course of employment," which is the Michigan's Worker's Disability Compensation Act's coverage formula. MCL 418.301(1). While the bifurcated inquiries into "arising out of" and "in the course of" can overlap, in general, the "arising out of" inquiry focuses on the risk triggering the injury and the "in the course of" inquiry looks to the time and location of the injury. *Thomason v Contour Fabricators, Inc*, 469 Mich 960 (2003); *Hills v Blair*, 182 Mich 20, 26-28 (1914); *Hill v Faircloth Mfg Co*, 245 Mich App 710, 719-720 (2001). There are exclusions from coverage, however, with one exclusion being the "social or recreational" activity exception in MCL 418.301(3).

1) Jeb's Argument:

Jeb's best argument is his injury satisfies the "arising out of and in the course of . . ." requirements. The injury satisfies the arising "out of" employment requirement because it resulted from a risk related to his work. Jeb was directed to be at the conference by his employer, dutifully attended and engaged in it, and, at most, slightly deviated while returning to his hotel room to briefly indulge in harmless activity. While he was not doing work at the precise time of his injury, Michigan law recognizes employees can be expected to slightly deviate from work or even engage in "horseplay" at work. *Crilly v Ballou*, 353 Mich 303, 314 (1958) ("An employee is not an automation and . . . he will to some extent deviate from the uninterrupted performance of his work.") overruled in part on other grounds by *Brackett v Focus Hope Inc.*, 482 Mich 269, 279 (2008). Jeb could, therefore, be expected to slightly deviate from the work related aspects of the conference. *Crilly* at 279; see also *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 637 (1974); see also *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 142 (1977). His slight deviation was neither explicitly forbidden by his employer nor unforeseeable. He drank only one beer; there was no indication he was inebriated; and, he had been in the bar for only a brief period of time. Contrast *Bush Parmenter, Forsythe, Rude & Dethmers,* 413 Mich 444, 459-460 (1982). Furthermore, Jeb may have expected other attendees to be in the bar or to soon join him there, which was part of the networking expected of him.

The injury also satisfies the "in the course of employment" requirement because the time and location of his usual work obligations were expanded by his employer's demand that he and his fellow loan officers attend the conference for the employer's benefit. See *Allison v Pepsi-Cola Bottling Co,* 183 Mich App 101, 111-112 (1990). Michigan law recognizes the workers' compensation statute covers employees engaged in such off-premise "special missions" or business related travel. *Bush, supra* at 452*; Owen v Chrysler Corp*, 143 Mich App 182, 185 (1985): *Ream v LE Myers Co,* 72 Mich App 238, 243 (1976). Jeb should be covered for the entire round trip to and from such a business conference and certainly when injured in the hotel his employer was paying for. *Ream, supra* at 242-243.

This is not a case where an employer merely encouraged an employee to attend a conference. Contrast *Camburn v Northwest Sch Dist*, 459 Mich 471, 477-478 (1999). Jeb was essentially compelled to attend. And, this is not a case of a traveling employee who was highly inebriated, did no work the day of injury, was away from his hotel for hours, and engaged in risky behavior when drunk. Contrast *Eversman v Concrete Cutting & Breaking,* 463 Mich 86, 96 (2000*)*. Jeb briefly stopped for one drink while in the hotel where the conference was held.

Finally, the "social or recreational" exclusion from compensation in MCL 418.301(3), quoted below, should not apply because Jeb is not relying on the presumption in 301(3). See Justice Cavanagh's concurring opinion in *Eversman, supra* at 99-100. He is instead arguing he was on a "special mission." In any event, given that 301(3) asks what was the "major purpose" of the employee's activity, the focus must be on the overall purpose of the trip not just on what Jeb was engaged in at the precise time of injury. The major purpose of Jeb's trip was to serve his employer's business interest. Compare *Angel v Jahm, Inc,* 232 Mich App 340, 344 (1998).

2) The Bank's Argument:

The employer's best argument is that MCL 418.301(3) applies and its exclusion from compensation precludes coverage of Jeb's injury. MCL 418.301(3) provides in pertinent part:

> An employee going to or coming from his or her work, while on the premises where the employee's work is to be

> performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act.

This exclusion applies broadly to all injuries, beyond claims relying on the presumption in the first sentence. *Nock v M&G Convoy (On Remand)*, 204 Mich App 116, 120-121 (1994); see also *Eversman, supra*. The correct focus is on the "major purpose" of the employee's activity "at the time of the accident" as opposed to the overall purpose of his trip. *Id*. "At the time of the accident" Jeb's major purpose, indeed only purpose, was having a beer (with no other conference attendees) and talking football. *Eversman, supra* at 96. Having a beer and talking football in a bar is a social activity.

Even aside from 301(3)'s exclusion, under the "arising out of" requirement, it was not a risk of employment that Jeb would be drinking and chatting about football in a bar. There was no business purpose to Jeb being in the bar. The fact he was probably not inebriated and not in the bar for a long time is irrelevant. What is relevant is there was no benefit to the bank in Jeb going to the bar. He was not networking given there were no other conference attendees in the bar. The conference's business ended that day when the attendees' dinner concluded. Additionally, there is no indication that the bank reimbursed him for drinks purchased at the hotel bar.

3) Likely Litigation Result:

Outcomes in these types of cases generally present close calls and are very fact driven. Litigation of the issue here would most likely result in a denial of benefits on the strength of 301(3)'s "social or recreational" exclusion. The courts have not limited the exclusion in the manner Jeb advocates. Rather, the indication is the "social or recreational" exclusion applies broadly. The focus is on the major purpose of the employee's activity at the time of accident, not the overall purpose of the trip. But for 301(3)'s exclusion, Jeb would probably prevail, given the degree to which the bank insisted on attendance. The examinee's prediction of the outcome of the litigation of this issue is less important than the quality of the arguments made for and against Jeb.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

The circuit court's errors were as follows. First, an affidavit, to be valid, must be signed and notarized. Here, the defendant's affidavit was not signed, and thus the statements within it do not constitute sworn testimony. It therefore should not have been considered by the court. *Rataj v City of Romulus*, 306 Mich App 735, n8 (2014) ("[A]n unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition." *Gorman v American Honda Motor Co*, 302 Mich App 113, 120 (2013)). Indeed, an unsigned, nonnotarized "affidavit" is no affidavit at all. *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 711-712 (2000).

Second, "[I]t is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Innovative Adult Foster Care v Ragin*, 285 Mich App 466, 480 (2009). Here, the circuit court did just that by opining that an affidavit was more worthy of belief than the deposition testimony. That is not the role of a court in deciding a motion for summary disposition.

Third, it is improper for a court to rely on inadmissible hearsay when determining whether a genuine issue of material fact exists. Newspaper articles are typically inadmissible hearsay, *Baker v Gen Motors Corp*, 420 Mich 463, 511 (1984), and the statements repeated by the police officer that were contained in the newspaper article is inadmissible hearsay. Hence, it may not be considered when deciding a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 125 (1999).

Fourth, for two reasons the court should not have visited the scene and should not have used that information in deciding the motion. Although MCR 2.507(D) permits a court to view the location at issue when sitting as trier of fact during trial, the rule does not give the court authority to use such information when deciding a summary disposition motion. Courts cannot reach out and consider evidence not on file or submitted by the parties. MCR 2.116(G)(5). Going outside the record was in error.

Fifth, a court may not "make findings of fact; if the evidence before it is conflicting, summary disposition is improper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299 (2003)

(quotation marks and citation omitted). The court improperly took evidence outside the record and used it to make a finding as to what occurred.

Sixth, and finally, the court erred in concluding that the use of an affidavit alone is not sufficient to create a genuine issue of material fact. Rather, the court rules allow a party opposing such a motion to submit affidavits. MCR 2.116(G)(4). No other evidence is necessary so long as the affidavit itself raises a genuine issue of material fact. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 66 (2004).

EXAMINERS' ANALYSIS OF QUESTION NO. 5

How the legal action must proceed

A suit to redress any injury caused to the corporation must generally be brought in the name of the corporation rather than an individual stockholder. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679 (1989). Therefore, Shemp will have to file a derivative action on behalf of MWC in order to seek damages for Moe's breach of fiduciary duty. Because Shemp was a shareholder at the time the 2017 contract was signed, continues to be a shareholder, and "fairly and adequately represents the interests of the corporation," he is eligible to file a derivative action. MCL 450.1492a. Pursuant to MCL 450.1493a, Shemp cannot commence a derivative action until he makes a written demand upon MWC to take action against Moe, and has either waited ninety days from the date the demand was made or received notice that the demand has been rejected by the corporation.

Recourse against Moe

As an officer and director of the Michigan Widget Corporation, Moe is required to discharge his fiduciary duty to the corporation (1) "In good faith"; (2) "With the care that an ordinarily prudent person in a like position would exercise under similar circumstances"; and (3) "In a manner he or she reasonably believes to be in the best interests of the corporation." MCL 450.1541a(1)(a)-(c). Certainly, Moe could argue that he acted in good faith by entering into the contract because he believed that the price of graphite would increase dramatically, and that the stable pricing that a fixed price contract would provide would benefit the company over the long term. In exercising his business judgment, Moe is entitled to rely upon information provided by "[l]egal counsel, public accountants, engineers, *or other persons as to matters the director or officer reasonably believes are within the person's professional or expert competence*." MCL 450.1541a(2)(b) (emphasis added). The facts indicate that the International Association of Graphite Miners is a trade organization in the field of graphite mining, and predicted that there would be a shortage of graphite in the coming years. Moe could reasonably believe that the International Association of Graphite Miners is knowledgeable on the topic of graphite mining, and he would be entitled to rely upon the information provided by

that group. Therefore, the shareholders will have no recourse against Moe. However, if a majority of shareholders agree, they could vote to remove Moe as a director. MCL 450.1511(1).

Whether Joe will vote for Curly or Moe

Under the fact pattern each of the five shareholders controls 20% of the stock. Larry and Moe support Moe, while Shemp and Curly support Curly. Thus, Joe will cast the deciding vote. While Joe indicated that he changed his mind about voting for Curly, and announced his intent to vote for Moe instead, he signed a voting agreement expressly agreeing to vote for Curly. Pursuant to MCL 450.1461, two or more shareholders may enter into a signed written agreement to vote "as provided in the agreement . . . " When such a voting agreement is entered into, it shall be "specifically enforceable." Thus, Shemp and Curly will be able to specifically enforce the voting agreement, Joe will be required to vote for Curly, and Moe will be ousted as a director.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

1) The most relevant cause of action is false imprisonment, as Smith is suing over his "wrongful detention", not a wrongful or false arrest. However, it should be recognized that false imprisonment and false arrest are closely aligned, and "there has been confusion in Michigan law regarding whether false arrest and false imprisonment are separate causes of action." *Moore v City of Detroit*, 252 Mich App 384, 386 (2002). A false arrest is an illegal or unjustified arrest, and is guided by the same probable cause analysis as is false imprisonment. *Burns v Olde Discount Corp*, 212 Mich App 576, 581 (1995); *Tope v Howe*, 179 Mich App 91, 105 (1989). An applicant's label of the tort is not as important as recognizing the elements related to Smith's confinement.

2) False imprisonment requires "an unlawful restraint on a person's liberty or freedom of movement." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 17 (2003). "The elements of false imprisonment are [1] an act committed with the intention of confining another, [2] the act directly or indirectly results in such confinement, and [3] the person confined is conscious of his confinement." *Moore*, 252 Mich App at 387 (quotation marks and citations omitted). "[B]rief confinements or restraints are insufficient for false imprisonment." *Id.* at 388. An essential component of a false imprisonment claim is that the imprisonment was false, i.e., that the defendant lacked any right or authority to confine the plaintiff. *Id.* Stated differently, to be "false," the restraint must be illegal, i.e., must have occurred without probable cause or other lawful authority to support it. See *Id.;* see also *Walsh v Taylor*, 263 Mich App 618, 627 (2004) and *Peterson Novelties*, 259 Mich App at 18.

> Probable cause involves a determination of both the historical facts and whether the rule of law as applied to the facts is violated. . . . To constitute probable cause, there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged. Probable cause is a commonsense concept dealing with practical considerations of everyday life that must be viewed from the perspective of reasonable and prudent persons, not legal

> technicians. [*Walsh*, 263 Mich App at 628 (quotation marks, punctuation, and citations omitted).]

If the "arrest" is legal, then there can be no false imprisonment. *Peterson Novelties, Inc*, 259 Mich App at 18.

3) There is no dispute that the security officer took an act intending to confine Smith, as that was the clear purpose in taking him to the back room. It is equally clear that the officer's act directly resulted in that confinement, as he left Smith in the back room. Finally, there is also no doubt that Smith was aware of his confinement, as he was told to remain in the room and the officer told Smith that he was locking the door when he left. But as to the "false" requirement, defendant will argue that there was probable cause to detain Smith in light of the security officer watching Smith put the fuses into his pocket and leave the store without paying for them. In light of what the security officer saw, he reasonably believed Smith was attempting to steal the fuses. Consequently, the initial detainment, including the hour time period for the investigation, was done with probable cause, was not "false," and thus Smith would likely not succeed in his case. At least to that point.

However, Smith very well could succeed on his claim once the officer's supervisors ordered Smith released. The officer disobeyed the order and kept Smith in the back room for another two hours, double the time Smith was in the room pending the investigation. Nothing suggests that the officer had probable cause to continue detaining Smith, and typically once an individual is no longer a suspect, there is no longer probable cause to detain. Additionally, the officer's purpose was to punish Smith, showing a lack of probable cause. Because the remaining elements from *Moore* continue to be met, Smith could prevail on his two hour detention.

4) Pursuant to MCL 600.2917, Smith could seek compensatory damages, to the extent any exist. He could also seek damages for his mental health, as well as punitive damages, as long as Smith proves that the detention was an unreasonable length of time. Being detained for twice the amount of time Smith spent while the proper investigation could take place is an unreasonable length of time. Under these facts, Smith would likely succeed with respect to the additional two hours he sat locked in the back room.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

1. Waiver of Interpreter

Waiver is the intentional relinquishment or abandonment of a known right. *People v Carines*, 460 Mich 750, 762 n7 (1999) quoting *United States v Olano*, 507 US 725, 733 (1993); *People v Carter*, 462 Mich 206, 217-218 (2000). A valid waiver consists of "a specific knowledge of the constitutional right and an intentional decision to abandon" its protection. *People v Kammeraad*, 307 Mich App 98, 117 (2014) quoting *People v Buie* (On Remand), 298 Mich App 50, 56-57 (2012)).

Certain constitutional rights must be waived by the defendant personally while some of defendant's rights can be waived by counsel. *Carter*, 462 Mich at 218. In this instance, the defendant was required to voluntarily, knowingly and intelligently, waive his right to have an interpreter assist him at trial.

The court had the obligation to either provide an interpreter for defendant or obtain defendant's "personal, informed waiver." *People v Gonzalez-Raymundo*, 308 Mich App 175, 193 (2014). The court did not appoint an interpreter for defendant and failed to secure defendant's personal and knowing waiver of the interpreter at trial. Counsel cannot waive that right for defendant. *Gonzalez-Raymundo*, 308 Mich App at 187; *People v Sepulveda*, 412 Mich 889 (1981). This was not a valid waiver of defendant's right.

2. Interpreter for Defendant

The defendant did not understand the trial proceedings because he did not speak or understand English. The language barrier, in effect, meant defendant was "effectively absent" from trial. Cunningham, 215 Mich App at 654-655. Defendant was impaired from effectively participating in his defense, a violation of due process. *Gonzales-Raymundo*, 308 Mich App at 188.

The lack of an interpreter for defendant at trial also violated defendant's right to "confront witnesses against him." *Gonzalez-Raymundo*, 308 Mich App at 188. Defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1 sec 20; *People v Ho*, 231 Mich App 178, 189 (1998). Defendant's right of confrontation was violated

because he did not understand the testimony presented against him. *People v Cunningham*, 215 Mich App 652, 654-655 (1996). Defendant's rights to due process and confrontation of witnesses against him were both violated.

3. Interpreter for Witnesses

Defendant was also deprived of due process and his right of confrontation by the conduct of the interpreter for the witnesses at trial. *Cunningham*, 215 Mich App at 657; *Gonzales-Raymundo*, 308 Mich App at 188. The interpreter must translate the questions of the lawyers and responses of the witnesses as they occur. *People v Ovalle*, 411 Mich 478, 481-482 (1981); *Cunningham*, 215 Mich App at 654-655. "The translation of each question and answer is required by a defendant's right to due process." *Cunningham*, 215 Mich App at 657. Failure to properly translate is a violation of due process.

Translation may be subject to "occasional lapses" but there must be an adequate translation of the testimony and trial proceedings the same as "someone conversant in English would be privy to hear." *Cunningham*, 215 Mich App at 655. Nonliteral translations run the danger of being inaccurate, inadmissible, or a violation of the confrontation clause. *Id.* at 657.

A defendant has a constitutional right to confront the witnesses against him, which includes the right to cross-examine witnesses against defendant. US Const, Am VI; Const 1963, art 1 sec 20; *Ho*, 231 Mich App at 189. The right of cross examination is not unlimited. It includes the opportunity to demonstrate bias, prejudice or the lack of credibility of a witness against the defendant. *People v Canter*, 197 Mich App 550, 564 (1992); *Cunningham*, 215 Mich App at 657; *People v Adamski*, 198 Mich App 133, 138 (1993). That right is impaired if the witnesses' answers are not accurately translated. *People* v *Mumford*, 183 Mich App 149, 153 (1990).

The inadequate translation by the interpreter deprived defendant of his right of confrontation on cross examination, and right to participate at trial. *Cunningham*, 215 Mich App at 657.

EXAMINERS' ANALYSIS OF QUESTION 8

Second degree murder

Daniel could be charged with second degree murder. An unplanned, impulsive killing with malice aforethought is second degree murder. *People v Stinson*, 58 Mich App 243, 247 (1975). The elements of second degree murder are: (1.) The defendant caused death (here Paul's death by blunt force trauma); (2) the defendant had one of these three states of mind (mens rea) at the time he acted: a.) he intended to kill; b.) he intended to do great bodily harm; or c.) he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions; and (3.) the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. *People v Dykhouse*, 418 Mich 488, 508-509 (1984); *People v Aaron*, 409 Mich 672, 728 (1980).

The evidence clearly supports the conclusion Paul died of blunt force trauma from being hit on the head by Daniel. The evidence also supports Daniel intended to kill or commit great bodily harm to Paul by hitting Paul on the head with a piece of cement, or Daniel knowingly created a very high risk of death or great bodily harm knowing one to be the likely result of his actions. Especially as he struck him on the head when Paul was defenseless on the ground.

An inference of intent to kill or to commit great bodily harm can be drawn from the use of a deadly weapon. *People v Martin*, 392 Mich 553, 561-562 (1974). A piece of cement can be a deadly weapon. It is hard and can be used as a dangerous weapon. Malice (any of the three states of mind) can be inferred from the type, duration, severity and manner in which the beating was inflicted. *Stinson*, 58 Mich App at 258; *People v McFee*, 35 Mich App 227, 230-231 (1971). Daniel struck Paul with a dangerous weapon on the head when Paul was defenseless on the ground. The mens rea requirement of second degree is fulfilled.

Voluntary manslaughter

Voluntary manslaughter parallels the crime of second degree murder but is distinguished from second degree murder by the fact the act is done as a result of provocation and done in heat of

passion (not cool reflection). *People* v *Townes*, 391 Mich 578, 589-590 (1974).

Voluntary manslaughter is murder committed in the heat of passion caused by adequate provocation without time for a reasonable person to control the passions. *People v Reese*, 491 Mich 127, 143 (2012). The mens rea required for voluntary manslaughter is the same as second degree murder. *Townes*, 391 Mich at 589; *People v Delaughter*, 124 Mich App 356, 360 (1983). Adequate provocation and passion mitigate second degree murder to voluntary manslaughter, but are not elements of the crime. *Reese*, 491 Mich at 143-144.

Provocation "is that which causes the defendant to act out of passion rather than reason." *People v Sullivan*, 231 Mich App 510, 518 (1998). Provocation must be adequate, that which would cause a reasonable person to lose control of reason, to "act out of passion rather than reason." *People v Pouncey*, 437 Mich 382, 390 (1991); *People v Mitchell*, 301 Mich App 282, 286-287 (2013); *Sullivan*, 231 Mich App at 518-519. The test is whether an ordinary or reasonable person of fair average disposition would have been provoked under the circumstances and lose control of reason. *Pouncey*, 437 Mich at 389*; People v Younger*, 380 Mich 678, 682 (1968).

Insulting words alone, or an assault and battery, are ordinarily insufficient provocation. *Pouncey*, 437 Mich at 391. A mutual fight is ordinarily sufficient provocation. See *People v Pouncey*, 437 Mich 382 (1991).

Paul's words were insulting but not sufficient provocation. There was not a mutual fight. Paul's failure to pay a debt, his words and economic pressure on Daniel is not adequate provocation. The fatal blow may have been delivered out of anger but not heat of passion. The best conclusion is that the facts support second degree murder as there was insufficient provocation and it did not cause Daniel to act out of heat of passion.

Involuntary manslaughter is the intentional killing of another without malice in 1) commission of an unlawful act not a felony, not naturally causing death or great bodily harm; 2) negligent commission of a lawful act; or 3) negligent omission to perform a legal duty. *People v Heffin*, 434 Mich 482, 507-508 (1990). It does not apply here as hitting a person with a weapon

is a felony (felonious assault) and is not a lawful act nor gross negligence.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Persons have a right to be secure from unreasonable searches and seizures based on both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, Art 1, Sec 11; *People v Kazmierczak*, 461 Mich 411, 417 (2000). *People v Williams*, 472 Mich 308, 313-314 (2005). A search without a warrant is presumed to be unreasonable and unconstitutional. *People v Champion*, 452 Mich 92, 98 (1996); *People v Barbarich*, 291 Mich App 468, 472 (2011).

A traffic stop is considered to be a seizure of the occupants of the vehicle and is within the parameters of the Fourth Amendment. *Brendlin v California*, 551 US 249, 255 (2007); *People v Williams*, 236 Mich App 610, 612 n1 (1999). Law enforcement officers are permitted to make an investigatory stop when they possess a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v California*, 572 US 393, 396-397 (2014) quoting *United States v Cortez*, 449 US 411, 417-418 (1981). A traffic stop is justified if the officer has "an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law." *Williams*, 236 Mich App at 612. A violation of the law includes a traffic law. *People v Davis*, 250 Mich App 357, 363 (2002). In this case, Officer Smith stopped the pickup based on information from an unidentified person who observed the erratic driving of the pickup. Smith performed a warrantless stop based on that information.

The court is required to evaluate the stop and view the totality of the circumstances presented to the officer in a light "based on commonsense (sic) judgments and inferences about human behavior." *People v Horton*, 283 Mich App 105, 109 (2009) quoting *People v Jenkins*, 472 Mich 26, 32 (2005). The court should not use "overly technical reviews" of an officer's assessment of whether criminal activity is afoot. *People v Faucett*, 442 Mich 153, 168 (1993).

When the information is not based on the personal knowledge of the officer but is based on information provided by another, a tip, the legal test is whether the tipster's information "contained sufficient indicia of reliability to provide law enforcement with a reasonable suspicion that would justify the stop." *Barbarich*,

291 Mich App at 474. In making this determination, the court must consider: (1.) The reliability of the informant; (2.) the nature of the informant's information; and (3.) the reasonableness of the suspicion in light of those factors. *People v Tooks*, 403 Mich 568, 577 (1978).

Information provided to law enforcement by a citizen who has "personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officer's own observations." *Id.* The amount of information needed to justify an investigative stop of an erratically driven vehicle based on an anonymous tip is less than other types of criminal behavior that pose a less immediate threat. *Barbarich*, 291 Mich App at 475, 479. The public interest in road safety is greater than the minimal invasive nature of the investigation. *Id.* at 479.

In this instance, the dispatcher relayed the information to Smith as it was being provided by the caller. The citizen tipster described reckless driving. The reliability of the information was corroborated by Officer Smith in a timely manner.

The information provided by the citizen tipster must support the inference the citizen tipster "witnessed an actual traffic violation that compels an immediate stop." *Barbarich*, 291 Mich App at 475 quoting *United State v Wheat*, 278 F3d 722, 732 (CA8 2001). The imminent danger of erratic driving and the tipster's "firsthand contemporaneous observations" requires less in regard to "predictive elements of reliability". *Barbarich*, 291 Mich App at 475 quoting *United States v Wheat*, 278 F3d 722, 730, 732 (CA8 2001); see also *People v Estabrooks*, 175 Mich App 532, 538-539 (1989).

The information (tip) must correctly identify the vehicle, i.e. the one identified by the citizen's information is the same one stopped by the police. This can be accomplished by verification of make, model, location and bearing (direction) of the vehicle. The quality or reliability of the information need only be corroborated in innocent detail. ("[L]ess is required with regard to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details." *Barbarich*, 291 Mich App at 480).

Smith verified the model of the vehicle (pickup truck), the color (black with a red tailgate, an unusual configuration), the road (I-96), the direction (east), the license plate letters (RO v RQ), and the number of occupants (two). Sufficient corroboration of the innocent details was provided to satisfy the legal test, making the investigative approach reasonable. The information provided by the tip warranted investigation by the officer as to whether Don was driving under the influence or was driving recklessly.

The gun and narcotics were then in plain sight in the pickup. If the stop was proper, the officer had a right to be in the position to see the gun and drugs in the pickup truck and the seizure of them by Smith was legal. If it is concluded the stop was not legal, the search and seizure of the gun and drugs is not legal. *Horton* v *California*, 496 US 128,135 (1990).

EXAMINERS' ANALYSIS OF QUESTION NO. 10

1. The December 2006 will has no effect on the distribution of the estate.

Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq.

MCL 700.2807(1) provides in part that:

> (1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (*i*) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

MCL 700.2806 defines certain terms in MCL 700.2807(1)(a)(*i*) as follows:

> (a) "Disposition or appointment of property" includes, but is not limited to, a transfer of an item of property or another benefit to a beneficiary designated in a governing instrument.
>
> ***
>
> (d) "Governing instrument" means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.
>
> (e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption,

> or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

Further, MCL 700.1104 provides that a "governing instrument" includes a will.

Accordingly, in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will later divorces his or her spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives.

Thus, under MCL 700.2807, Mary and Joe's divorce revoked all revocable provisions of the will that transferred property or another benefit to Mary, as the former spouse, and to Jane and Jack, as Mary's children. The divorce, therefore, revoked the provisions of Joe's will that left real property to Mary and the remaining estate to Jane and Jack.

2. Jane, Jack and Bobby will receive the insurance proceeds.

Life insurance policies are non-probate property and are governed by contract law. See *Hilliker v. Dowell*, 54 Mich App 249 (1974); *Starbuck v. City Bank & Trust Co*, 384 Mich 295 (1970). Since the facts do not provide that there are any other provisions in the policy requiring a different result, the named beneficiaries will be entitled to the proceeds of the policy, as set forth in the agreement.

Thus, Jane, Jack and Bobby would receive the life insurance proceeds because they are the individually named beneficiaries under the policy and the proceeds are not considered part of Joe's estate to be disposed of by will or that can be distributed through intestate succession.

3. Joe's estranged brother will likely take the entire probate estate.

Because the divorce revoked Joe's will, Joe died without a testamentary document, and as such, Joe's estate will be distributed according to the EPIC rules governing intestate succession, MCL 700.2101 et seq.

Where a decedent dies without a surviving spouse, as is the case here since Joe was divorced, the decedent's estate passes first to the decedent's descendants by representation. MCL 700.2103(a). Thus, if Jane, Jack and Bobby are Joe's descendants, they will take the entire estate equally by representation. The statutory definition of descendant contemplates "the relationship of parent and child," MCL 700.1103(k). The statutory definition of "child" specifically excludes "a stepchild" and "a foster child." MCL 700.1103(f). As a result, even though Joe thought of Jane, Jack and Bobby as "his children," they are not statutorily considered his children and therefore cannot take his estate.

Michigan, however, recognizes the doctrine of adoption by estoppel. See *Perry v. Boyce*, 323 Mich 95 (1948). Under this equitable doctrine, a child is entitled to inherit as if he were adopted where a parent promises to adopt the child but does not. In the instant case, Joe was merely considering adoption as an option. In fact, Joe merely said that he "should try" to adopt Bobby, and not that he *would* adopt Bobby. Additionally, Joe only discussed the adoption process with his attorney, but made no further attempts to move forward with the process. Because the facts do not indicate that Joe ever actually promised to adopt Bobby, nor made a real concerted effort to adopt Bobby, adoption by estoppel will likely not prevail as a basis to award Joe's estate to Bobby.

If the decedent has no surviving descendant or parent, then the decedent's estate passes to "the descendants of the decedent's parents or of either of them by representation." MCL 700.2103(c). Because Jane, Jack and Bobby do not qualify as a descendant and Joe is not survived by his parents, Joe's estranged brother will take Joe's entire estate.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

1. Pharmacy Glasses Proceeds – Annmarie v. Beth:

Beth is likely able to keep the proceeds of the pharmacy sunglasses because it appears that Annmarie abandoned the sunglasses. "Two requirements must be met to establish abandonment. First, it must be shown that there is an intent to relinquish the property and, second, there must be external acts that put that intention into effect." *Sparling Plastic Indus, Inc v Sparling*, 229 Mich App 704, 717–718 (1998); see also *Emmons v Easter*, 62 Mich App 226, 237 (1975).

As indicated in the facts, Annmarie's intent to relinquish control over the sunglasses is inferred by the fact that she was frustrated by the bent sunglasses and attempted to throw the sunglasses in the trash. Additionally, the act reflected her desire to permanently part with the sunglasses and an indifference as to what would happen to the sunglasses next. It does not matter that Annmarie missed the trash can and instead threw the sunglasses next to the trash can, her intent was clear.

There are no statutory or other legal requirements on the part of a private party who finds abandoned property of that nature. Therefore, as a private party finder of the sunglasses, Beth acquired full ownership interest of the sunglasses once retrieved. The abandonment of the sunglasses by Annmarie forecloses any arguments of her subsequent entitlement to the glasses.

2. Return of Designer Sunglasses – Kate v. Mary:

In Michigan, there is no legal distinction between lost and mislaid property with respect to a finder's legal status as it relates to the owner. In either case, the Lost and Unclaimed Property Act, MCL 434.21 et al, (the "UPA") requires the finder to follow certain requirements if seeking to gain full ownership rights in an item when the legal owner is either not determined, or does not claim, the property. The UPA provides in relevant part that:

> A person who finds lost property shall report the finding or deliver the property to a law enforcement agency in

> the jurisdiction where the property is found. . . . If the person wishes to receive the property if it is not claimed by the legal owner as provided in this act, the person shall provide his or her name and current address to the law enforcement agency and shall inform the agency of any change in his or her address.

MCL 434.22(1). Law enforcement is responsible for taking certain steps pursuant to the UPA to establish the legal owner. Law enforcement would be required to mail notice to any known legal owner of major value property identifying, among other things, its location, the date found, type of property, etc. MCL 434.25(1).

Property categorized as having major value may be returned to the finder if the owner fails to claim it within six months from the date of the notice. MCL 434.25(2) and 434.26(1). Similarly, if a legal owner cannot be established or located, the finder is entitled to return of the property from law enforcement. MCL 434.26(1)(a). Property of major value is statutorily defined as "any property that is not collectible currency, contraband, currency, evidence, hazardous material, junk, perishable property, or property of minor value." MCL 434.21(j).

Here, Kate purposely placed her sunglasses on the table next to where they were sitting, intending to later retrieve them but forgetting to do so, so Kate mislaid the sunglasses. Therefore, Mary had no automatic legal right to the sunglasses as the finder. Moreover, the sunglasses were designer sunglasses that were probably in excellent condition considering they were brand new, so the sunglasses would not likely have been deliberately discarded.

Under such circumstances, Mary would be required to follow the requirements of the UPA and report her find or deliver the sunglasses to the local law enforcement agency, which she did not. Delivering the sunglasses to the HOA office does not meet the requirements of the UPA. Additionally, it is likely that the sunglasses would be classified as a major value item under the UPA since the facts state that the sunglasses were valued at $3,000. As such, Mary would only be entitled to the sunglasses if the law enforcement agency is unable to determine ownership, unable to locate Kate or Kate does not claim the sunglasses within six months after the notice date. Here, not only did Mary deprive the local law enforcement agency of its ability to either locate Kate or

otherwise determine ownership, but Mary also did not wait the required six month timeframe before retrieving the sunglasses – she only waited four months. Mary will be required to return the sunglasses to Kate.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Sunnyville Condo - Tenancy by the Entirety

In Michigan, there is a common-law presumption that a tenancy by the entirety is created when a validly married couple takes property as joint tenants and share the unities of time, title, interest, and possession. *Budwit v Herr*, 339 Mich 265, 272 (1954).

In a tenancy by the entirety, each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. *Rogers v Rogers*, 136 Mich App 125, 134 (1984).

> When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. *Rogers*, 136 Mich App at 134.

Here, with respect to the Sunnyville property, the deed to Nancy and Drew indicated only that the property was conveyed to them “jointly as husband and wife.” Therefore, Nancy and Drew clearly acquired a tenancy by the entirety with respect to the Sunnyville property.

Nancy and Drew’s divorce was not final when Drew died. Therefore, the tenancy by the entirety was not dissolved by divorce. However, the tenancy by the entirety did terminate when Drew died. At that time, Nancy took sole title to the property through the right of survivorship. This right provides that in the event that one spouse dies during the course of the marriage, the surviving spouse automatically takes fee simple ownership in the entire property.

The quitclaim deed to Jen did not divest Nancy of her ownership interest. As a tenant by the entirety, Drew did not have a separate or individual property interest that he could lawfully transfer to Jen without Nancy’s consent. *Rogers*, 136 Mich App at 134-135. A quitclaim deed only passes “the estate which the grantor

could lawfully convey by a deed of bargain and sale." MCL 565.3. As Drew could not lawfully transfer his interest in the tenancy by the entirety, the quitclaim deed transferred no property interest to Jen. Nancy has the sole ownership interest in the condo and can evict Jen pursuant to applicable law.

Fixitville Property – Joint Tenants with Rights of Survivorship

Michigan law recognizes two forms of joint tenancies: a more standard form of joint tenancy and joint tenancy with rights of survivorship.

> The first is of the type typically recognized in various jurisdictions. This joint tenancy is characterized by the four unities, that is, unity of interest, unity of title, unity of time, and unity of possession. Each joint tenant shares in possession of the entire estate, and each is entitled to an undivided share of the whole. The principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate. In the standard joint tenancy, the right of survivorship may be destroyed by severance of the joint tenancy. . . . The joint tenancy may be severed by an act of the parties, by conveyance by either party, or by levy and sale on an execution against one of the parties. . . . If one joint tenant conveys his interest to a third party, then the remaining joint tenant and the grantee become tenants in common, thus destroying the element of survivorship.
>
> The . . . [second form of joint tenancy], while unfortunately sharing the same appellation as the typical joint tenancy, is an interest of a different nature. It is created by express words of survivorship in the granting instrument in addition to those creating a joint tenancy, such as "and to the survivor of them," "to them and the survivor of them," "or survivor of them," "with right of survivorship," "with full rights of survivorship." *Albro v Allen*, 434 Mich 271, 274–275 (1990)(citations omitted).

A "joint tenancy with full rights of survivorship is . . . composed of a joint life estate with dual contingent remainders."

Wengel v Wengel, 270 Mich App 86, 94–95(2006)(citations omitted)(citing *Albro*, 434 Mich at 275). "While the survivorship feature of the ordinary joint tenancy may be defeated by the act of a cotenant, the dual contingent remainders of the joint tenancy with full rights of survivorship are indestructible." *Id.* (citing *Albro*, 434 Mich at 275–276). Thus, where property stands in the name of joint tenants with the right of survivorship, the "contingent remainder of a cotenant is not subject to being destroyed by the actions of the other cotenant." *Id*. Or said another way, "survivorship rights cannot be destroyed where the grant is to joint tenants with right of survivorship . . ." *Townsend v Chase Manhattan Mortg Corp*, 254 Mich App 133, 136 (citing *Albro*, 434 Mich at 287).

With respect to the Fixitville property, the deed to Nancy, Drew and Steve indicated that they acquired the property as "joint tenants with rights of survivorship." As such, Drew was only permitted to transfer his concurrent life estate interest (which terminated when Drew died) but could not transfer his interest in any contingent remainder, thus cannot deprive Nancy or Steve of their right of survivorship. The right of survivorship provides that in the event that any tenant dies, the surviving tenant or tenants automatically takes the whole estate in fee. Since both Drew and Steve died, Nancy automatically took sole ownership of the Fixitville property in fee. Thus, the quitclaim deed to Jen did not transfer fee simple ownership interest to the Fixitville property to Jen.

Mannsville Property – Joint Tenants

The facts state that the Mannsville property was deeded to Nancy, Drew and Steve as "joint tenants," without mention of the right of survivorship. As such, Nancy, Drew and Steve were standard form joint tenants. As standard form joint tenants, their rights of survivorship with respect to the Mannsville property was subject to severance, including by conveyance, which could destroy the element of survivorship and convert the joint tenants to tenants in common. *Albro*, 434 Mich at 274–275. Upon the conveyance by Drew to Jen of the Mannsville property, the joint tenancy status of the owners was severed and the remaining owners (Nancy and Steve) became tenants in common with Jen. A tenant in common has the right to compel partition. *Albro*, 434 Mich at 282. As such, Jen has the right to compel partition of the Mannsville property.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

Test-x's defense

Test-x argues that it did not breach the contract because its 3% estimate fulfilled its promise to be "accurate to within 5%," as stated in its written report to Mellow-Glo. This argument fails, however, because the contract between Test-x and Mellow-Glo required Test-x's determination to be "accurate to within 1%," and Test-x's determination did not satisfy that requirement. While Test-x may claim that the contract was modified by Test-x's statement in its report to Mellow-Glo, that statement did not constitute a valid contract modification.

"[A] party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372 (2003); see also *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 326-327 (1996) ("[I]n the same way a meeting of the minds is necessary to create a binding contract, so also is a meeting of the minds necessary to modify the contract after it has been made."). "Simply put, one cannot unilaterally modify a contract because by definition, a unilateral modification lacks mutuality." *Quality Prods*, 469 Mich at 373. "This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id.* at 364-365.

Here, Test-x attempted to unilaterally modify the contract by including a provision in its written report to Mellow-Glo that directly conflicted with a provision addressing the same subject matter in its contract with Mellow-Glo. There is no evidence — written, oral, or through affirmative conduct—that Mellow-Glo agreed to modify the "accurate to within 1%" language. Indeed, Mellow-Glo was unaware of the "accurate to within 5%" statement because no one at the company read the written report (nor did anyone have a duty to do so). The contract was thus not validly modified, and Test-x's claim that it did not breach the contract fails.

Test-x's claim for damages

A. Duty to mitigate

After it learned of the inaccuracy of its labels, Mellow-Glo had a duty to mitigate any damages. "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Morris v Clawson Tank Co*, 459 Mich 256, 263-264 (1998); see also *Farm Credit Servs, PCA v Weldon*, 232 Mich App 662, 680 (1998) ("It has long been recognized that the law should encourage a potential plaintiff to take reasonable actions to minimize the extent of damages arising from the wrongful breach of a contract."); *Lawrence*, 445 Mich at 15 ("At common law . . . a plaintiff has a duty to mitigate his loss . . . .").

Here, once Mellow-Glo discovered that the labels on its products were inaccurate, it was required to use reasonable means to avoid the damages that would result from that inaccuracy. This could include recalling the mislabeled products, removing the labels, covering the labels, or taking some other step to avoid violating the truth-in-advertising statute. Mellow-Glo would thus not be entitled to recover for any damages incurred after it learned of the error. However, it would be able to recover from Test-x any costs of mitigation (for example, the cost of recalling the mislabeled products or removing the inaccurate labels).

B. Mellow-Glo's claim for lost profits

Mellow-Glo can recover lost profits as part of normal expectation damages.

"[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 414 (1980); see also *Frank W Lynch & Co v Flex Technologies*, 463 Mich 578, 586 n 4 (2001) (same). "Lost profits resulting from a breach of contract are proper items of loss to be considered . . . in determining damages." *Lorenz Supply Co v Am Standard, Inc*, 100 Mich App 600, 611 (1980), *aff'd*, 419 Mich 610 (1984). Such profits are recoverable if "the defendants reasonably knew or should have known

that in the event of breach this plaintiff would lose profits." *Lawrence v Will Darrah & Assocs, Inc*, 445 Mich 1, 14-15 (1994). "[E]ven where lost profits are difficult to calculate and are speculative to some degree, they are still allowed as a loss item." *Bonelli v Volkswagen of Am, Inc*, 166 Mich App 483, 511 (1988). "Furthermore, Michigan case law indicates that doubts as to the certainty of damages must be resolved against the wrongdoer." *Lorenz*, 100 Mich App at 612.

Here, the contract stated that Mellow-Glo intended to use Test-x's analysis on its labels "to differentiate its products in a very competitive market." Thus, when Test-x and Mellow-Glo entered into the contract, they were both aware that the accuracy of Test-x's analysis would clearly affect the ability of Mellow-Glo to earn profits based on that analysis. Because both parties realized the potential for lost profits in the event of breach, Mellow-Glo can recover those lost profits, excluding lost profits attributed to Mellow-Glo's failure to mitigate its damages upon learning of the breach.

Alternative credit was given for arguing that Mellow-Glo cannot recover lost profits because even if Test-X had not breached, Mellow-Glo's manufacturing flaw meant that its products contained no CBD and thus would not have been profitable in any event.

C. Mellow-Glo's claim for the amount of the fines for statutory violations

Mellow-Glo can likely recover for the amount of any fines imposed before it discovered Test-x's error. As explained above, damages "that arise naturally from the breach" are recoverable. *Kewin*, 409 Mich at 414. Fines imposed for selling inaccurately labeled products can be said to "arise naturally" from the use of inaccurate labels that resulted from breach of a contract.

D. Mellow-Glo's claim for the costs of defending the DoRite lawsuit

Mellow-Glo probably cannot recover the costs of defending the lawsuit because the lawsuit was likely unforeseeable. As explained above, damages "which can reasonably be said to have been in contemplation of the parties at the time the contract was made" are recoverable. *Kewin*, 409 Mich at 419. Courts apply an "objective

standard" of foreseeability, under which damages are recoverable if "the defendants reasonably knew or should have known that in the event of breach," such damages would result. *Lawrence*, 445 Mich at 13, 14-15.

This lawsuit by the new organization, DoRite, was likely unforeseeable: The group was "new," and it brought lawsuits against "select" companies. The facts do not support the conclusion that either Test-x or Mellow-Glo could have reasonably anticipated that this new group would decide to target Mellow-Glo in its litigation campaign. Consequently, Mellow-Glo cannot recover for the costs of defending against this lawsuit.

E. Mellow-Glo's claim for punitive damages

Mellow-Glo cannot recover punitive damages because they are not available for breach of contract. "[T]he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-626 (1996). "[A]bsent allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." *Kewin*, 409 Mich at 420-421 (citation omitted); see also *Valentine v Gen Am Credit, Inc*, 420 Mich 256, 263 (1984) (same). Punitive damages in the absence of a statutory authorization are not recoverable in Michigan. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400 (2006).

Here, there is no evidence of tortious conduct by Test-x independent of its breach, so Mellow-Glo cannot recover exemplary/punitive damages.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

Agency principles govern the analysis of this question. The issue is whether there was an agency relationship between Chance and Sophia, such that Chance was bound to shoot the Henry wedding and is exposed to liability for his failure to do so. 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) (citations omitted). An agent's authority in that regard may be either actual or apparent/ostensible. *Meretta* v *Peach*, 195 Mich App 695, 698 (1992). "Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses." *Id*.

In contrast, apparent authority may be found "when acts and appearances lead a third person reasonably to believe that an agency relationship exists." *Id*. at 698-699. While "all surrounding facts and circumstances" must be considered in determining whether an agent has apparent authority to engage in an act that binds the principal, "[a]pparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent." *Id* at 699. Additionally, a principal can be estopped from challenging the authority of an agent

> [w]henever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed . . . [*Meretta*, 195 Mich App at 699-700 *quoting Central Wholesale Co v Sefa,* 351 Mich 17, 26-27 (1957).]

The facts show that an agency relationship existed between Chance (as principal) and Sophia (as agent) with respect to Sophia performing a myriad of administrative, collection and logistical duties in connection with Chance's photography business. However, there was an express limitation on Sophia's authority to bind Chance to photograph events that he did not preapprove. Thus, Sophia had no actual authority, express or implied, to act on

behalf of Chance to contract with the Henry couple unless she had prior approval from Chance. Sophia obtained no such permission.

However, the Henrys could make a strong argument that Sophia had apparent authority to book Chance as their wedding photographer, given her publicly well-known reputation as Chance's assistant. Moreover, Chance himself directed potential clients to Sophia when approached about photo opportunities. Consequently, the Henrys could have reasonably assumed that Sophia had unlimited authority to bind Chance to photographing their wedding. This would likely result in Chance's liability to the Henrys for failure to do so.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

A. The Rap Videos Are Not Hearsay Because They Are Non-Hearsay Party Admissions.

Davis' MRE 801 objection should fail because the rap videos are party admissions pursuant to MRE 801(d)(2), and, as such, are not hearsay. MRE 801(d)(2) provides:

A statement is not hearsay if

***

> (2) *Admission by Party-Opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth . . ..

Given that Davis is the rapper in both videos, the videos are his statements, and as such, they are not hearsay. On this basis, the court should overrule Davis' MRE 801 objection.

B. The Court Should Grant Davis' MRE 403 Objection to the Videos Given Their Low Probative Value and Potential for Undue Prejudice or Juror Confusion.

Pursuant to MRE 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

Both videos are, at best, statements of a general intent to engage in violent behavior, rather than of Davis' intent on the night in question. The Michigan Supreme Court opined that such statements projecting gun use or violence, removed in time from the actual crime, appear to be more "an exercise in machismo, one accomplice bragging to another about how tough he would be", rather

than probative of a criminal defendant's motive on the night the actual violent event occurred. *People v. Goddard*, 429 Mich 505, 520 (1988). The videos show Davis condoning his own and other gang members' escalation to gun violence whenever they perceive insulting words have been directed at them, such as being challenged to leave a party by a rival gang member. As such, the videos are highly provocative. Because the prosecutor intends to offer the videos as proof Davis acted with the intent to kill, rather than in self-defense, what little probative value the videos may have is substantially outweighed by the danger of unfair prejudice or juror confusion. *Goddard*, 429 Mich at 520-521. See also *People v. Blackston*, 481 Mich 451, 462 (2008). While the court should exercise its discretion to exclude the videos under MRE 403, credit will be given for a good analysis that reaches the opposite conclusion as well.

C. Evidence of "Other Acts" of Gang Affiliations is Admissible per MRE 404(b)(1):

MRE 404(b)(1) provides:

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

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

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

Evidentiary safeguards employed when admitting "Other Acts" evidence:

The prosecution has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose under MRE 404(b)(1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376, 385 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010) (emphasis in original).

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

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

The prosecutor argues that the "other acts" evidence is admissible to show witness bias or lack of credibility in the Shark witnesses' denials that they saw Davis shoot Van. While evidence of gang affiliation is often deemed inadmissible in criminal proceedings on the grounds it is impermissible character evidence, *People v Bynum*, 496 Mich 610, 625-626 (2014), testimony regarding gang affiliation may be admissible to explain a witness's bias or to reflect on his credibility. *United States v Abel*, 469 US 45, 52 (1984). Because the prosecutor's articulated purpose is to show the motivation of the Shark witnesses to refuse to "snitch" on Davis, the admitted shooter, the prosecution has established a permissible purpose for admission.

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

The court next must determine whether the evidence has a tendency to make the existence of a fact of consequence in the case more or less probable then it would be without the evidence, pursuant to MRE 402. Given the fact that multiple witnesses have adopted a "see no evil" stance despite having witnessed Davis' admitted shooting, the evidence passes the relevancy threshold.

The evidence must be admissible under MRE 403:

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

As stated previously, evidence of gang affiliation is often considered not only provocative in content, but also impermissible character evidence. Davis therefore likely has the stronger argument under MRE 403 against admission of the evidence. However, it presents a close question on a matter left to the court's discretion, so an examinee could also argue – and deserve credit for – reaching the opposite conclusion. In the event the examinee comes down on the side of admissibility, the defense would be entitled to, and the court should give, a limiting instruction.