FEBRUARY 2017 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

1. Abby's Request to Relocate:

Abby is incorrect that all she must do is seek permission and the court must grant it, without more. Arthur is correct that he is entitled to a hearing or, at the very least, a judicial determination on the factors listed in MCL 722.31.

The salient components in the fact pattern that trigger the statute are 1) the parties have joint legal custody, and 2) the move to Colorado is more than 100 miles. The statute is therefore triggered and Abby must do more than simply request permission; she must satisfy the statute (see also MCR 3.211(C)(1)). Section (2) of the statute states, inter alia, that "[t]his section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents" (emphasis added). Abby does not have sole legal custody. [Contrast *Brecht v Hindry,* 297 Mich App 732 (2012), holding that permission to leave the state with the minor children is to be granted, without more, at the request of the sole legal custodian.] Because Abby and Arthur share joint legal custody, Abby being the sole physical custodian does not negate statutory compliance.

2. Arthur's Request to Modify Parenting Time:

Abby's position that Arthur's request for additional parenting time necessarily fails because the facts he alleges do not amount to proper cause or changed circumstances - as those terms are understood in custody modifications - is incorrect. While Arthur's averments may not reopen the prior physical

custody award to Abby, the same is not true when only parenting time is involved. In *Vodvarka v Grassmyer,* 259 Mich App 499 (2003), the court determined that MCL 722.27 legitimately restricted custody changes to situations where proper cause or a change of circumstances were present. *Vodvarka* explained that the instability brought about by frequent changes in custody was to be avoided by limiting revisiting prior custody awards.

However, in *Shade v Wright,* 291 Mich App 17 (2010), the court drew a distinction between requests to change custody and requests to change parenting time. For the former, the phrase "proper cause or a change in circumstances" must be read restrictively to serve the statute's goal of unwarranted hearings on custody changes. As to parenting time, the phrase should be read more expansively. As the court stated:

> Thus, the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time. Therefore, we hold that, in a case where a modification of parenting time does not alter the established custodial environment, the fact that a child has begun high school and seeks to become more involved in social and extracurricular activities (normal life changes that do not constitute a change of circumstances under *Vodvarka)* constitutes a change of circumstances sufficient to modify parenting time. *Shade,* pp. 30-31.

Shade, however, left open the possibility that if modification of parenting time changed the established custodial environment, more would be required of the petitioner.

An established custodial environment is defined by MCL 722.27(1)(c):

> . The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. . .

3. Arthur's Request for Modification:

On the facts presented and Arthur's position, no real issue exists that Abby has an established custodial environment with the boys. However, the salient issue is whether the proposed change would change that custodial environment. Arthur's request deletes his Wednesday evenings which in turn leaves the boys with Abby. He picks up a few more hours on the front end of his weekend and a few more hours on the back end, plus an additional overnight while the boys are in school. Abby would be hard-pressed to maintain that this limited amount of additional time would alter the established custodial environment because the children would still naturally look to her ". . . for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

EXAMINERS' ANALYSIS OF QUESTION NO. 2

Speaking generally, this workers' compensation question primarily tests: (1) whether the examinee can correctly advise Angie she can legitimately pursue and receive both a workers' compensation recovery and a civil tort recovery for her injury; and, (2) whether the examinee knows there is a statutory presumption that holds, although an injury occurs before the employee's starting time, the injury can still be considered "in the course of his or her employment." MCL 418.301(3)

1. More specifically with respect to the first question, even if an injury arises out of and in the course of employment for workers' compensation purposes, the employee can also pursue a third party tortfeasor for damages giving rise to the injury. The Worker's Disability Compensation Act provides in pertinent part: "Where the injury for which compensation is payable . . . was caused under circumstances creating legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee . . . may also proceed to enforce the liability of the third party for damages in accordance with this section." MCL 418.827(1). Here, XYZ, an independent contractor, is not Angie's employer. Therefore, it does not enjoy the exclusive remedy protection afforded employers in the workers' compensation statute. MCL 418.131(1) ("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.") Nor is XYZ's crew "in the same employ" as Angie, so as to prevent application of MCL 418.827(1).

Therefore, Angie can pursue and obtain both a workers' compensation remedy for her injury and still file and receive a third party civil recovery against XYZ for the injury. Partial credit may be given if the examinee explicitly infers that XYZ is not an independent contractor and shares ABC's exclusive remedy protection.

The examinee should also note a double recovery for the injury can be avoided by MCL 418.827(5). This provision of the workers' compensation statute creates a lien on a third party

recovery saying in pertinent part: "Any recovery against the third party . . . after deducting expenses of recovery, shall first reimburse the employer or carrier" for workers' compensation benefits paid and any unused balance from the third party recovery creates an advance payment by the employer against future workers' compensation benefits. (Application of this lien means the collateral source rule of MCL 600.6303 would not apply to reduce the third party recovery by workers' compensation benefits.)

2. With respect to the second question, the relevant statute says workers' compensation is available for injuries "arising out of and in the course of employment." MCL 418.301(1). The workers' compensation statute contains a statutory presumption that injuries such as Angie's "arise in the course of" employment. MCL 418.301(3) says: "An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment." Angie was on the premises where her work was to be performed - she was at her work area. She was there within a "reasonable time before . . . her working hours" - ten minutes is a reasonable time. Compare, *Ladner v Vander Band,* 376 Mich 321, 325 (1965) (25 minutes); *Queen v General Motors,* 38 Mich App 630, 634 (1972) (27 minutes). Therefore, she is presumed to be in the course of her employment, although not yet "on the clock" and getting paid. There is no countervailing evidence to defeat the presumption. The "arising out of" portion of the requirement requires consideration of whether the injury relates to an employment risk. *Hill v Faircloth Manufacturing Co,* 245 Mich App 710, 719 (2001). Here, slipping in one's work area is a risk of employment.

Therefore, Angie has a viable workers' compensation remedy and should prevail.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

This question calls for a Michigan choice-of-law analysis. Under Wisconsin law, Diana is absolutely immune from liability, while under Michigan law, Paige has a viable argument that Diana was grossly negligent and is thus not entitled to governmental immunity.

"When resolving a conflict of law question," courts "apply Michigan law unless a rational reason to do otherwise exists." *Frydrych v Wentland,* 252 Mich App 360, 363 (2002). The court first examines whether any foreign state has an interest in having its law apply. *Id.* "If no state has an interest, the presumption that Michigan law will apply is not overcome." *Id.* "If a foreign state does have an interest in having its law applied," the court then determines "if Michigan's interests mandate that Michigan law be applied, despite any foreign state interest." *Id.*

"However, application of a state's law may not violate a party's due process rights." *Id.* "When a court chooses a state's law, the state must have a significant contact or significant aggregate of contacts that create state interests such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 363-364.

Here, Wisconsin has a strong interest in having its law apply, as all of the parties are Wisconsin residents. Wisconsin also has a strong interest in protecting its teachers. Michigan, on the other hand, "has little or no interest in affording greater rights of tort recovery to a foreign state resident than those afforded by the foreign state." *Frydrych,* 252 Mich App at 364. "While Michigan, a state where the injury occurred, has an interest in conduct within its borders, the interest in the litigation is minimal when none of the parties is a Michigan resident." *Id.* Michigan no longer follows "the traditional doctrine of lex loci delicti, or application of the law of the place of the wrong." *Id.*

There is also a forum-shopping concern presented in this case. "[T]here is a presumption that the plaintiff will bring suit in the forum whose law is the most advantageous." *Frydrych,* 252 Mich App at 364. "This raises the concern that applying the law sought by a forum-shopping plaintiff will

defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted or from which the defendant hails." *Id.* Here, it is apparent that Paige's parents, who are not residents of Michigan, filed suit in Michigan in order to avoid Wisconsin's less favorable governmental immunity law. This forum-shopping concern weighs in favor of applying Wisconsin law.

Finally, "there is no indication that Michigan has any significant contacts such that application of Michigan law would not violate [Diana's] due process rights." *Id.* at 365

EXAMINERS' ANALYSIS OF QUESTION NO. 4

1. Generally, the party asserting an affirmative defense has the burden of proving it. *Lima Dap v Bateson,* 302 Mich App 483, 495 (2013). Thus, Phil has the burden of proving that the money Debbie paid for his rent over the past few years was a gift instead of a loan. A valid gift requires the following 3 elements: (1) an intent by the donor to pass title "gratuitously" to the donee; (2) either actual or constructive delivery of the gift; and (3) acceptance of the gift by the donee. *Buell v Orion State Bank,* 327 Mich 45, 55 (1950). If the gift benefits the donee, there is a legal presumption that it has been accepted. *Id.*

In the instant case, it was Phil, the purported donee, who solicited money from Debbie. Although seemingly without hesitation Debbie agreed to pay Phil's portion of the rent and was not concerned about repayment even when Phil repeatedly offered, both parties acknowledged that repayment was anticipated. Phil attempted each time to repay, and while Debbie did not accept the repayment when offered, she continued to suggest that she would accept repayment from Phil at a later time when needed. Thus, donative intent regarding covering the rent appears to be missing, and therefore Debbie would be entitled to collect on the debt when she was ready. Phil could argue that the elements of a gift are established because (1) the significant passage of time between Debbie's payment of the rent and her demanding repayment only after the relationship fractured, supports a donative intent at the time of delivery; (2) the money was constructively delivered when Debbie paid the landlord Phil's portion; and (3) Phil accepted the gift when he did not continue to attempt to pay her back. However, it is likely that Phil's gift defense would fail because Debbie never completely extinguished her interest in being reimbursed.

2. Similarly, Debbie has the burden of proving her affirmative defense of abandonment. *Lima, supra,* 302 Mich App at 495. See also, *Ambs v Kalamazoo County Road Commission,* 255 Mich App 637, 652 (2003). To prove that Phil abandoned the luggage set, Debbie must establish 2 elements: (1) that Phil intended to relinquish the luggage; and (2) an external act by Phil that manifested that intention. *Emmons v Easter,* 62 Mich App 226, 237 (1975). "Nonuse alone is insufficient to prove abandonment." *Sparling Plastic v Sparling,* 229 Mich App 704, 718

(1998). Debbie would likely succeed on this affirmative defense. Phil's intent to relinquish control over the luggage is inferred by his taking of all of his personal belongings except the luggage when he vacated the apartment. Moreover, according to the facts, Phil never even used the luggage all those previous years. Additionally, the intent to abandon the luggage was effectuated when Phil continuously ignored Debbie's repeated requests to remove it, and never made any attempt recover it. An argument could be made that Phil did not abandon the luggage, but was merely taking his time to retrieve it from the apartment. However, Phil never expressed any previous desire to retain the luggage. Moreover, the passage of time after repeated requests to recover luggage that he had never used anyway, supports the notion that Debbie will likely succeed on her abandonment affirmative defense to Phil's counterclaim.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

1. Estates in Michigan are statutorily governed by the estates and protected individuals code ("EPIC"), MCL 700.1101 et seq. The journal entry that Bridget made would not qualify as a valid will under any provision of EPIC. All valid wills require that the testator be at least 18 years old and have "sufficient mental capacity." According to the facts, Bridget met these preliminary requirements. Additionally, a will must generally be (a) in writing, (b) signed by the testator, and (c) signed by at least two persons who witnessed either the signing of the will by the testator or the testator's acknowledgment of the signature or of the will. MCL 700.2502(1)(a)(b)(c). Because Bridget's journal entry was signed neither by her nor by witnesses, it does not qualify as a valid will under the above provisions.

Nevertheless, a writing that does not satisfy all of the above requirements, may qualify as a valid holographic will under EPIC even if not witnessed "if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting." MCL 700.2502(2). In the instant case, Bridget's journal entry again fails even as a valid holographic will because although it can be argued that it contained a preprinted date and the entry itself was entirely in her handwriting, she did not sign it.

Finally, even if the provisions of MCL 700.2502 are not satisfied, as is the case with Bridget's journal entry, a writing is treated as if it is compliant with those provisions if Abe, as the proponent of the writing, can establish "by clear and convincing evidence" that Bridget intended the journal entry to be her will. MCL 700.2503(a). It is highly unlikely that Abe will be successful. The writing is not labeled a will, and Bridget expressed some ambiguity in her entry. The writing reads as if Bridget is contemplating the possibility of devising all of her possessions to Abe when she states, "I think I'd like to leave . . ." Also, her surmising comment about Abe's gratefulness "if" she did such a thing also suggests at most a possible intent to make a devise to him in the future. This does not constitute clear and convincing evidence that Bridget intended that journal entry to be an actual will. Thus Abe would not receive anything, including any insurance proceeds, pursuant to the journal entry.

2. Brandon and Stephanie would receive the life insurance proceeds because they are individually named beneficiaries under the policy and the proceeds are not considered part of Bridget's estate to be disposed of by will or that can be distributed through intestate succession.

Additionally, since Bridget had no valid will, she died intestate and her 1 million dollar estate would be distributed pursuant to the EPIC rules of intestate succession which set forth the order of disposition of an estate that is "not effectively disposed of by will." MCL 700.2101(1). Because Bridget had no surviving spouse, her entire estate would be distributed to her descendants by representation. MCL 700.2103(a). Under EPIC, an individual's descendant is defined as "all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this act." MCL 700.1103(k). As Brandon and Stephanie are Bridget's only two descendants, they would be entitled to an equal share ($500,000 each) of Bridget's estate. MCL 700.2106(1).

Bridget's brother Carl would receive nothing from her estate under the intestacy provisions of EPIC. He would be entitled to the estate only if Bridget had no surviving descendant or parent. MCL 700.2103(c).

EXAMINERS' ANALYSIS OF QUESTION NO. 6

1. As owner, Freda is entitled to recover possession of the apartment that Jared currently occupies. Her reasons are legitimate and not against the law, and Jared begins a new tenancy with Freda each month unless terminated. Generally, employing self-help methods to regain possession of rental real property is not allowed in Michigan. *Deroshia v Union Terminal Piers*, 151 Mich App 715, 718-720 (1986). Thus, unless Jared voluntarily moves, Freda must follow the procedures set forth in the Michigan Summary Proceedings Act (the "Act") to recover possession. MCL 600.5701 et seq. Specifically, because Jared has a month-to-month tenancy arrangement and pays rent monthly, Freda is required to first give Jared 1 month's written notice demanding possession in order to terminate the tenancy. MCL 600.5714(1)(c)(iii); MCL 554.134(1); MCL 600.5716. If Jared does not vacate the property by the time the termination is effective, Freda may begin summary proceedings in the district court and obtain a judgment of possession against him. MCL 600.5741. If a judgment is issued and Jared still has not vacated after the date designated in the judgment (which must be at least 10 days from the judgment date), Freda may apply to the court for an order of eviction (a/k/a writ of restitution) which would direct an authorized person (e.g. sheriff) to restore full possession of the premises to her. MCL 600.5744(1) and (4).

2. As indicated above, Freda would be unable to legally employ self-help measures to seek possession of the apartment from Bryce for his failure to pay rent. Under the Act, one of the ways that a landlord is entitled to recover possession of the property by summary proceedings is "[w]hen a person holds over premises after failing or refusing to pay rent due under the lease or agreement by which the person holds the premises within 7 days from the service of a written demand for possession for nonpayment of the rent due." MCL 600.5714(1)(a). Thus, Freda must first serve Bryce with a written seven-day notice to quit to terminate the tenancy. See also, MCL 554.134(2). If Bryce does not bring the rent current within those seven days and still occupies the premises, Freda may begin a summary proceedings action against Bryce as indicated above. A possession judgment in a case based upon nonpayment of rent allows the tenant the option to either pay the amount determined to be owed or vacate the premises. If Bryce does

neither within the time prescribed in the possession judgment (again, which must be at least 10 days from the judgment date), Freda may obtain an order of eviction from the court to regain possession of the apartment. If Bryce pays to Freda monies in the amount and within the time set forth in the judgment, no eviction order may issue. MCL 600.5744(6).

3. Freda could initiate summary proceedings under the Act to regain possession of the studio apartment that is being occupied by Maya as a trespasser. MCL 600.5714(1)(f). Because Maya is a trespasser, she would not be entitled to any previous notice before Freda institutes the court action, and an order of eviction could be issued "immediately after the entry of a judgment for possession." MCL 600.5744(2)(d). Most significantly, however, is that because of Maya's trespasser status, Freda could also opt to use self-help and forgo the judicial process pursuant to a revised Michigan statute that allows a person entitled to possession to use force to enter premises occupied by a trespasser, so long as criminal laws are not violated. See MCL 600.5711(3) which states:

> If the occupant took possession of the premises by means of a forcible entry, holds possession of the premises by force, or came into possession of the premises by trespass without color of title or other possessory interest, the owner, lessor, or licensor or an agent thereof may enter the premises and subsection (2) [regarding entry without force and only in a peaceable manner] does not apply to the entry. However, any forcible entry shall not include conduct proscribed by chapter XI of the Michigan penal code, 1931 PA 328, MCL 750.81 to 750.90h.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Paula's counterclaim for rescission:

A contract may be rescinded on the basis of mutual mistake. "[R]escission is indicated when the mistaken belief relates to a basic assumption of the parties upon which the contract is made, and which materially affects the agreed performances of the parties." *Lenawee County Bd of Health v Messerly,* 417 Mich 17, 29 (1982), citing Restatement (Second) of Contracts § 152(1) ("Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . . ."); *see also Britton v Parkin,* 176 Mich App 395, 397-98 (1989) (same). "The erroneous belief . . . must relate to a fact in existence at the time the contract is executed." *Messerly,* 417 Mich at 24.

Here, Sally and Paula both mistakenly assumed that the property was suitable for human habitation, which relates to the basic assumption of both parties that the apartment complex could be utilized to generate income. The performance of the parties has been materially affected because Paula paid, and Sally received, consideration for property that turned out to be worthless. Their mistake related to a fact in existence--the defective septic system--at the time they executed their contract.

Rescission, however, "is an equitable remedy which is granted only in the sound discretion of the court." *Messerly,* 417 Mich at 31; *see also Stanton v Dachille,* 186 Mich App 247, 260 (1990) (same). "In cases of mistake by two equally innocent parties," a court must "determine which blameless party should assume the loss resulting from the misapprehension they shared." *Messerly,* 417 Mich at 31 (footnote omitted). Since neither Sally nor Paula knew of the problem with the septic system, a court must decide which of these "blameless" parties should assume the loss resulting from their mutual mistake.

"Rescission is not available . . . to relieve a party who has assumed the risk of loss in connection with the mistake." *Id.* at 30, citing Restatement (Second) of Contracts § 154(a) ("A party bears the risk of a mistake when . . . the risk is

allocated to him by agreement of the parties . . . ."). "'As is' clauses allocate the risk of loss arising from conditions unknown to the parties." *Lorenzo v Noel,* 206 Mich App 682, 687 (1994). Here, the sales contract stated that the purchaser agreed to accept the property "as is," indicating that Sally and Paula agreed to allocate the risk of loss to Paula. Consequently, Paula's counterclaim for rescission will fail.

Under an alternative analysis, a party's duty to render performance under a contract may not arise because of existing frustration or may be discharged by supervening frustration. No duty arises "[w]here, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the nonexistence of which is a basic assumption on which the contract is made. . . ." Restatement (Second) of Contracts § 266(2). Similarly, the duty may be discharged "Mhere, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made. . . ." *Id.* 265. Here, one could argue that at the time the contract was made, Paula's performance was substantially frustrated by the fact that the septic system was defective; alternatively, one could argue that after the contract was made, Paula's performance was substantially frustrated by the septic system failure, the condemnation of the property and the injunction. Paula was not at fault for the defective septic system and had no reason to know of the defect, nor was she at fault for the system's failure and the consequent condemnation and injunction. These facts/events frustrated her purpose in contracting, which was to acquire an income-generating apartment complex. But, as with the doctrine of mistake, a court would likely not grant the equitable remedy of rescission under these doctrines because the "as is" clause placed the risk of loss on Paula.

Sally's claim for damages due to breach of contract:

Paula breached the contract by failing to make the required payments. Since her claim for rescission of the contract will fail, Sally's claim for breach of the contract will succeed.

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Casings, Inc,* 450 Mich 620, 625 (1996) (footnote omitted). *See also Frank W Lynch & Co v*

Flex Techs, 463 Mich 578, 586 n 4 (2001) ("Damages awarded in a common-law breach of contract action are 'expectancy' damages designed to make the plaintiff whole.")

"Under the rule of *Hadley v Baxendale,* the 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) (citation omitted); *see also Lawrence v Will Darrah & Assocs, Inc,* 445 Mich 1, 13 (1994) (same). Damages are recoverable only if the defendant "reasonably knew or should have known that in the event of breach" such damages would result. *Id.* at 14-15.

Sally seeks to recover Paula's missed payments under the contract, as well as the penalty for Sally's loan default. Since Sally is entitled to expectancy damages that will put her in as good a position as if the contract had been fully performed, she can recover Paula's missed payments under the contract. However, she cannot recover the penalty for her own loan default. Sally's default did not "arise naturally" from Paula's breach, but arose from an independent and unrelated cause--Sally's taking of a loan to purchase a boat. Moreover, there is no evidence that Paula knew or could have known that her failure to make payments under her contract with Sally would result in Sally's failure to make payments under a loan agreement. Consequently, Paula is not responsible for the penalty.

EXAMINERS' ANALYSIS OF QUESTION 8

A judgment creditor like U-New has the legal right to employ several different methods of collecting on a civil judgment entered by Michigan courts, one of which is the garnishment of the assets of, or payments due, judgment debtors like Adele, Brian and Colby who have not yet satisfied the judgments against them. Michigan Court Rule (MCR) 3.101. Judgment debtors may file objections to garnishments, but those objections "may only be based on defects in or the invalidity of the garnishment proceeding itself, and may not be used to challenge the validity of the judgment previously entered." MCR 3.101(K)(1). Additionally, any objections must be based on one or more of the following six reasons specifically set forth in MCR 3.101(K)(2):

> (a) the funds or property are exempt from garnishment by law;
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> (b) garnishment is precluded by the pendency of bankruptcy proceedings;
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> (c) garnishment is barred by an installment payment order;
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> (d) garnishment is precluded because the maximum amount permitted by law is being withheld pursuant to a higher priority garnishment or order;
>
> (e) the judgment has been paid;
>
> (f) the garnishment was not properly issued or is otherwise invalid.

Further, an installment payment order from the court protects *only* the wages of the defendant, not any other type of asset subject to any other type of garnishment. MCL 600.6245. See MCL 600.6215(2) which provides that a court order allowing the judgment to be paid in installments "shall stay the issuance of any writ of garnishment for work and labor during the period that the defendant complies with the order." See also, MCR 3.101(N)(1) which specifically instructs that an installment payment order "suspends the effectiveness of a writ of garnishment of periodic payments for work and labor performed by the defendant from the time the order is served on the

garnishee. An order for installment payments does not suspend the effectiveness of a writ of garnishment of nonperiodic payments or of an income tax refund or credit."

Finally, social security funds are exempt by law from garnishment. 42 USC 407(a). That exemption applies even after the funds are received by the judgment debtor and deposited in a bank account. *Whitwood, Inc v South Boulevard Property Management Co,* 265 Mich App 652, 654 (2005).

Based upon the above law, the following applies:

(1) Adele: U-Knew would have no recourse against Adele's valid objection that the funds in her bank account comprised solely of social security benefits are exempt from garnishment. *Whitwood, Id.* MCR 3.101(K)(2)(a).

(2) Brian: U-Knew would be able to garnish Brian's wages because his objection attacking the underlying judgment as invalid is specifically improper under MCR 3.101(K)(1). Also, while a pending bankruptcy proceeding is a valid basis for a garnishment objection pursuant to MCR 3.101(K)(2)(b), a mere intention to institute such a proceeding in the future is not.

(3) Colby: U-Knew would be able to garnish Colby's state income tax refund. As noted above, while an installment payment order from the court stays and/or prevents any periodic garnishment of wages, it does not protect any other assets of the judgment debtor from garnishment, in particular state income tax refunds. MCR 3.101(N)(1). Since Colby's state income tax refund is the subject of the writ of garnishment and not her wages, her objection based upon compliance with an installment payment order is invalid.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

The Transcript of the **Voice Recording Is Recorded Recollection:**

In this case, Justine concedes that the transcribed recording is hearsay because it is an out-of-court statement offered for its truth. MRE 801. The transcript of the recording is admissible as a Recorded Recollection, but cannot be received as an exhibit. MRE 803 provides a hearsay exception for:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

MRE 803(5). To qualify for admission under this exception, a record, in this case the transcript, must meet the following three foundational requirements:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) the declarant must now have an insufficient recollection as to such matters; (3) the document must be shown to have been made by the declarant or, *if made by one other than the declarant,* to have been examined by the declarant and shown to accurately reflect the declarant's knowledge *when the matter is fresh in his memory.*
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> *People v Hoffman,* 205 Mich App 1, 16 (1994). See also, *Rush v Illinois Cent R Co,* 399 F3d 705, 719 (CA 6, 2005) (reiterating the three elements and holding that transcribed interview could have been read to the jury as past recollection recorded had the witness not provided detailed testimony at trial recalling the events in question).

Alternatively, some Michigan cases suggest the additional foundation requirement of showing the document to the declarant in order to ensure her

memory is not refreshed by it, before allowing the document to be read into evidence. *Hewitt v Grand Trunk Western R Co,* 123 Mich App 309, 321 (1988).

Here, the transcript contains Justine's own statements reciting her knowledge of what had just happened to her in a voice she recognizes as her own, satisfying the first and third foundational requirements. And Justine now has no recollection of the events of that night before she lost consciousness, satisfying the second requirement. Thus, the transcript of the recording may be read in the presence of the jury. It cannot, however, be made an exhibit by Justine, so it does not fully satisfy her objective.

Transcribed **Voice Recording Is Not A Statement Made For Medical Purposes:**

Rule 803(4) provides a hearsay exception for:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Here there is no indication thai Justine made the statements for purposes of medical treatment or medical diagnosis in connection with treatment, nor was she describing her medical history or any pain or even injury, as the exception requires. Instead, Justine was describing what she heard (someone outside) and saw (Larry) and how she ended up at the bottom of the stairs. See *Merrow v Bofferding,* 458 Mich 617, 630 (1998) (statement of events that eventually ended with an injury was not made for purposes of medical treatment).

Transcribed **Voice Recording is "Excited Utterance" Or "Present Sense Impression":**

MRE 803(2) provides a hearsay exception for:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This "excited utterance" exception fits the transcribed recording. Pursuant to *People v Smith,* 456 Mich 543 (1998), the foundational requirements for the exception are (1) a startling event; and (2) a statement resulting from the event made while still under the excitement of the event. 456 Mich at 550. To the extent that Larry may argue that, apart from the recording, there is no independent evidence of the events (Larry lurking outside and Justine falling because of a broken banister), such independent evidence is not required under MRE 803(2). *People v Barrett,* 480 Mich 125 (1992). Justine was awakened by a person lurking outside then fell down a flight of stairs. Heidi heard the commotion, found Justine lying at the bottom of the stairs, and immediately recorded Justine's breathless description of what had just occurred.

MRE 803(1) provides a hearsay exception for:

> A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

This "present sense impression" exception also fits the recording. Pursuant to *People v Hendrickson,* 459 Mich 229 (1998), there are three foundational prerequisites for the exception:

> (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be "substantially contemporaneous" with the event.

459 Mich at 236. All of these are satisfied here. In addition, the recording was made "in the presence of another witness who has the opportunity to observe and verify its accuracy," *id.* at 235-236, which augments its trustworthiness.

The advantage of relying on either the excited utterance or present sense impression exception is that either would allow Justine to both read the transcript in the presence of the jury and allow the court to receive it as an exhibit.

Credit will not be given for MRE 803(3), a statement of then-existing mental, emotional, or physical condition. Justine was not describing any pain, emotion, or physical condition in the recording, as this exception requires. MRE 803(3). Rather,

she was stating the facts that transpired as she remembered them, which is not the purpose of this exception. *Id.*

Transcribed **Voice Recording Authenticated Under MRE 901:**

Pursuant to MRE 901:

> The requirement of authentication or identifi-cation as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

MRE 901(a). By way of illustration, an example of conform-ing authentication includes "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." MRE 901(b)(5). See *People v Berkey,* 437 Mich 40, 50 (1991) ("a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more.").

Both Justine and Heidi can identify the voices on the recording, and Heidi, the owner of the recorder, can confirm when the recording was made, the absence of any alterations to it, and the accuracy of the transcript. While Larry's attorney can cross-examine Heidi on the recording's creation date, mere theorizing that it is always possible a witness is wrong does not go to authentication.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

The district judge should reject all defense arguments and bind Marty and Joe over to stand trial on armed robbery.

The court should reject the legal arguments on elemental insufficiency. MCL 750.530, Michigan's robbery statute, says:

> (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 commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

This statute does not require an actual taking or larceny but rather contemplates an attempted larceny. The Michigan Supreme Court so held in *People v Williams,* 491 Mich 164 (2012). Accordingly, Marty and Joe's joint argument regarding the lack of a larcenous taking must be rejected.

The elements of robbery are (1) using force or violence against or putting complainant in fear, (2) while in the course of committing, and (3) the complainant was present while the defendant was in the course of committing a larceny. M Crim JI 18.2 and *Williams, supra.* The challenged element is the taking of money. But the facts indicate (1) a demand for money; (2) resorting to force or instilling fear in Caroline and her gathering the money to hand to the robbers; and finally, (3) while the facts indicate the police siren scared off the robbers, their actions certainly qualify as "acts that occur in an attempt to commit the larceny." M Crim JI 18.2(3).

Marty and Joe's individual arguments regarding the absence of a gun fare no better. MCL 750.529, Michigan's armed robbery statute, states in pertinent part:

> A person who engages in conduct proscribed under Section 530 and who in the course of engaging in that conduct,]possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty . .

A clear reading of this statute reveals there is no requirement that the perpetrator actually had a gun or other dangerous weapon, in order to establish the elements of armed robbery.

A robbery is considered armed if, while in the course of committing the larceny, the defendant possessed a dangerous weapon; or, even if not dangerous, possessed any object that was used or fashioned in a way to lead someone present to reasonably believe that it was a dangerous weapon; or if the defendant "represents orally or otherwise" that he is in possession of a dangerous weapon, even if he was not. See MCL 750.529, emphasis added.

Marty's argument that his words alone are insufficient misses the mark. The words he chose, "we will blow you away" qualify as language that "represents orally or otherwise" possession of a dangerous weapon. MCL 750.529. Similarly, Joe's hand in his jacket and pointing at Caroline would qualify as an article used or fashioned in a manner to lead her to reasonably believe the article is a dangerous weapon. Similarly, Joe's act qualifies as a non-oral representation as to the possession of a gun used to make Caroline fearful.

The district judge should also reject Marty's and Joe's argument that dismissal is warranted based on insufficient identification. The test for bind over is not proof beyond a reasonable doubt but rather probable cause. *People v Plunkett,* 485 Mich 50 (2010); *People v Lowery,* 274 Mich App 684 (2007); MCL 766.13; and MCR 6.110(E) and (F). Probable cause is defined as evidence "sufficient to make a person of ordinary caution and prudence to conscientiously entertain a reasonable belief of defendant's guilt. *People v Waltonen,* 272 Mich App 678, 684 (2006). A conflict in testimony is to be resolved by a jury or judge at trial, not by the district judge at preliminary examination.

Here the testimony reveals a clear conflict as to the identity of the robbers. But this conflict is not to be resolved by dismissal. Rather, the district judge--so long as probable cause is established as to the identity of the robbers--should let a jury decide the matter at trial. Caroline's identification suffices to establish probable cause. See *People v Lunsford,* 20 Mich App 325, 328 (1969) and *People v Angers,* 36 Mich App 28, 30-31 (1971).

Accordingly, both the defendants' legal arguments and factual arguments for dismissal of the armed robbery charge should be rejected.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1. A traffic stop for a suspected violation of law is a "seizure" of the occupants of the vehicle and, therefore, must be conducted in accordance with the Fourth Amendment. *Brendlin v California,* 551 US 249, 255-259 (2007).

For the type of seizure involved here, a traffic violation stop, officers need only "reasonable suspicion"--that is "a particularized and objective basis for suspecting the particular person stopped" of breaking the law. *Prado Navarette v California,* 572 US __ , 134 S Ct 1683 (2014). Stated differently, police may stop a vehicle for a traffic violation, consonant with the Fourth Amendment.

The touchstone of the Fourth Amendment is "reasonableness" and, under this rubric, an officer stopping a vehicle for a traffic violation need not be absolutely right but in being wrong must be reasonable in mistake. *Riley v California,* 573 US _____, 134 S Ct 2473 (2014) and *Brinegar v United States,* 338 US 160, 176 (1949). Searches and seizures based on mistakes of fact can be reasonable.

2. The issue presented by Dirk's motion is whether a reasonable mistake of law is entitled to the same deference under the Fourth Amendment as mistakes of fact.

In *Heien v North Carolina,* 574 US ___ , 135 S Ct 530 (2014), the United States Supreme Court held that for Fourth Amendment analysis a seizure based on a reasonable mistake of law nevertheless can be squared with the Fourth Amendment's requirement for reasonableness. Seeing little or no difference between reasonable mistakes of fact and reasonable mistakes of law in calculating reasonable suspicion, the Court upheld a stop

despite the officer's mistake about what a traffic ordinance required.

3. Applying *Heien's* holding to Dirk's argument yields the conclusion suppression is unwarranted. Dirk's coun-sel's argument, i.e. that a reasonable mistake of law cannot justify a seizure based on reasonable suppression for a traffic violation, cannot be squared with *Haien.* So long as Officer Murphy's mistake of law was reasonable, the Fourth Amendment was not violated when he stopped Dirk's vehicle for having only one working brake light. Because the sole basis of Dirk's motion was his claim his truck was unconstitutionally stopped, his motion should be denied. Dirk does not even argue that Murphy's mistake of law was unreasonable, thereby leaving him no basis for suppression.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

The facts as presented raise a question regarding whether Signet's rights to free speech under the First Amendment are abridged. The First Amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . ." The First Amendment is made applicable to the states under the 14th Amendment. *Gitlow v New York,* 268 US 652 (1925).

However, the contours of Signet's First Amendment right to free speech are more particularly shaped by applicable precedent in the school setting. Students do not shed their constitutional rights at the schoolhouse door, nor are a student's free speech rights in the school setting co-extensive with adults' free speech rights in a more general venue. *Tinker v Des Moines Independent County School District,* 393 US 503 (1969); *Bethel School District No. 43 v Fraser,* 478 US 675, 682 (1986); *Hazelwood School District v Kuhlmeirer,* 484 US 260, 266 (1988). Without question, greater restrictions on speech are allowable in the student school setting.

The facts as presented raise basically two issues. First, whether the free speech denial claim should be viewed through the prism of school speech. Second, as compared against the appropriate standard, whether Principal Kelly's actions violated Signet's right to free speech. Both questions are answered by the Supreme Court's decision in *Morse v Frederick,* 551 US 393 (2007).

As in *Morse,* it can easily be concluded that this is a school speech case as opposed to a more generally based First Amendment speech case. The facts indicate the event in question occurred during normal school hours, permission had been sought by students from school officials to attend, and participation was sanctioned as an approved social event or class trip. Rules of conduct at approved social events or class trips are like those during "school" proper. Moreover, teachers and administrators were present at the parade to monitor student behavior. On these facts it is easy to conclude this is a school speech case.

Because this is a school speech case, the precedent concerning this genre of First Amendment speech rights cases applies.

As such, Principal Kelly's actions, *vis-a-vis* Signet's rights, must be analyzed in light of the special characteristics of the school environment. *Kuhlmeirer, supra.* Pursuant to *Morse*, school officials may take steps to safeguard those entrusted to their care from speech that can be reasonably regarded as encouraging illegal drug use. *Morse,* at 397.

As *Morse* indicated, Signet's intent would not be determinative. Whatever his intent, the words must still be analyzed. The notion that the words used here, "Meth Shots 4 Moses," may be silly, nonsense, ambiguous, and the like, does not per se detract from Principal Kelly's conclusion that drug use was being promoted, nor the reasonableness of that conclusion and the need to act consistent with the schools anti-drug policy.

Focusing on the language, "Meth" is a common truncation of methamphetamine, a drug of concern to the schools. The word "shot" is reasonably thought to be a method of ingesting methamphetamine. The number "4", used as an apparent substitute for the word "for," while arguably nebulous, does not detract from the focus on meth shots' meaning. "Moses" contributes similar analysis. In total, if forced to choose between the message being senseless, meaningless fun and promoting drug use, Principal Kelly did not act unreasonably by choosing the latter.

In conclusion, Signet's suit will fail. This is a school speech case. A student's rights in this regard must be analyzed in that vein. The school's anti-drug use policies are consistent with the obligation of school authorities. The words on the banner could reasonably have been concluded to promote illegal drug use. Principal Kelly's actions, therefore, did not violate Signet's First Amendment right to free speech.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. Which party bears the burden of proof regarding the existence of a partnership?

The burden of proof to show a partnership is on the party alleging the partnership. *Grosberg v Michigan Nat Bank Oakland,* 113 Mich App 610, 614 (1982); *Falkner v Falkner,* 24 Mich App 633, 644 (1970). Because Steve is the party alleging the partnership, it is Steve's burden to establish the existence of a partnership.

2. What is the burden of proof required to establish a partnership in this case?

Generally, the party alleging the partnership is required to prove that a partnership exists by a preponderance of the evidence. *Lobato v Paulino,* 304 Mich 668, 670 (1943). However, where the alleged partners are relatives, a heightened standard applies, and the party alleging the partnership is required to prove the existence of the partnership by clear and convincing evidence. *Grosberg, supra; Falkner, supra; Cole v Cole,* 289 Mich 202, 204 (1939). Therefore, Steve will be required to establish the existence of the partnership by clear and convincing evidence.

3. Does a partnership exist between Brian and Steve?

A partnership is an association of two or more persons to be the co-owners of a business for profit. MCL 449.6(1). In general, under this statute the primary question is "whether the parties intentionally *acted* as co-owners of a business for profit, and not on whether they consciously intended to create the legal relationship of 'partner-ship.'" *Byker v Mannes,* 465 Mich 637, 652 (2002). MCL 449.7 lays out specific rules for determining the existence of partnership. MCL 449.7(4) states that "[t]he receipt by a person of a share of the profits of a business is *prima facie evidence* that he is a partner in the business . . ." (emphasis added). However, the statute also lays out several exceptions to the "prima facie evidence" rule. Relevant to this fact pattern, the statute states that no inference of partnership is drawn if the profits were received in payment "[a]s a debt by installments or otherwise,". MCL 449.7(4)(a). While receiving a share of the profits would

normally constitute evidence of partner-ship, no inference of partnership exists because the facts state that the payments were made to Steve in order to satisfy a debt. Moreover, the facts do not indicate that Steve made any other contributions toward the enterprise, such as labor, *Michigan Employment Sec Commission v Crane,* 334 Mich 411, 416 (1952), and no other acts of the parties are supplied that would allow for the argument that the parties acted as co-owners of a business for profit. Based on the information provided, a partnership does not exist between Brian and Steve.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

The legal theory pursued by Smith is malicious prosecution, as he is seeking damages against Jones for his filing of a frivolous lawsuit against him. To prove mali-cious prosecution in Michigan, a plaintiff must prove:

> (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *[Matthews v Blue Cross/Blue Shield,* 456 Mich 365, 378 (1998).]

Additionally, "under Michigan law special injury remains an essential element of the tort cause of action for malicious prosecution of civil proceedings." *Friedman v Dozorc,* 412 Mich 1, 31 (1981). "A complaint for malicious prosecution must allege interference with the plaintiff's person or property, such as through arrest or attachment, sufficient to constitute special injury." *Pauley v Hall,* 124 Mich App 255, 261 n 1 (1983); *Friedman,* 412 Mich at 34, 40-42. (A special injury is an arrest, seizure of property, or other direct injury to one's person or property.)

Based on the facts provided, it is clear that the first element is satisfied, as Jones initiated a case against Smith, and that a civil suit suffices, as it does not need to be an actual criminal prosecution. See *Pauley,* 124 Mich App at 267; *Friedman,* 412 Mich at 48. As for the second element, the prior proceedings terminated in favor of Smith. With respect to probable cause to bring the prior district court suit, there clearly was no probable cause to institute the district court proceeding. Jones knew all along that Fido never entered his property, and that his evidence in support of the district court case was fabricated. Clearly, Jones lacked probable cause to initiate the district court suit against Smith. There is also no question but that Jones acted maliciously in bringing the district court action. Malice may be inferred from the lack of probable cause, *Matthews,* 456 Mich at 378 n 14, and Jones did not have probable cause to initiate the case. Additionally, the

evidence shows that Jones had an ulterior purpose in bringing the suit: he did not actually believe that Fido was on his property, he was instead fabricating a case in hopes of invoking an inapplicable ordinance to have Fido removed because of his barking. Thus, malice is established. *Pauley,* 124 Mich App at 266.

Finally, though it is not as clear, it is reasonable to conclude that Smith has alleged a special injury. As a result of the district court proceedings, Smith was deprived of his property--Fido--when it was seized for a period of three months, until the proceedings were terminated.

Although the question only reasonably raises a malicious prosecution claim, because emotional distress was a form of damage sought, applicants may raise the validity of an intentional infliction of emotional distress claim. Though not recognized by the Supreme Court, *Van Vorous v Burmeister,* 262 Mich App 467, 481 (2004), the elements of this tort are:

> To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causa-tion, and (4) severe emotional distress." The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Hayley v Allstate Ins Co,* 262 Mich App 571, 572; 686 NW2d 273 (2004)].

Under these facts, Smith would likely not prevail. Although intent and recklessness may be established, nothing in the facts reveal that Smith suffered severe emotional distress, nor is the filing of a frivolous lawsuit necessarily an act that goes beyond all bounds of decency in a civilized society. This tort is very difficult to establish, and the better analysis would be that it cannot be met under these facts.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

1. The trial court properly granted Power's motion for summary disposition.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion, and if the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *[Wilson v Alpena Co Rd Comm,* 474 Mich 161, 166 (2006) (citations omitted).]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183 (2003). Courts are "liberal in finding genuine issues of material fact." *Jimkoski v Shupe,* 282 Mich App 1, 5 (2008). However, the trial court may only consider substantively admissible evidence in ruling on a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood,* 461 Mich 109, 123 (1999). Thus, affidavits, depositions, admissions, and documentary evidence offered in support or opposition to a motion under MCR 2.116(C)(10) may "only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc,* 285 Mich App 362, 373 (2009).

Here, Donovan's CEO asserted by affidavit that she had been told by her loading-dock employees that the widgets were defective, and therefore, she refused to pay for the widgets. However, this statement is hearsay that would not be admissible as evidence to establish the proof of the truth of the matter asserted, i.e., that the widgets were defective. See MRE 801(c) ("'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). See also *In re Contempt of Henry,* 282 Mich App 656, 670-671 n 1 (2009) ("Under MRE 802, hearsay evidence is inadmissible absent an

exception."). Donovan's CEO claimed to have been told that the widgets in question were defective, but she did not establish that she had personal knowledge that this was true, nor did Donovan present affidavits from the de-clarants who purportedly had personal knowledge. Moreover, Donovan did not present other evidence to support the em-ployee's assertions that the widgets were defective, such as affidavit testimony that the employees were unable to use the widgets because they were defective, or that the widgets were tested in some fashion by experts who opined that the widgets were defective. Because Donovan relied on inadmissible evidence in opposition to Power's motion, while Power's motion was supported by documentary evidence that was undisputed, the trial court was required to grant Power's motion. In other words, Donovan did not establish a genuine issue of material fact that it failed to pay Power $30,000 for widgets delivered to Donovan pursuant to contract.

2. The trial court properly granted Power case evaluation sanctions. As articulated in *Peterson v Fertel,* 283 Mich App 232, 236 (2009), case evaluation sanctions are governed by MCR 2.403(0), which provides in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the oppos-ing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evalu-ation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
> (b) a judgment by the court after a nonjury trial,
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

Under MCR 2.403(L)(1), the failure of a party to file a written acceptance or rejection of a case evaluation award within 28 days of being notified of the evaluation panel's award constitutes a rejection of the award. *Peterson,* 283 Mich App at 234 n 1. In the question pre-sented, because Power filed its motion for summary disposition two months after the panel issued its award, the facts demonstrate that Donovan rejected the award

by failing to respond to the panel's award within 28 days. The facts also demonstrate that summary disposition was awarded in favor of Power after Donovan rejected the case evaluation award. Thus, the judgment in favor of Power constituted a verdict as provided by MCR 2.403(0)(2)(c), because it was entered as the result of the trial court's summary disposition ruling after the case evaluation award was rejected by Donovan. In addition, the verdict of $30,000, being greater rather than 10% less than the $25,000 case evaluation award, MCR 2.403(0)(3), was not more favorable to Donovan, and therefore, Donovan was liable to Power for its actual costs.