JULY 2020 MICHIGAN BAR EXAMINATION
EXAMINER'S ANALYSES

EXAMINER'S ANALYSIS OF QUESTION NO. 1

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) (footnote omitted.).

Applying the preliminary injunction factors, the court should grant Pax's motion. The first factor involves Pax's ability to show irreparable harm. 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 (footnote omitted). To establish irreparable harm, 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).

Pax's allegations of loss of customer goodwill and Delta's use of confidential information it acquired as a Pax franchisee to compete against it are sufficient to show a risk of irreparable harm [Factor (1)].

"'[T]he loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.'" *Slis v State of Mich*, ___ Mich App ___; 2020 WL 2601577, at *21 (2020), quoting *Basicomputer Corp v Scott*, 973 F2d 507, 512 (CA 6, 1992). Cf. *Thermatool*, 227 Mich App at 377 (finding no irreparable harm where the plaintiffs alleged only "a single breach of the noncompetition agreement in the sale of one [product] to a known customer," such that "[a]ny damages suffered by plaintiffs as a result of that sale" were "easily calculable").

Similarly, the loss of fair competition resulting from use of confidential information in breach of a non-compete provision has been recognized as likely to cause irreparable harm. *Basicomputer*, 973 F2d at 512. "[P]reventing the anticompetitive use of confidential information is a legitimate business interest" that may validly be protected by enforcing a noncompete. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158-159 (2007).

As for the balance of harms [Factor (2)], Delta has not identified any harm it would suffer that would outweigh the irreparable harm being claimed by Pax. Indeed, the covenant not to compete does not completely prohibit Delta from providing home health care services—it just cannot solicit patients or provide services to Pax patients within a 20-mile radius for one year.

Pax has also shown a likelihood of success on the merits [Factor (3). Delta's plan to abandon its Pax franchise and continue to operate under a new name is a plain breach of the covenant not to compete. And while Delta claims that the noncompete provision is unenforceable, such provisions are valid and enforceable in Michigan so long as they are reasonable in duration and geographical area. *Rooyakker*, 276 Mich App at 157; MCL 445.774a. There is nothing to suggest that the covenant not to compete is unreasonable. Indeed, courts applying Michigan law have upheld noncompete agreements containing similar restrictions. See *Whirlpool Corp v Burns*, 457 F Supp 2d 806, 813 (WD Mich, 2006) (observing that "[c]ourts have upheld non-compete agreements covering time periods of six months to three years"); *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 550 (CA 6, 2007) (upholding agreement prohibiting competition within a 25-mile radius).

Finally, the public interest factor [Factor (4)] is either neutral or weighs in favor of granting preliminary injunctive relief. Enforcement of valid noncompete agreements is in the public interest. *Lowry Computer Products, Inc v Head*, 984 F Supp 1111, 1116 (ED Mich, 1997). Moreover, while Delta asserts that its existing patients will be harmed if it cannot continue to provide home health care services to them, there is no evidence to support that claim.

Although the better answer is that the court should grant Pax's request for a preliminary injunction, some credit will be given for a reasoned analysis reaching a contrary conclusion.

EXAMINER'S ANALYSIS OF QUESTION NO. 2

This question involves analysis and application of Michigan's race-notice recording statute and the application of such title to a scenario involving after-acquired title.

Race-Notice Recording Statute:

As a threshold matter, Michigan is a race-notice statute with respect to determining disputes regarding multiple conveyances of the same parcel of property. MCL 565.29. Michigan's race-notice recording statute MCL 565.29, provides in relevant part that:

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

Accordingly, a person holding an interest in real estate and who first records his or her interest generally has priority over subsequent purchasers. *Richards v Tibaldi*, 272 Mich App 522, 539 (2006). However, in the event a valid real estate interest holder does not record his or her interest, a later interest holder may take priority over the same property if such later real estate interest holder takes the property in "good faith." *Coventry Parkhomes Condo Ass'n v Fed Nat Mortg Ass'n*, 298 Mich App 252, 256 (2012).

"A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Mich Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410 (1992). Notice can be actual or constructive. *Richards*, 272 Mich App at 539. Constructive notice "is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not." *Id* at 540 (citation and quotation marks omitted). "A person having notice of a possible defect in title who fails to make further inquiry into the potential rights of a third party does not constitute a good-faith purchaser." *Wells Fargo Bank, NA v SBC IV REO, LLC*, 318 Mich App 72, 110 (2016); *Penrose v McCullough*, 308 Mich App 145, 152–53 (2014).

In the instant case, Peter failed to promptly record his interest, so that interest will be void against Laura's later conveyed interest if Laura acted in good faith and without notice of Peter's interest. Laura will likely be found to have acted in

good faith and without notice of the earlier sale to Peter. Laura only knew that Olivia "may be selling" the property and that Olivia was "in talks with someone," but not that Olivia had actually sold the property to someone. Additionally, the facts show that Laura was trying to do her due diligence on whether the property was still available by researching online and calling local real estate agents to inquire into the status of the property. Further, Laura asked Olivia if the property was still available and Olivia never informed her of the prior sale.

One could argue that there is some question as to whether Laura had notice of another claim to the property because she was aware that Olivia "was in talks with someone" and therefore might have been put on inquiry notice to investigate even further. This is, however, a weak claim because Laura in fact investigated the status of the property before the conveyance.

Accordingly, under Michigan's race-notice recording statute, Laura should prevail over Peter.

After-Acquired Title:

Even though Laura's interest will most likely prevail under Michigan's race-notice recording statute, examinees should also consider whether Laura even holds a valid interest in the real property because, at the time of the conveyance to Laura, Olivia was not the legal titleholder of the property.

"Under the doctrine of after-acquired title, if a grantor by warranty deed conveys an estate that the grantor does not own and subsequently acquires title to that estate, that title inures to the benefit of his or her grantee." *Donohue v Vosper*, 189 Mich 78 (1915); *Richards*, 272 Mich App at 541. "This is a form of estoppel, and the grantor is estopped to deny the title the grantor subsequently acquired." *Id.* A quitclaim deed, however, cannot convey after-acquired title because the grantor in the quitclaim deed warrants no title and conveys only what the grantor owned at the time of the conveyance. *Olmstead v Tracy*, 145 Mich 299 (1906); *Richards*, 272 Mich App at 541.

Because Oliva executed a warranty deed, and not a quitclaim deed, conveying the cottage and land to Laura and then subsequently acquired title to the same property, Laura holds a valid interest in the property. Accordingly, Laura would likely prevail in a quiet title action.

EXAMINER'S ANALYSIS OF QUESTION NO. 3

A constitutional challenge of an ordinance or an enactment based on vagueness is "brought under the Due Process Clause of the 14th Amendment of the United States Constitution." *People v Lino*, 447 Mich 567, 575 (1994); *People of City of Grand Rapids v Gasper*, 314 Mich App 528, 536 (2016). Const 1963, art 1, § 17. The applicant should recognize that the constitutional challenges could be brought under both the US and Michigan constitutions. The analysis is the same.

An ordinance or enactment is "void for vagueness" if what it prohibits is "not clearly defined." *Gasper*, 314 Mich App at 536 (2016); *Grayned v City of Rockford*, 408 US 104,108-109 (1972). An ordinance must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolendar v Lawson*, 461 US 352, 357 (1983); *Lino*, 447 Mich at 574. A person of ordinary intelligence should have a "reasonable opportunity to know what is prohibited" so he or she may act accordingly. *Gasper*, 314 Mich App at 536, quoting *Grayned*, 408 US at 108-109.

There are generally three ways an enactment (ordinance) can be void for vagueness using the same criteria used to construe statutes. *Lino*, 447 Mich at 574; *Kolendar*, 461 US at 365. These are:

1. It does not provide fair notice of the conduct proscribed.
2. It confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.
3. Its coverage is overbroad and impinges on First Amendment freedoms. *People v Howell*, 396 Mich 16, 20 (1976).

There is the additional danger that a person may "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Gasper*, 316 Mich App at 536-537, quoting *Grayned*, 408 US at 108-109.

A challenge for vagueness not on First Amendment grounds is "examined in light of the facts of each particular case." *Howell*, 396 Mich at 21; *Lino*, 447 Mich at 574. No First Amendment challenge is made in this case. The ordinance is void for vagueness because:

1. It does not provide sufficient notice as to what conduct is required or prohibited; and
2. It allows arbitrary and discriminatory enforcement by the code enforcement officer.

Either ground is sufficient under the law to render the ordinance vague in this case. *Gasper*, 314 Mich App at 538.

Discussion

David read the City ordinance, got a permit, and built a new fence. He received a ticket because it was not “open” and did not comply with the ordinance. He paid the fine. David’s failure to remove the fence escalated the matter into a misdemeanor offense for the continuing violation.

1. The ordinance in question does not provide criteria by definition, standard, specification, or measurement of the type of fence required. Any person of reasonable intelligence erecting a fence is left to guess whether it complies with the ordinance’s undefined term “open.”

2. The code officer is vested with complete discretion to determine whether the fence complies with the ordinance. The lack of definition and standard in the ordinance renders enforcement subjective, arbitrary, and discriminatory. Compliance is predicated on his personal view of whether it is “open,” the meaning which he learned when he overheard council members talk about it after a meeting. Enforcement on this basis is “subjective and arbitrary” on an ad hoc basis because the definition is known only to the enforcer, not learned from a reading of the ordinance language.

In conclusion, David is correct that the plain language of the code does not fairly apprise him of what is expected of him in building an “open” fence by specific definition. In addition, the unstated standard of the type of fence leaves it to the discretion of the code enforcer to determine on “an ad hoc basis” whether the fence erected complies with the ordinance. David should prevail on the argument that the ordinance is void for vagueness.

EXAMINER'S ANALYSIS OF QUESTION NO. 4

The court should deny the motion to dismiss for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, meaning they can only hear actions authorized by the United States Constitution or federal statutes. The two primary categories of federal subject matter jurisdiction are when (1) there is a either a federal question asserted in a well-pleaded complaint that seeks a remedy based on the federal question or (2) there is complete diversity of jurisdiction, which requires that the action be between citizens of different states and the amount in controversy exceeds $75,000. For "complete diversity" to exist, no plaintiff can be a citizen of the same state of any defendant. 28 USC § 1332.

In terms of diversity jurisdiction for this case, complete diversity between the parties exists; however, the federal court lacks diversity jurisdiction because the amount in controversy does not exceed $75,000.

When determining an individual's citizenship, a court will look to the person's domicile at the time the action was filed. A person can have only one domicile for purposes of diversity jurisdiction, *Eastman v Univ of Mich*, 30 F3d 670, 673 (CA 6, 1994), and a previous domicile cannot be lost until another is adequately established, *Mitchell v US*, 88 US 350, 353 (1874). Establishment of a new domicile, for diversity jurisdiction purposes, is determined by two factors: (1) residence in the new domicile, and (2) intention to remain there. *Von Dunser v Aronoff*, 915 F2d 1071, 1072 (CA 6, 1990). Thus, the relevant questions are whether Michael took up a new domicile in Ohio *and* whether Michael intended to remain in Ohio indefinitely.

Here, the facts do not support that Michael intended to abandon his Michigan domicile in favor of relocating to the Ohio farmhouse. Michael had established a Michigan domicile in which he lived "for over 30 years" before he purchased the Ohio farm. Although he lived at the Ohio farmhouse for the majority of the year and moved many personal items there, his presence in Ohio was necessitated by his livelihood. There is far stronger evidence that Michael considered his Michigan house as his domicile. For instance, he referred to his Michigan house as his "home," he would live there during the fall and winter when he wasn't required to be "growing and selling" produce at the farm; he maintained an active social life in Monroe; he maintained health club and church memberships in Monroe; he was registered and did in fact vote in Monroe, and he continues to obtain medical and dental care from

his doctors in Monroe. Michael has not changed his Michigan driver's license and car registration. Thus, Michael's intent was not to abandon his Michigan domicile in favor of the Ohio farmhouse. Accordingly, Michael is a citizen of Michigan for diversity purposes.

The fact that Michael moved to the Ohio farmhouse full time after the action was filed is irrelevant for diversity purposes. Diversity is determined at the time that the action is filed, and based on the residency of the parties at that time. A change in domicile by a party after that date does not destroy diversity. *LeBlanc v Cleveland*, 248 F3d 95, 100 (CA 2, 2001).

Unlike an individual, a corporation is a citizen where it is incorporated and where it has its principal place of business. 28 USC § 1332(c)(1). Here, Sally Foods is a citizen for diversity purposes in Minnesota where it is incorporated. A corporation's "principal place of business" for purposes of federal diversity jurisdiction refers to "the place where the corporation's high-level officers direct, control, and coordinate the corporation's activities." *Hertz Corp v Friend*, 559 US 77, 80 (2010). Sally Foods is also a citizen of Ohio because that is where its headquarters and CEO who directs and controls Sally Foods activities are located. Therefore, complete diversity exists between Michael and Sally Foods

However, diversity jurisdiction also requires that the amount in controversy exceed $75,000. 28 USC § 1332. In determining the amount in controversy, courts will accept the plaintiff's good faith allegations as to damages unless it appears to a legal certainty that the plaintiff cannot recover that amount. *St Paul Mercury Indemnity Co v Red Cab Co*, 303 US 283, 288-289 (1938). Here, Michael's claim for $80,000 in damages does not appear to have been made in good faith. During the first two years of this 4-year contract, Michael earned no more than $20,000 per year. The facts further state that Sally Foods learned that Michael prices "were higher than other farms in the area." Nevertheless, Michael asserted $80,000 in damages for his expected loss of produce sales for the remaining 2 years of the contract. The facts do not support Michael's assertion that expected future produce sales for the last two years of the contract would be greater than $75,000 when he earned only $40,000 during the first two years. Thus, although the parties are diverse, the jurisdictional threshold is not met and federal jurisdiction based on diversity is lacking.

However, the federal court has subject matter jurisdiction because Michael has asserted a federal claim. Federal courts have subject matter jurisdiction to hear claims that “arise under” the Constitution or other federal laws. 28 USC § 1331. Because Michael’s lawsuit is based on federal law, not state law, the federal claim establishes an independent basis for federal jurisdiction regardless of whether the parties are diverse or the $75,000 amount in controversy threshold for diversity jurisdiction is met. Thus, the federal court should deny defendant’s motion to dismiss for lack of subject matter jurisdiction.

EXAMINER'S ANALYSIS OF QUESTION NO. 5

Analysis of Sasha's sale of the painting to Brandon is prompted by consideration only of the uniform commercial code (UCC) adopted in Michigan. MCL 440.1101 et seq. Article 2 of the UCC involves sales and generally applies to "transactions in goods." MCL 440.2102. According to the statutory definition, "[g]oods means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ." MCL 440.2105(1).

Generally, a buyer has three options with respect to transactions in goods under the UCC. The buyer may accept the goods; reject the goods; or revoke an acceptance of the goods. MCL 440.2606 and 440.2607; MCL 440.2602; and MCL 440.2608, respectively. *See also*, *Bev Smith, Inc* v *Atwell*, 301 Mich App 670, 684 (2013). The UCC provides in pertinent part that revocation of acceptance of the goods is legally justified where there is a nonconformity with respect to the goods that "substantially impairs its value to [the buyer] if he accepted it . . . without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." MCL 440.2608(1)(b). The UCC further mandates that:

> Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it. MCL 440.2608(2).

Express warranties can be created by the seller of goods by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. MCL 440.2313(a).

Remedies for recovery of damages are available to a buyer under the UCC for a seller's breach of the contract. MCL 440.2701 et seq.

The UCC applies to the sale of the painting in the instant case, as it is a transaction in goods. The fact that the sale was consummated between two private art collectors and would probably not be considered commercial in nature, does not negate application of the UCC. *See*, *Bev Smith, Inc.* at 682, citing *Wilson v Hammer*

Holdings, Inc, 850 F2d 3, 4-6 (CA 1, 1988). Brandon clearly accepted the painting by taking possession of it, retained possession of it for four years, and is now attempting to revoke his acceptance. The issue now is whether Brandon's revocation of acceptance is either legally legitimate or wrongful under the UCC.

The four-year passage of time between consummation of the sale and notice of revocation of acceptance of the painting is significant. A strong argument could be made that Brandon waited too long, without legal justification, to revoke acceptance of the goods under the UCC, and therefore cannot recover any damages against Sasha. Brandon himself inspected the painting before purchase. Nothing in the facts suggests that Brandon was not at liberty to have a professional appraisal performed before and even immediately after the sale, which would have certainly revealed the inauthenticity of the piece. The facts indicate that the nonconformity was easily discoverable at least to a trained professional eye, and for an investment of $20,000, it would have been prudent for Brandon to secure an appraisal much earlier. Moreover, there is no evidence of fraud by Sasha who had also relied on the certificate of authenticity that accompanied the work. Thus, a four-year delay in seeking an appraisal and actually discovering the nonconformity and notifying Sasha is unreasonable and does not constitute a legally justified revocation of Brandon's acceptance under the UCC.

On the other hand, a perhaps less compelling argument could be made that Sasha's provision of a certificate of authenticity to Brandon constituted an assurance by her as the seller that the painting was authentic. Both Brandon and Sasha were seasoned art collectors at the time and did not discover or even suspect that the artwork was not an original Josh Landing piece. In fact, Brandon sought appraisal of the piece, not to verify authenticity, but to assess any appreciation in value. Thus, Brandon had no reason to discover the nonconformance earlier. Once it was actually discovered, Brandon immediately notified Sasha. If that argument is convincing, Brandon may be able to legally revoke acceptance of the painting and recover damages from Sasha.

Brandon could also seek damages based on Sasha's breach of warranty because the painting does not conform to the affirmation or promise provided in the certificate of authenticity that accompanied the sale of the painting. MCL 400.2313(a). Arguments regarding other warranties, such as implied warranty of merchantability under MCL 440.2314, would not be applicable here because Sasha is a private art collector, not a merchant.

EXAMINER'S ANALYSIS OF QUESTION NO. 6

This question involves analysis and application of Michigan law on gifts. If a valid gift occurred, then the diamonds would belong to Mary. If not, then the diamonds would be part of Mike's estate when he died and thus would belong to Dan.

Three elements are necessary to constitute a valid gift: (1) the donor must possess an intent to gratuitously pass title to the donee; (2) there must be actual or constructive delivery; and (3) the donee must accept the gift, although a gift beneficial to the donee will be presumed to have been accepted. *See Brooks v Gillow,* 352 Mich 189, 197-98 (1,958); *Osius v Dingell,* 375 Mich 605, 611(1965); *Lumberg v Commonwealth Bank,* 295 Mich 566 (1940).

Most gifts convey absolute irrevocable title to the donee, but some gifts are conditional. For instance, a gift causa mortis is a gift of personal property "made by a person in the expectation of imminent death, on condition that the donor dies as anticipated, leaving the donee surviving him." *Brooks v Gillow,* 352 Mich 189,197 (1958). It is the apprehension or expectation of imminent death, and not the actual imminence of death, which is evaluated. See *In* re *Van Wormer's Estate,* 255 Mich 399, 406 (1931); *Brooks,* 352 Mich at 197; *In* re *Reh's Estate,* 196 Mich 210, 218 (1917)

Unlike a gift inter vivos, a gift causa mortis does not transfer title to the donee until the death of the donor because it is "revocable during the lifetime of the donor." *In* re *Reh's Estate,* 196 Mich 210, 218 (1917). Absent an express revocation of a gift causa mortis by a donor during the lifetime of the donor, a gift causa mortis will not be revoked by a subsequent will. *Lumberg v Commonwealth Bank,* 295 Mich 566, 569 (1940).

Under the facts presented, there appears to be a valid gift **causa mortis.**

First, the facts show that Mike intended to gift the diamonds to Mary, as shown by Mike's statements to Mary and the written instructions to the jeweler. One could argue that because Mike later executed *a* will and the will did not expressly exclude the diamonds, that Mike may have changed his mind about gifting the diamonds to Mary and intended the diamonds to be covered by the will. This counterargument,

however, will likely fail because unless Mike expressly revoked the gift causa mortis, the gift will remain. The facts do not show that Mike expressly revoked the gift to Mary either verbally or in the will.

Second, there is evidence to establish sufficient delivery. “While it is true that a gift causa mortis must be delivered to or for the donee to vest title at the death of the donor this does not mean the subject of the gift must be in the hands of the donee, but it is sufficient delivery if placed in the hands of a third party by the donor, with written instructions from which the third party may not depart and which the donor does not change.” *Lumberg*, 295 Mich at 568. In the instance case, Mary was in a foreign country and it was impossible to place the diamonds in her hands and so Mike placed the gift with his regular jeweler to hold for his sister with written instructions for the delivery of the diamonds to his sister upon his death. Further, he never changed his instructions to the jeweler, he segregated the gift from the rest of his estate and the jeweler assumed liability to deliver the diamonds to Mary.

Third, as to the acceptance, “where a gift is beneficial to the donee and imposes no burdens upon the donee, acceptance by him or her is presumed as a matter of law.” *Lumberg*, 295 Mich at 569 (1940); *In re Handelsman*, 266 Mich App 433, 438 (2005). Thus, even though Mary did not clearly accept the gift when she said "thank you, but do whatever you want," acceptance by her will likely be presumed as a matter of law since the diamonds may be beneficial to her. On the other hand, Mary did say "do whatever you want," which could be shown that acceptance was not valid. That said, it can be argued that this statement should not rebut the presumption that Mary accepted the diamonds and she clearly did not reject the gift. However, credit will be given for a cogent analysis which concludes that acceptance was not valid.

And fourth, because the gift was made with impending death in mind, the gift must meet the requirements of a gift causa mortis. Mike gifted the diamonds to Mary in view of his apprehension of imminent death. Mike was seriously ill and was aware that his time was limited. Lastly, the gift was expressly conditional on his death. The written instruction provided that the diamonds would only pass in the event of Mike's death.

Since a valid gift causa mortis was made (and never revoked by Mike) the subsequent will did not revoke the gift to Mary. Thus, the jeweler is obligated to deliver the diamonds to Mary.

Alternatively, credit will also be given for a cogent trust analysis. If applying a trust analysis, applicants should (i) identify the trust creation method, (ii) discuss the statutory requirements for creating a trust, (iii) confirm that nothing in the facts support a showing that the purpose of the trust was unlawful, contrary to public policy or impossible to achieve, and (iv) identify the written instructions as the trust instrument.

EXAMINER'S ANALYSIS OF QUESTION NO. 7

This question tests the rules governing a premises owner's liability to an invitee. "To establish a prima facie case of negligence," underlying a premises liability claim, "a plaintiff must prove that '(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.'" *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660 (2012), quoting *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011).

The first step is to determine the duty owed by the landowner to the person coming upon his land. *Hoffner v Lanctoe*, 492 Mich 450, 460 (2012). There are three common-law categories in which visitors to one's land fall: invitees, licensees, and trespassers. One's category determines the duty owed. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). A social guest of a tenant is an invitee of the property owner. *Stanley v Town Square Co-op*, 203 Mich App 143, 147-148 (1993) ("Part of the rent paid to the landlord is the consideration for giving to the tenants the right to invite others onto the property. Thus, the same duty that a landlord owes to its tenants also is owed to their guests, because both are the landlord's invitees"); *Bailey v Schaaf*, 494 Mich 595, 604 (2013) ("Michigan law has recognized that a special relationship exists between "[o]wners and occupiers of land [and] their invitees," including between a landlord and its tenants and their invitees.").

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). However, a landowner's duty to remedy or warn does not generally encompass defects that are "open and obvious." With regard to a premises owner's duty, in *Hoffner*, 492 Mich at 460, the Supreme Court recognized that "an integral component of the duty owed to an invitee considers whether a defect is 'open and obvious.' The possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." Thus, the duty imposed on property owners does not extend to open and obvious conditions that are effectively avoidable and do not impose a uniquely high likelihood of harm or severity of harm. *Hoffner*, 492 Mich at 463. An effectively unavoidable hazard is one that the person, "for all practical purposes, must be *required or compelled* to confront."

Hoffner, 492 Mich at 469 (emphasis in original.) Whether a condition is open and obvious is judged by an objective standard by asking, "Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?" *Price v Kroger Co*, 284 Mich App 496, 501 (2009).

Citing to *Lugo*, 464 Mich at 517, the *Hoffner* Court also addressed an exception to this rule that arises when the condition is so hazardous or its placement makes even the openly obvious risk unreasonable:

> Yet, as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable. When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm.
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> It is worth noting *Lugo*'s emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." The touchstone of the duty imposed on a premises owner being reasonableness, this narrow "special aspects" exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature. [*Hoffner*, 492 Mich at 461-462 (footnotes omitted).]

Under the law set forth above, defendant had a duty to Steve, an invitee, to warn of the pothole. Given its size and location, it is easy to conclude that the pothole was open and obvious to a reasonable observer and that it was at least arguably effectively avoidable because Steve could have walked around the pothole. However, the size of the pothole and its location also allows there to be at least a question of fact on whether the pothole presented a special aspect. As the examples in *Lugo* suggest, a premises owner continues to have a duty to warn if a readily observable condition on the land presents such an extremely high risk of harm to the invitee. Here, it can be argued that the pothole was so large in

size that it presented an unusual and dangerous condition in the land. Potholes are not unique, but one that is two feet wide and a foot deep are somewhat more so, and its location on the driveway where the driveway and the front walk meet, adds to the uniqueness and dangerousness of the pothole. Though it is a somewhat close issue, the most reasonable conclusion is that defendant would have had a duty to warn Steve of the dangerous condition on the land.

The question states Steve sued in *tort*. As a result, the applicant does not need to mention MCL 554.139, which provides a statutory duty to keep common areas fit for the use intended by the parties. A breach of that duty is a breach of the terms of the lease and "any remedy under the statute would consist exclusively of a contract remedy." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425-426 (2008).

Finally, as to any relationship between Steve's pre-existing weak ankle condition and his broken leg, defendant's argument will not succeed. First, a tortfeasor takes the plaintiff as he comes, *Wilkinson v Lee*, 463 Mich 388, 391 (2000), so the fact Steve's ankle was weak or sore has no bearing on defendant's liability for Steve's broken leg. Second, the facts show that Steve's ankle did not fail him until he stepped into the pothole. Nothing suggests that the ankle caused him to step into the pothole. Defendant's argument on this point will not succeed.

EXAMINER'S ANALYSIS OF QUESTION NO. 8

(1) Valid Trust Likely Created

In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, *et seq*.

Michigan recognizes five methods of creating a trust: (i) when there is transfer of property to a trustee during the settlor's life or by will or other disposition taking effect on the settlor's death, (ii) when there is a declaration by the owner of property that the owner holds identifiable property in trust, (iii) when there is an exercise of a power of appointment in favor of a trustee, (iv) by declaring an irrevocable trust under MCL 700.7820a, and (v) when there is a promise by one person to another person to hold property for the benefit of a third person. MCL 700.7401(1)(a)-(e).

Regardless of the method chosen, a trust is created only if five statutory requirements are met, which are as follows: (i) the settlor has capacity to create a trust; (ii) the settlor indicates an intention to create the trust; (iii) the trust either has a definite beneficiary, is a charitable trust, is a trust for a noncharitable purpose, or is a trust for the care of an animal, as provided in MCL 700.2722; (iv) the trustee has duties to perform; and (v) the same person is not the sole trustee and sole beneficiary. MCL 700.7402(1).

Lastly, the Michigan Trust Code specifically permits the creation of oral trusts. MCL 700.7407 provides that "[e]xcept as required by a statute other than the [Michigan Trust Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence." Thus, while a trust in real property cannot be established verbally, *see* MCL 566.106, a trust in personal property may be established by oral declaration. *Osius v Dingell*, 375 Mich 605, 613 (1965); *Harmon v Harmon*, 303 Mich 513, 519 (1942).

In this case, it appears that Kia created a valid trust in March 2018.

As to the trust creation method, Kia created the trust by declaration as to the owner of the property (the stock of ABC Beauty Company) that she was holding the property in trust, thus satisfying MCL 700.7401(1).

The statutory requirements also appear to be satisfied. Nothing in the facts call into question Kia's capacity to create the trust. Kia clearly indicated her intentions to create the trust when she announced the creation of the trust in front of other patrons and employees at the restaurant. The trust has definite beneficiaries – Jane and Sara. Kia, as the trustee, had duties to perform – she was to hold and manage the stock. And, the same person was not the sole trustee and sole beneficiary. While Kia was the sole trustee, she was not the sole beneficiary.

(2) Clear and Convincing Evidentiary Standard

As indicated above, a trust need not be in writing, "but the creation of an oral trust and its terms may be established *only* by clear and convincing evidence." Jane and Sara would appear to satisfy a "clear and convincing" evidentiary standard based on Kia's announcement to all of the other patrons and employees at the restaurant.

(3) Spa Trip Expenses

Generally, the terms of a trust are to be carried out as nearly as possible in order to give effect to the intent of the settlor. *In re Maloney Trust*, 423 Mich 632, 639 (1985). While the terms of the trust normally prevail over the provisions of the Michigan Trust Code, MCL 700.7105(2)(c) provides that the requirement contained in MCL 700.7404 prevails over any term in the trust. MCL 700.7404 provides that a trust may be created "only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." MCL 700.7404.

Most of the expenses of the spa trip appear to satisfy the requirements of MCL 700.7404. Transportation, lodging, food, yoga, massages, facials, and wine are neither unlawful nor contrary to public policy. So, those terms of the trust are valid. However, because the "Magic Dragon" spa treatment is unlawful, the expenses related to such treatment would not be considered a valid term of the trust, and the related expenses would not be permitted.

EXAMINER'S ANALYSIS OF QUESTION NO. 9

Faith should prevail because her arguments are far more consistent with applicable Michigan law. As an initial matter, the court has the authority to amend its previous judgment as to support. The moving party, however, must allege and prove a proper cause or a change in circumstances. MCL 722.27(1)(c). A significant change in incomes of the payer and recipient of support can establish proper cause or a change in circumstances. Compare *Maier v Brablec*, 125 Mich App 511, 514 (1983); *Sayre v Sayre*, 129 Mich App 249 (1983). Moreover, Faith is correct that the setting of support is primarily determined by the Michigan Child Support Guidelines. MCL 552.605. The hallmark of the Guidelines' support formula is the net incomes of the payer and recipient of the child support, together with the number of children eligible for support. "Income" can include gambling winnings from state-sponsored lotteries. MCL 552.602(o)(iii); 2017 MCSF 2.01(C)(5).

In the face of these cogent arguments, Larry simply maintains the children "had all they need." While, at best, this is an extreme stretch to an argument that there should be a downward deviation from the figure called for under the guidelines, this barren, subjective assertion does not establish a legal basis for deviation. See MCL 552.605(2)(a)-(d) and *Burba v Burba,* 461 Mich 637 (2000). Finally, Larry's argument ignores Faith's reduction in income.

Accordingly, Faith is likely to prevail on getting support raised to an amount called for by the guidelines based on the parties' expressed positions.

On the question of retroactivity of any increase in support, Larry is correct – but only partially so: Michigan limits the retroactivity of modifications in child support. MCL 552.603(2) states in pertinent part:

> Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date *notice of the petition was given* to the payer or recipient of support. (Emphasis added.)

Support may be modified retroactively, but only from the date of service on the non-moving party of the petition to modify. See *Waple v Waple*, 179 Mich App 673, 677 (1989); *Harvey v Harvey*, 237

Mich App 432, 437, 438 (1999); *Cipriano v Cipriano*, 289 Mich App 361, 374 (2010); and *Malone v Malone*, 279 Mich App 280, 286 (2008).

Applying the foregoing to the facts yields the conclusion that neither Larry nor Faith are fully correct. Support may be retroactively modified in contrast to what Larry maintains, but not to the date Larry got his first lottery check, as Faith requests. Rather, it is retroactive only to August 1, 2019, the date Larry *was served* with Faith's request.

On Faith's third request – for Larry to pay towards her attorney fee bill – Larry's position is not well-taken. His contention that he would not be obligated to pay Faith's bill because they are not married ignores MCR 3.206 and the cases interpreting it. In pertinent part, MCR 3.206(D) states:

> (1) A party may at any time request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, *including a post-judgment proceeding*. (Emphasis added.)
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> > (a) the party is unable to bear the expense of the action, . . . and that the other party is able to pay, [.]

Clearly from the foregoing, Larry's argument that he need not pay toward Faith's fees because they are no longer married holds no water in light of MCR 3.206(D)(1)(a). See also *Smith v Smith*, 278 Mich App 198, 207 (2008). Accord, *Colen v Colen*, Michigan Court of Appeals No. 345318, released for publication February 4, 2020. (Award of attorney fees for post-judgment action authorized under MCR 3.206[D][1][a] based on parties' financial circumstances, but requesting party must make factual showing.)

As the applicant for an attorney fee award, Faith's argument must still satisfy subsection (D)(2)(a) of MCR 3.206. In this regard, she must demonstrate her lack of sufficient funds to pay her attorney and Larry's ability to pay. Faith establishes both of the rule's demands.

As to her lack of funds, Faith has submitted a minimal budget that reveals she has but $25 per month in disposable, discretionary income. She had to borrow a portion of the retainer fee and still owes her lawyer $2,500. This sum is more than she makes in a month. And her personal financial situation is not soon to improve, given

her pay reduction is permanent. On the second component, Larry is able to pay, given he has gained a 150% increase in monthly income, and it is locked in for thirty years. Should he be ordered to pay the $2,500 to Faith's lawyer, this would represent a small fraction of just one month of his lottery income, as contrasted by the same sum wiping out a month of Faith's entire wages. Finally, Larry has not remarried nor had more children. The facts provide nothing to conclude there are other demands on his income, underscoring his financial ability to pay Faith's attorney fees.

Faith should prevail on her attorney fee request.

EXAMINER'S ANALYSIS OF QUESTION NO. 10

Under MCL 450.1487(2), *"[a]ny* shareholder of record, in person or by attorney or other agent, shall have the *right*" to inspect "for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records."

Under the statute, a shareholder is required to give the corporation a written demand, "describing with reasonable particularity" the shareholder's purpose, the records sought, and that "the records sought are directly connected with the purpose." A "proper purpose" under the statute is defined as "a purpose reasonably related to such person's interest as a shareholder."

The party bearing the burden of proof changes depending upon the type of documents sought by the shareholder. Assuming that the written demand requirements have otherwise been met:

- If the shareholder seeks to inspect the stock ledger or list of shareholders, the burden of proof is on the *corporation* to show that the demand was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose.
- If the shareholder seeks records *other than* the stock ledger or list of shareholders, the burden is on *the shareholder* to establish that the inspection is for a proper purpose and that the documents are directly connected with the stated purpose.

The court has the discretion to permit the shareholder to inspect corporate books and records "on conditions and with limitations as the court may prescribe and may award other or further relief as the court may consider just and proper." MCL 450.1487(3).

Al Albert

Al has demanded a list of MMCC's suppliers and prices. Because the information sought is neither a stock ledger nor a list of shareholders, the burden is on Al to establish that the inspection is for a proper purpose and that the documents are directly connected with the stated purpose. Here, Al's claim will likely fail. A proper purpose for seeking corporate records is one that is in good faith, seeks information bearing upon protection of shareholder interests, and is not contrary to the corporation's

interests. The Legislature did not intend to erect a formidable obstacle for shareholders. *North Oakland Co Bd of Realtors v Realcomp, Inc*, 226 Mich App 54, 58-59 (1997), citing *Slay v Polonia Publishing Co*, 249 Mich 609, 613 (1930). The facts strongly suggest that Al's request did not have a proper purpose. For one, it seems it was more an attempt to find out what competitive prices were in the cookie industry that he was just entering, and releasing such information to a prospective competitor was not in MMCC's interests. Thus, Al will likely not be entitled to inspect the corporate documents.

Bob Bennett

Because Bob seeks a list of all MMCC shareholders, the burden would be on MMCC to show that Bob's demand was made for an *improper purpose* or that the records sought are not directly connected with Bob's stated purpose.

Here, it is irrelevant that Bob's attorney, rather than Bob himself made the demand. MCL 450.1487(2) specifically contemplates that a demand is permissible through "an attorney or other agent" so long as the demand is "accompanied by a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder." Here, the facts specifically indicate that the demand was accompanied by a power of attorney. Therefore, the demand cannot be invalidated on the basis that it was presented by an attorney.

The fact that Bob seeks a list of shareholders in order to enter voting agreements will in all likelihood be deemed a "proper purpose." Voting agreements are permitted and "specifically enforceable" according to Michigan law (MCL 450.1461), so the fact that MMCC wishes to discourage them is irrelevant. Moreover, the record sought – a list of the shareholders – is directly connected with Bob's stated purpose. Therefore, Bob will be entitled to inspect the corporate documents.

EXAMINER'S ANALYSIS OF QUESTION NO. 11

A. Wally's Youthful Age Does Not Render Him Unqualified To Testify.

The Court should overrule DeWitt's objection to Wally taking the stand. Pursuant to MRE 601:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

The facts show Wally speaks thoughtfully and understands what it means to testify truthfully. When asked if he understood the difference between the truth and a lie, he responded that he thought he did. He then thoughtfully responded, when asked whether a clearly untruthful statement was a lie, that he didn't know whether it was a lie, but he knew it was not the truth. The Michigan Court of Appeals has held under similar circumstances involving a seven-year-old witness that, while it is within the discretion of the trial court to rule on witness competency, the witness's young age is not a determining factor. Rather, it is the child's understanding of the responsibility to tell the truth, and knowing and being able to articulate what is or is not a truthful statement. *People v. Norfleet*, 142 Mich. App. 745, 747-750 (1985).

B. The Court Should Overrule the MRE 609 Objection to the Criminal Fraud Conviction Without Regard to Balancing Its Prejudicial Impact.

Pursuant to MRE 609 (a):

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
> (2) the crime contained an element of theft, and

> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is a defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect.

Pursuant to MRE 609 (c):

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date.

DeWitt's criminal fraud conviction was for dishonesty or false statement. The Michigan Supreme Court held in a landmark opinion that a criminal defendant's prior conviction for dishonesty or false statement is per se admissible, without regard to any balancing requirement that applies to crimes of theft:

> [C]rimes having an element of dishonesty or false statement are directly probative of a witness' truthfulness and can be understood as reflecting upon veracity by jurors without the mediation of their deciding that the defendant has a bad general character. Such convictions are of high probative value and possess little likelihood of prejudice. Therefore, the revised MRE 609 does not permit the exclusion of these convictions. *People v Allen,* 429 Mich 558, 593-594 (1988).

Moreover, DeWitt was released only eight years ago from his incarceration for fraud, meaning the conviction is not time-barred pursuant to the 10-year rule of MRE 609 (c).

C. The Court Should Sustain the MRE 609 Objection to the Negligent Homicide Conviction, but on Different Grounds.

DeWitt's objection regarding his conviction for negligent homicide should be sustained, but not because it is unduly prejudicial. Rather, while punishable by incarceration in excess of one year and not time-barred by MRE 609(c), the negligent homicide conviction does not fall within the strict limitation on

the kind of convictions that can be admitted under MRE 609. Specifically, the rule limits those convictions to those involving fraud or dishonest statement or those that contain an element of theft. As the Michigan Supreme Court held in *People v Allen*:

> In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. If it is a theft crime and it is punishable by more than one year's imprisonment, the trial judge would exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. 429 Mich at 605-606.

Because negligent homicide involves neither dishonesty, false statement, nor theft, it fails the bright-line test of MRE 609 and *Allen*, and no further analysis is needed.

EXAMINER'S ANALYSIS OF QUESTION NO. 12

1. Right to Counsel

A suspect has no 6th Amendment right to counsel at an on-the-scene identification. The right to counsel attaches only to corporeal identifications "conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 609 (2004); *Moore v Illinois*, 434 US 220 (1997); *People v Perry*, 317 Mich App 598 (2016); Const 1963, art 1, § 20.

Donald has no constitutional right to have counsel present at the on-the-scene identification under the US or the Michigan constitution because his right to counsel has not attached as formal criminal proceedings had not yet been initiated. Donald's complaint that he was deprived of his right to an attorney at the on-the-scene identification will fail.

2. On-the-Scene-Identification

A prompt on-the-scene identification is one where the victim or witness views the suspect in the field within a reasonable time of the crime. A prompt on-the-scene identification "allows the police to know whom to arrest and ensure the expeditious release of innocent suspects." *People v Wilki*, 132 Mich App 140,142 (1984). The on-the-scene identification also allows the victims to confirm or deny the identification while his or her memory is fresh and accurate. *People v Turner*, 120 Mich App 23, 34-35 (1982) (overruled on other grounds, *People v Randolph*, 466 Mich 532 (2002), (superseded by statute on other grounds); *People v Purifoy*, 116 Mich App 471, 480 (1982); *People v Libbett*, 251 Mich App 353, 362 (2002).

On-the-scene identifications are a "reasonable, indeed indispensable, police practice because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *People v Winters*, 225 Mich App 718, 728 (1997); *Libbett*, 251 Mich App at 361 (2002). This method of identification promotes "fairness and greater reliability." *Winter*s, 225 Mich App at 728. It "insures both that the police have the actual perpetrator and that any improvidently detained individual can be immediately released." *Libbett*, 251 Mich App at 361; *Winters*, 225 Mich App at 728.

The use of the on-the-scene identification by the police was proper and Donald's argument that it should not have been done will fail.

3. Due Process

Donald does have a constitutional right of due process in the procedure used in the on-the-scene identification. *Hickman*, 470 Mich at 610. A suspect has a due process right from being subjected to "unnecessarily suggestive" identification procedures which are "conducive to irreparable mistaken identification . . . ." *Winters*, 225 Mich App at 725, citing *Stovall v Denno*, 308 US 293 (1967). This right applies whether it occurs before or after the initiation of criminal proceedings. *Winters*, 225 Mich App at 725.

A pretrial identification, including an on-the-scene identification, is a violation of due process if the procedure is "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Williams*, 244 Mich App 533, 542 (2001) quoting *People v Kurlczyk*, 443 Mich 289, 302 (1993). Suggestive identifications include the witness being told "that the police have apprehended the right person." *People v Gray*, 457 Mich 107,111 (1998); evidence of other motives by the police; *Libbett*, 251 Mich App at 363; or the police suggest by other means that the suspect be chosen.

Identification factors to consider include: (1) The opportunity of the witness to view the suspect at the time of the crime; (2) The witness's degree of attention; (3) The accuracy of the prior description by the witness; (4) The level of certainty of the witness in the identification; and (5) The length of time between the crime and the identification. *People v Colon*, 233 Mich App 295, 304-305 (1998).

Donald complains the on-the-scene identification was suggestive because: (a) he was under arrest so he should have been in a line up not an on-the-scene identification; (b) he was handcuffed in a police car when seen by Peter which is suggestive; and (c) 70 minutes elapsed between the crime and identification, which is not prompt.

Discussion

(a) The fact Donald was arrested on an outstanding warrant does not negate the fact he was a suspect in the theft of the watch and does not prevent the police from investigating that crime. The police were not required to put him in a line up. An on-the-scene identification by its nature does not require a line up or show up. Donald's argument will fail.

(b) The identification has a degree of suggestiveness because Donald "looks like an offender" considering he was identified by Peter while he was handcuffed in the back of the police car after

he was arrested on an outstanding warrant. *People v Starks*, 107 Mich App 377, 379-381 (1981). But it is also part of the on-the-scene identification. It is not so suggestive as to overcome the purpose of the prompt on-the-scene identification nor to lead to the conclusion that Peter made the identification only because Donald was handcuffed in the back of the police car. Any conclusion based on the rule is acceptable. An applicant might note that Peter's identification of Donald was spontaneous in that he identified him before the police officer even got out of the car, and therefore the procedure was not suggestive. The counterpoint is that Peter was called by the police and told to meet them in the parking lot at the Coney Island. The inference is that the meet was for Peter to view a suspect.

(c) The on-the-scene identification was prompt, within 70 minutes of the theft. The time between the apprehension of Donald and Peter's identification of him was only 10 minutes. The search for, and apprehension of, Donald took up most of the time, about an hour. There were two people arrested, but Peter identified only Donald as involved in the theft. That identification resulted in the release of the other person. Seventy minutes is a reasonable period of time for the police to respond, apprehend the suspects, and have an identification. See e.g., *Libbett*, 251 Mich App 353 (2 hours); *Starks*, 107 Mich App 377 (an hour and a half.) However, points can be awarded if the contrary conclusion is reached.

In conclusion, Donald's complaints that it was unfair and suggestive for the witness to see only him in the police car while under arrest fail. The arrest does not trigger the line up or show up and does not eliminate the use of an on-the-scene identification. The timing of the identification was reasonable. Donald's arguments will not succeed.

EXAMINER'S ANALYSIS OF QUESTION NO. 13

With respect to the first question, unlike some states, Michigan recognizes and allows recovery for workers' compensation claims based on mental injuries where is no physical injury, no physical problem, and no physical trauma. *Carter v General Motors Corp,* 361 Mich 577, 586 (1960); see also, *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 741 (2002). This has been a hallmark of Michigan workers' compensation law for some time. *Carter, supra*. Michigan has a specific statute addressing mental disabilities and, in keeping with Michigan's tradition on this point, there is no requirement a mental injury claim be dependent on or accompanied by physical trauma or physical injury. MCL 418.301(2).[1]

Discussion of the possible success of Emily's claim is beyond the scope of the question. The correct answer is Emily can file and pursue compensation for treatment of her mental problem under Michigan workers' compensation law.

With respect to the second question, workers' compensation is the exclusive remedy available to employees for work related injuries. There is, however, one exception: an action for an intentional tort, with intentional tort being defined specifically and narrowly in the workers' compensation statute. The relevant statute says:

> "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall

[1] "Mental disabilities and conditions of the aging process…are compensable if contributed to or aggravated by or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." See also, MCL 418.301(1).

not enlarge or reduce rights under the law." MCL 418.131(1).

Case law explains the intentional tort exception means an employee must prove the injury was a result of the employer's deliberate act or omission and that the employer specifically intended an injury. *Travis v Dreis & Krump Manufacturing Co*, 453 Mich 149, 169-180 (1996) (Opinion by BOYLE, J.). An employee must show "the employer . . . made a conscious choice to injure an employee and . . . deliberately acted or failed to act in furtherance of that intent." *Id*. at 180. There are two ways to show an employer specifically intended an injury: direct evidence the employer "had the particular purpose of inflicting injury" or alternatively circumstantial evidence the employer "has actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id.* at 172-173, 180. An employer's "knowledge of general risks is insufficient to establish an intentional tort." *Herman v City of Detroit,* 261 Mich App 141, 149 (2004). Merely showing that injury is likely to occur is insufficient to prove it was certain to occur. *Id.*; *Bagby v Detroit Edison Co*, 308 Mich App 488, 496 (2014).

Emily would have a difficult time meeting this high threshold. She could argue ABC deliberately failed to act in response to her warnings and complaints, but the facts suggest ABC's motivation was to increase profits as opposed to deliberately injure her. Emily would also have some difficulty proving by her injury was certain to occur, as opposed to being merely likely to occur.

Result aside, the primary purpose of the question is to ascertain the examinee's awareness of the exclusive remedy provision and awareness of the high threshold of the intentional tort exception.

EXAMINER'S ANALYSIS OF QUESTION NO. 14

Validity of contract

Illegality

The contract provision calling for installation of Drain-Rite is void because it violates public policy. "[N]either law nor equity will enforce a contract . . . that is in violation of public policy." *Krause v Boraks*, 341 Mich 149, 155 (1954) (quotation marks omitted); *see also Allard v Allard*, 318 Mich App 583, 598 (2017) ("[C]ontracts in violation of public policy . . . are void." (quotation marks omitted)); *Peeples v City of Detroit*, 99 Mich App 285, 302 (1980) ("Contracts which are in contravention of public policy are unenforceable."). Public policy "is to be found in . . . statutes and when they have not directly spoken, then in the decisions of the courts . . . ." *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511 (1997); *see also Rory v Continental Ins Co*, 473 Mich 457, 471 (2005) ("In ascertaining the parameters of our public policy, we must look to policies . . . reflected in our state and federal constitutions, our statutes, and the common law.").

Here, a Michigan court declared that any agency contract provision requiring the use of Drain-Rite violates public policy. Consequently, the provision in the contract between the roofing company and the agency calling for the roofing company to replace gutters on clients' homes with Drain-Rite violates public policy. The provision is therefore void and unenforceable.

Severability

Although the Drain-Rite provision is void, it is severable from the rest of the contract, which remains enforceable. Under the doctrine of severability, "[a]n unlawful term in a contract is severable from the whole unless that term is central to the parties' agreement. Hence, the failure of a distinct part of a contract does not void valid, severable provisions." *Co of Ingham v Mich Co Rd Comm'n Self-Insurance Pool*, 329 Mich App 295, ___ (2019) (quotation marks, citations, and brackets omitted)[App Pndg]; *see also Prof Rehab Assocs v State Farm Mut Auto Ins Co,* 228 Mich App 167, 174 (1998). The Michigan Supreme Court has explained the severability analysis:

> As a general rule, a contract is entire when, by its terms, nature and purpose, it contemplates that each and all of its parts are interdependent and common to one

> another and to the consideration, and is severable when, in its nature and purpose, it is susceptible of division and apportionment.
>
> The singleness or apportionability of the consideration appears to be the principal test. The question is ordinarily determined by inquiring whether the contract embraces one or more subject matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned.

Dumas v Auto Club Ins Ass'n, 437 Mich 521, 537-38 (1991) (quotation marks and citation omitted). "When the price is expressly apportioned by the contract . . . to each item to be performed, the contract will generally be held to be severable." *Id.* at 538 (citation and emphasis omitted) (finding severability because "[t]here is no problem apportioning the consideration," *Id.* at 539).

Here, the Drain-Rite provision is not central to the main purpose of the contract, which is to replace leaking roofs. The Drain-Rite provision and the roofing provisions address different subject matters and are supported by separate consideration. Consequently, the invalid Drain-Rite provision can be severed from the contract, and the remainder is enforceable.

Alternative Analysis

Some answers may argue that when the court declared Drain-Rite provisions to be in violation of public policy, the contract between the roofing company and the agency had already been signed or had already been performed. Alternative credit will be given to those answers therefore concluding that 1) the roofer is still liable under the contract because the law at the time of contracting governs; or 2) the roofer is liable for any work performed before the court ruling.

<u>Third-party beneficiaries</u>

"In Michigan, a person who is a nonparty to a contract may be entitled to sue to enforce the contract as a third-party beneficiary." *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 674 (2019). MCL 600.1405 states:

> Any person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

This statute "does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person." *Shay v Aldrich*, 487 Mich 648, 663 (2010), quoting *Koenig v City of South Haven*, 460 Mich 667 (1999). Contracting parties must be "clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id.* at 664-665 "However . . . this Court has long held that the standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only." *Id.* at 664.

Here, the purpose of the contract between the roofer and the agency is to benefit the agency's indigent clients. The contract explicitly requires the roofer to perform work on clients' homes and provide clients with a written guarantee of the work. The clients are thus intended beneficiaries of the contract. As a client whose roof was replaced pursuant to the contract, then, Hans is an intended beneficiary of the contract and can sue to enforce it.

Franz, in contrast, is only an incidental beneficiary. He has no ownership interest in the house but is merely a visitor who derives benefits from the contract only because Hans allows him to stay there. "Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under 1405." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 429 (2003); *see also Kisiel v Holz*, 272 Mich App 168, 170-71 (2006) ("A third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach."). Because he is merely an incidental beneficiary, Franz cannot sue to enforce the contract.

EXAMINER'S ANALYSIS OF QUESTION NO. 15

MCL 750.530 defines unarmed robbery:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight or after the commission of the larceny, or in an attempt to retain possession of the property.

The elements of unarmed robbery are that a defendant:

1. used force or violence against any person who was present or assaulted or put the person in fear;
2. in the course of committing a larceny;
3. while unarmed. MCL 750.530; M Crim JI 18.2.

Unarmed robbery is a specific intent crime. The defendant must have intended to permanently deprive the owner of the money or property. *People v Harverson*, 291 Mich App 171, 177-178 (2010); *People v Dupie*, 395 Mich 483,487 (1975).

The element of force, violence, or assault is satisfied even if it does not occur until after the money or property is taken. *People v Smith-Anthony*, 494 Mich 669, 686 (2013). The word "force" has been defined to include the exertion of "strength or physical power" and does not require an act of violence to the person. *People Passage*, 277 Mich App 175,178 (2007).

The element of specific intent that must be established is that the defendant intended to "permanently deprive the owner of the money or property. This requirement can be met in a number of ways. It is not only met by establishing the defendant had the intent to "permanently deprive" the owner of money or property. *People v Jones*, 98 Mich App 421, 425-426 (1980). The specific intent requirement can be established by keeping the property with the lack of purpose to return it within a reasonable time and in an unchanged condition, disposing of the property, keeping it in

exchange for compensation, transferring the property, and in other ways. *Jones*, 98 Mich App at 426.

In this case, Dan took the property (ring) which belonged to Pauline. Pauline was in the area when the theft occurred. However, she would not be deemed close enough to her purse such that it could be considered to be within her immediate presence. Dan was not armed when he took the ring. The taking of the ring was not accomplished by force, violence, assault, or by putting Pauline in fear. However, Dan did use force "in the course of the larceny" toward a person, Gail. This force was used by Dan after the taking of the ring as Dan was leaving the bar to get away from Pauline. While the act of force was minimal, it was sufficient to thwart Gail's attempt to prevent Dan from leaving the bar with Pauline's ring. *Passage*, 277 Mich App at 178.

As to the element of "permanently depriving" Pauline of the ring, Dan's express intent was to use it as collateral for John's repayment of his loan. Keeping the ring as collateral satisfies the definition of "permanently deprive." *Jones*, 98 Mich App at 426; *Harverson*, 291 Mich App at 177-178.

Both of Dan's arguments that he cannot be guilty of unarmed robbery would fail because he did use force in the course of taking the ring and intended to "permanently deprive" Pauline of the ring.