FEBRUARY 2010 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

MCR 2.116 governs summary disposition motions. A motion for summary disposition based on a lack of subject matter jurisdiction is brought under MCR 2.116(C)(4). MCR 2.116(D) addresses when summary disposition motions must be raised. The grounds for the motion dictate which subrule applies. Subrules (D)(3) and (4) provide:

"(3) The grounds listed in subrule (C) (4) and the ground of governmental immunity may be raised at any time, regardless of whether the motion is filed after the expiration of the period in which to file dispositive motions under a scheduling order entered pursuant to MCR 2.401.

"(4) The grounds listed in subrule (C) (8), (9), and (10) may be raised at any time, unless a period in which to file dispositive motions is established under a scheduling order entered pursuant to MCR 2.401. It is within the trial court's discretion to allow a motion filed under this subsection to be considered if the motion is filed after such period."

MCR 2.116(D)(3) and (4) were amended by the Michigan Supreme Court effective September 1, 2007. Before then, (D)(3) provided "the grounds listed in subrule (C) (4), (8), (9) and (10) may be raised at any time." The Staff Comment to the 2007 amendment states the amendments:

"clarify that motions for summary disposition based on governmental immunity or lack of subject-matter jurisdiction may be filed even if the time set for dispositive motions in a scheduling order has expired. Defects in subject-matter jurisdiction cannot be waived and may be raised at any time."

"It is well established that subject matter jurisdiction can be considered at any stage of a proceeding because it calls into question the power of the court to hear a case." *Sumpter v Kosinski,* 165 Mich App 784, 797 (1988). Subject matter jurisdiction "can never be conferred by the actions of the parties." *Hastings v Hastings,* 154 Mich App 96, 99 (1986). Subject matter jurisdiction can also be raised on appeal. *Orloff v Morehead Mfg Co,* 273 Mich 62, 66 (1935).

Therefore, the supervising attorney should be advised that there is a dispositive motion to file but that the filing deadline has been missed. However, because a summary disposition motion regarding a lack of subject matter jurisdiction can be filed "at any time" under MCR 2.116(D)(3), this rule will prevail over the trial court's scheduling order that places limits on the filing of motions.

However, the supervising attorney should also be told that the trial is in 18 days and summary disposition motions need at least 21 days notice. MCR 2.116(G)(1) (a) (i). Thus a motion to adjourn the trial to allow filing of the motion for summary disposition would be needed to have the motion heard before trial. One argument could be that the prior attorney's illness prevented him from timely filing the motion and that constitutes good cause for an adjournment. Additionally, it could be argued that a dispositive motion based on a lack of subject matter jurisdiction should be heard before a trial is conducted. MCR 2.116(G) also contemplates the trial court setting a different period for the filing of motions and any replies.

ANSWER TO OUESTION NO. 2

(1) Parker v Daisy--Battery:

In order to establish a claim of battery, a plaintiff must demonstrate that the defendant had the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, that such contact would result. *Boumelhem v BIC Corp,* 211 Mich App 175, 184 (1995). Here, the facts indicate that Daisy took the lid off her drink and intentionally threw it in Parker's face. She knew with substantial certainty that the contents of her cup would come into contact with Parker's face. Thus, Parker could sue Daisy for battery.

(2) Sara v Movie Theater--Premises Liability:

A prima facie case of negligence requires a party to establish: (1) a duty; (2) breach of that duty; (3) proximate cause; and (4) damages. *Jones v Enertel, Inc,* 254 Mich App 432, 437 (2002). 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, the duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id.,* pp 516-517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novontney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475 (1993).

Here, Sara is clearly an invitee and the movie theater owes a duty to protect her from unreasonable risks of harm caused by a dangerous condition, like a slippery floor. As such, the movie theater probably had a duty to clean up the wet floor when the danger became obvious. The facts indicate that Johnny knew of the danger. The movie theater can be held vicariously liable for the negligence of an employee if it was committed while the employee was acting within the scope of his employment. *Rogers v JB Hunt Transport, Inc,* 466 Mich 645, 649 (2002). But the facts indicate that only a few minutes had lapsed from when Daisy spilled her drink and when Sara slipped. Additionally, the facts as presented allow for a discussion on whether the danger was open and obvious,

allow for a discussion on whether the danger was open and obvious, i.e., Sara came barreling through the entrance--was she paying attention? Was the danger hidden? Did it have any special aspects?

(3) Parker v Fred--No-Fault:

Under Michigan law, the operator of a motor vehicle is liable for an injury caused by the negligent operation of a motor vehicle. MCL 257.401(1). However, Parker can only recover non-economic damages if she suffered death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1).

Here, the facts indicate that Fred was not paying attention to the roadway when he hit Parker with his car. Therefore, this claim would clearly fall under the No-Fault Act. Therefore, Parker could only recover non-economic damages for pain and suffering if she can prove a permanent serious disfigurement based on the ugly scar left on her forearm. Whether a scar is a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on the person's ability to lead a normal life. *Kosack v Moore,* 144 Mich App 485, 491 (1985). Whether a scar is serious must be answered by resorting to common knowledge and experience. *Nelson v Myers,* 146 Mich App 444, 446 (1985). The scar must be readily noticeable; a hardly discernable scar is not a permanent serious disfigurement. *Petaja v Guck,* 178 Mich App 577, 579-580 (1989). The facts as presented could support an argument for a permanent serious disfigurement. As such, Parker could recover in an action against Fred.

ANSWER TO OUESTION NO. 3

Recourse Against Amber: As officers and directors of Acme Anvil, Amber and Greg are required to discharge their fiduciary duties to the corporation (1) in good faith; (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he or she reasonably believes to be in the best interests of the corporation. MCL 450.1541a(1)(a)-(c). Certainly, Amber would argue that she acted in good faith by entering into the contract because she believed that the price of iron ore would skyrocket, and that a long-term contract fixing the price would benefit the company. In exercising her business judgment, Amber is entitled to rely upon information provided by consultants or experts as to matters Amber "reasonably believes are within the person's professional or expert competence." MCL 450.1541a(2)(b). In this case, Amber's psychic has no professional or expert competence regarding iron ore speculation, so it is unlikely that her reliance on the psychic's predictions will be deemed reasonable. Pursuant to MCL 450.1541a(4), an action can be filed against Amber for breach for fiduciary duty within 3 years after the cause of action accrued. Here, the cause of action is timely.

However, a suit to redress injury caused to the corporation must generally be brought in the name of the corporation rather than an individual stockholder. *Michigan Nat Bank v Mudgett*, 178 Mich App 677 (1989). Therefore, Uncle Bob will have to file a derivative action on behalf of Acme in order to seek damages for Amber's breach of fiduciary duty. Because Uncle Bob was a shareholder at the time the 2007 contract was signed, continues to be a shareholder, and "fairly and adequately represents the interests of the corporation," he is eligible to file a derivative action. MCL 450.1492a. Pursuant to MCL 450.1493a, Uncle Bob cannot commence a derivative action until he makes a written demand upon Acme Corporation to take action against Amber, and has either waited ninety days from the date the demand was made or received notice that the demand has been rejected by the corporation.

Shareholder's Meeting: Even if the corporate bylaws do not provide for an annual meeting of the shareholders, Uncle Bob can compel a meeting of the shareholders by filing an application with the circuit court of the county in which Acme Anvil's registered office is located, provided that no date for an annual meeting has been designated for 15 months after the organization of the corporation. MCL 450.1402.

The Probability of Ousting Greg and Amber: Because the nine minority stockholders collectively control 54% of the Acme Anvil stock, each minority shareholder will have to vote in favor of ousting Greg and Amber in order to install Tammy and Chris as directors. While Aunt Faye subsequently changed her mind about removing Greg and Amber, she signed a voting agreement expressly agreeing to vote for Tammy and Chris. Pursuant to MCL 450.1461, the voting agreement is "specifically enforceable." Uncle Bob and the rest of the minority shareholders will be able to specifically enforce the voting agreement, and will be able to remove Greg and Amber as directors.

ANSWER TO QUESTION NO. 4

The legal profession is a self-governing profession. MRPC 8.3 requires lawyers to report certain lawyer misconduct to the Michigan Attorney Grievance Commission.

"A lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission."

Rule 8.3 has three thresholds that must be met before reporting is required: (1) knowledge; (2) significant violation(s) of the rules; (3) substantial question as to another lawyer's honesty, trustworthiness, or fitness.

Rule 8.3 does not require a lawyer to report every violation of a Rule of Professional Conduct; it is meant to be limited to violations which go to the heart of the profession. Thus, a lawyer who is contemplating whether he or she is under an obligation to report suspected misconduct must make reasonable value judgments about the significance of the other lawyer's suspected misconduct and whether it is required to be reported.

(1) Knowledge: Both Daniel and Marcus have knowledge of Charles' conduct. Marcus was asked to clean up the mess, and thus had to review the case file and research the legal support for the setting aside of the default. Daniel, the managing partner of the firm, was put on notice of Charles' conduct by Marcus, who was concerned about the manner in which the file was handled by Charles.

(2) Significant Violation: Charles has violated MRPC 1.1:

"A lawyer shall provide competent representation to a client. A lawyer shall not:

"(a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;

"(b) handle a legal matter without preparation adequate in the circumstances; or

"(c) neglect a legal matter entrusted to the lawyer."

The stated facts do not raise any issue involving subpart (a),

but they do show violations of subparts (b) and (c). Charles did not adequately prepare to respond (or object) to the interrogatories in compliance with applicable discovery deadlines; indeed, he did not prepare at all. His multiple failures to respond and to appear in court also evidence neglect of the matter entrusted to him. Neglect involves indifference and a lawyer's consistent failure to carry out the obligations assumed to the client or a conscious disregard for the responsibility to the client. (ABA Informal Ethics Opinion 1273 [1973].) Appearance for a hearing is required by court rule, and a violation is arguably within MRPC 8.4(c), conduct prejudicial to the administration of justice. Failure to appear may also be a violation of MRPC 1.3, requiring a lawyer to act with reasonable diligence in representing a client.

(3) Substantial question of honesty, trustworthiness or fitness: There is no indication that Charles lied, withheld information from the client, or tried to cover up what had occurred. However, any lawyer knows that ignoring interrogatories is potentially prejudicial to a client, and that failure to show up at a court hearing is an egregious error. Charles failed to do this on three occasions, plus he did not tell the firm of a problem or seek support on the case from others in the firm before the court hearings were missed and the problem had exacerbated. Even then, instead of informing firm management, he assigned to an associate the responsibility of fixing the problem. It does not appear that Charles discussed with the client the nature of discovery obligations or gave advance notice of his intent not to appear for the hearings. Taken together, these failures show a glaring lack of appreciation for his duties to the client and to his firm. Charles' conduct also inconvenienced the opposing party and the opposing counsel, who had to prepare for and attend hearings that otherwise would not have been required.

The Comment to MRPC 8.3 defines "substantial" as follows:

"This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term 'substantial' refers to the seriousness of the possible offense and not to the quantum of evidence of which the lawyer is aware."

Charles' conduct was "serious"--a default was entered against Brenda because of his repeated neglect to take action and appear for hearings. Whether it raises a substantial question as to his "honesty, trustworthiness or fitness" to practice can be debated, but on these facts doubts should be resolved in favor of reporting

such flagrant indifference to a lawyer's professional obligations to client and firm. No mitigating reasons for the conduct have been offered, and Charles' failure to inform the firm in a timely fashion is an exacerbating circumstance that reflects poorly on his trustworthiness.

Daniel and the firm should also take immediate action to remedy the consequences of Charles' neglectful conduct. MRPC 5.1(c)(2), provides in pertinent part that a:

"lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if . . . the lawyer is a partner in the law firm in which the other lawyer practices . . . and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take responsible remedial action."

The facts indicate that a default was entered against Brenda, but at the time the firm became aware of Charles' conduct a default judgment had not yet entered. The firm must take swift action to remove Charles from the file; fully inform Brenda regarding the status of her case; and move to set aside the default that was entered against Brenda due to Charles' neglect. Additionally, the firm should investigate whether Charles' conduct in Brenda's case represents an isolated instance or a pattern of neglect and indifference. The firm should, at a minimum, establish internal procedures to monitor Charles' calendar and prevent recurrences.

ANSWER TO QUESTION NO. 5

The first issue is whether Ms. Grandy can testify to what Jones said after she fell. Since this raises a hearsay issue, the applicant should first set out the appropriate definitions. 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." MRE 801(c). Hearsay is not admissible unless it comes within an exception. MRE 802. All out-of-court statements offered to prove the truth of the matter asserted are not inadmissible hearsay. In particular, a statement is not hearsay if it is offered against a party and it is the party's own statement. MRE 801(d)(2)(A).

For several reasons, Ms. Grandy should be allowed to testify to what Jones stated. First, the statement is not hearsay because it is a statement made by a party opponent. Clearly Jones was the declarant, and he is a defendant in the case. Thus, it is admissible. It could also be argued that it is not hearsay because it is not being offered for the truth of the matter asserted, i.e., that Jones should have fixed the stairs, but to instead prove that as the owner, Jones was on notice that the stairs were defective. See *Clark v KMart,* 465 Mich 416, 419 (2001). (Notice of dangerous condition is relevant in premises liability cases.) Either way, it is not hearsay and is admissible.

Points should be awarded if the applicant determines that the evidence is relevant, MRE 401, and the probative value is not substantially outweighed by unfair prejudice. MRE 403. Finally, this is not a declaration against interest, as Jones is available to testify. MRE 804(b) (3); MRE 804(a) (4), *Sackett v Atyeo,* 217 Mich App 676, 684 (1996). It is also not admissible as a present sense impression, MRE 803(1), or as an excited utterance, MRE 803(2), as the facts reveal that Jones made the statement at least 30 minutes after the fall, and there is nothing to suggest that he was under any stress of excitement from seeing Ms. Grandy fall. See *Johnson v White,* 430 Mich 47, 57-58 (1988) and *Hewitt v Grand Trunk W R Co,* 123 Mich App 309, 320-322 (1983).

The second issue is whether Ms. Grandy can testify to Jones' offer to settle her potential claim. Initially, it should be noted that, for the reasons outlined above, the statement is not hearsay because it is an admission of a party opponent. MRE 801(d) (2) (A). However, under MRE 408 evidence of an offer to furnish consideration to compromise a claim that is disputed as to either

amount or validity is inadmissible. Here, although there was no pending lawsuit, and the accident just occurred, Jones was offering consideration to resolve any dispute Ms. Grandy may have had immediately after she fell. Given these facts, and Ms. Grandy's response, there was a sufficient "dispute" even though it had not yet crystallized into a lawsuit. *Affiliated Mfrs Inc v Aluminum Co of America,* 56 F3d 521, 527 (CA 3, 1995); *Commonwealth Aluminum Corp v Stanley Metal,* 186 F Supp 2d 770, 773 (WD KY, 2001). This testimony is therefore likely to be inadmissible.

The third issue is whether Ms. Grandy can testify about the replaced stairs she saw a week after the accident. MRE 407 precludes evidence of subsequent remedial measures that if made previously would have made the event less likely to have occurred. Ms. Grandy's testimony is clearly prohibited. No facts have been provided to suggest that it was offered to show ownership, control, or feasibility of the measure, and its only possible use would be to prove that Jones and the bakery were negligent.

As to the final issue, "[t]o lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal knowledge, that the photograph is an accurate representation." *Knight v Gulf & Western Properties, Inc,* 196 Mich App 119, 133 (1992). The original photograph is normally required for admission, MRE 1002, but a duplicate would be admissible in the absence of doubt as to the duplicate's authenticity. MRE 1003. Here Ms. Grandy can testify to the accuracy of the scene depicted in the photograph, as she was there when it occurred. There is also nothing to suggest that the photo was not the original. Additionally, neither the fact that she did not take the photo, *Ferguson v Delaware International Speedway,* 164 Mich App 283, 291 (1987), nor the fact the scene has partially changed since the photo was taken, *Knight, supra* at 133, precludes her from establishing its foundation for admission.

ANSWER TO QUESTION NO. 6

For the following reasons, I would advise Landscape Design that it may safely retain the amount it already collected for the preliminary design, but that, because it breached the contract by submitting a non-compliant revised plan, the most it can recover in addition is the amount owed under the second invoice covering the budget estimate it prepared on the preliminary design.

1. In the contract, Landscape Design agreed that it had to comply with cost limitations, if any, imposed on it by Mall Management. Because there was no cost limitation at the time Landscape Design supplied its preliminary design, Landscape Design was contractually entitled to keep the payment at the $150 hourly rate that it received for this work. *Zannoth v Booth Radio Stations,* 333 Mich 233, 242-243 (1952).

2. Landscape Design also was contractually entitled to payment at the $150 hourly rate for providing the estimated cost of the preliminary design, in light of the fact budgeting was within the scope of the contract and Mall Management's request related to the preliminary design. *Id.* Therefore, Landscape Design should recover on the second invoice in the amount of $4,800.

3. Once Mall Management imposed the cost limitation as a condition precedent, however, Landscape Design was required to present only designs that complied with the cost limitation. Any design that did not comply was a breach of contract by Landscape Design, relieving Mall Management of its duty to perform. In addition, Mall Management afforded Landscape Design with an opportunity to cure (which Mall Management was not required to do), which Landscape Design refused to do. *Id.* 333 Mich at 246; *Able Demolition v City of Pontiac,* 275 Mich App 577, 583-584 (2007).

4. An issue also may be raised as to whether Landscape Design's breach was a substantial breach, because only a substantial breach would be sufficient to relieve Mall Management of its obligation to perform. The question under these circumstances is whether, despite the breach, Mall Management obtained the benefit it reasonably expected to receive. Because in this case, Mall Management reasonably expected to receive a final design plan that could be implemented within its cost limitation, it did not receive the benefit it reasonably expected, and the breach was substantial. *Able Demolition,* 275 Mich App at 584-585; *Michaels v Amway Corp,* 206 Mich App 644, 650 (1994).

5. Nor is the amount for the revised plan available under a theory of quantum meruit, which would require that Mall Management have unfairly received and retained a benefit from Landscape Design. The revised plan was unusable, and therefore of no benefit to Mall Management, which had to hire and pay for another landscape design firm to start from scratch. *Zannoth,* 333 Mich at 243; *Morris Pumps v Centerline Piping,* 273 Mich App 187, 194 (2006).

6. This also is not a situation that is amenable to a frustration of purpose of performance or impossibility defense, although this writer recommends that a test taker who raises the issue be provided one point for recognizing it as a potential issue. To the extent the frustration of purpose defense is recognized in Michigan, it requires that the frustrating event be one that was not reasonably foreseeable at the time the contract was made and was not a risk that was assumed by the breaching party. While Landscape Design concluded that it was unable to modify its existing design to abide by the cost limitation, the parties agreed in the contract that cost limitations could be imposed and, once imposed, were a condition precedent to performance. Both parties were also aware of an unfavorable economic climate at the time the contract was entered. Under these circumstances, the imposition of a cost limitation was foreseeable and was a risk that Landscape Design assumed. *Rooyakker v Plante & Moran,* 276 Mich App 146, 159-160 (2007).

ANSWER TO QUESTION NO. 7

The attorney should advise Joan it is very likely she has a workers' compensation remedy for the medical treatment related to her exposure at the workplace. But, her claim for weekly wage loss benefits is much more tenuous. The disability claim will be unsuccessful if all Joan can demonstrate is an inability to return to work at 3C's.

Employees are entitled under the workers' compensation statute to have the employer pay for medical treatment resulting from a "personal injury arising out of and in the course of employment." MCL 418.301(1); MCL 418.315(1). Joan's skin irritations would almost certainly be deemed a personal injury arising out of and in the course of employment. The fact that Joan brought to the work place a latent sensitivity to the chemicals does not preclude benefits because the employer takes the employee as it finds him or her. See, *Deziel v Difco Laboratories, Inc,* 394 Mich 466, 475-76 (1975). Where the employee brings to the workplace a pre-existing problem, however, the employee must demonstrate that work caused a condition "medically distinguishable" from the pre-existing condition itself; that is, the employee must prove work caused a change in the pathology of the pre-existing problem. *Rakestraw v General Dynamics Land Systems,* 469 Mich 220, 234 (2003); *Fahr v General Motors Corp,* 478 Mich 922 (2007). Here, Joan would argue that work exposure caused a change in pathology and produced a problem "medically distinguishable" from her previously quiescent problem.

An examinee may argue that here work merely elicited the symptoms of a pre-existing latent condition and symptomatic aggravation does not satisfy *Rakestraw/Fahr.* While that point might be debated, the previously dormant nature of Joan's condition and the lack of indication that the skin irritations are just temporary should yield the conclusion that she has suffered a work-related personal injury. The ultimate answer is less important than recognition of the "personal injury" *Rakestraw/Fahr* rule and recognition that a pre-existing problem does not necessarily preclude a claim the employer is responsible for aggravating it.

Disability (Wage Loss) Benefits: To prove entitlement to weekly wage loss benefits, the employee must demonstrate that he or she is "disabled." The workers' compensation statute defines "disability" as follows: "'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her

qualifications and training resulting from a personal injury or work related disease." MCL 418.301(4) (first sentence); MCL 418.401 (1). The Supreme Court has emphasized that an employee's inability to return to his/her last job or the inability to return to just one type of employment that he/she had performed in the past does not, standing alone, suffice to demonstrate "disability." *Stokes v Chrysler LLC,* 481 Mich 266, 278-79 (2008); *Sington v Chrysler Corp,* 467 Mich 144, 155 (2002). The one exception can be where the employee is only qualified and trained to do one type of job and has no skills that might transfer to other job fields. Joan's community college degree, as well as the skills she used in working at 3C's, qualify her to perform other suitable work. Consequently, Joan's inability to return to 3C's will not, standing alone, suffice to prove "disability." Joan's only chance of prevailing on this issue would be to demonstrate that all other work suitable to her qualifications and training, *e.g.,* working in the medical field, performing customer relations and clerical type of work elsewhere, etc., is either not currently available in the labor marketplace or pays less than her maximum earning capacity. *Stokes,* 481 Mich at 280-81. And, in this regard, Joan would need to show she is making a good faith job search for all work suitable to her qualifications and training and/or that all available work pays less than she earned at 3C's. *Id.* at 283.

ANSWER TO OUESTION 8

I. No. A court *must* order support in the amount determined by applying the child support formula unless it determines from the facts of the case that application of the formula would be unjust or inappropriate. MCL 552.605(2). If the court deviates from the formula, it must set forth on the record: (1) the amount determined by the formula; (2) how the ordered support deviates from the formula; (3) the value of property or other support ordered in lieu of child support, if applicable; and (4) the reasons the application of the formula would be unjust or inappropriate. MCL 552.605(2); *Ghidotti v Barber,* 459 Mich 189, 191 (1998). There is no reason to deviate from the guidelines in this case. The parties' incomes will be factored directly into the calculation of the guidelines, and the support Lisa receives from her parents can be attributed to her as income. See Michigan Child Support Formula Manual, §2.05.

2. Yes. A Michigan court would have authority to take jurisdiction over the custody of the children. Interstate custody disputes are governed by the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA sets forth several grounds for a finding of jurisdiction over a custody dispute, the most important of which is that "[Michigan] is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state." MCL 722.1201(1)(a).

The "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-custody proceeding". MCL 722.1102(g).

Since Lisa has lived with the children in Michigan since the fall of 2008, i.e., more than six months, Michigan is the home state, arguably because the children lived in Michigan for six consecutive months before the filing of the proceeding. Even if the children are in Ohio, Lisa is still in Michigan, so Michigan was the home state "within six months before the commencement of the proceeding."

3. In Michigan, every custody determination must be based on the "best interests of the child." MCL 722.25(1). The first step

is to determine whether an "established custodial environment" has been established by either party, because a judge may not issue an order changing an established custodial environment absent clear and convincing evidence that such a change is in the best interests of the child. MCL 722.27(1)(c). This is an essential first step in any custody dispute. *Stringer v Vincent,* 161 Mich App 429, 434 (1987). The custodial environment 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. MCL 722.27(1)(c). Here, given the fact that the children have lived with their mother in Michigan all of their lives, except for one summer in Ohio, the court would definitely find that an established custodial environment existed with Lisa in Michigan. Larry would thus have a very high burden of establishing that it would be in the best interest of the children to move to Ohio.

The list of factors a court must consider in determining the best interests of the child are set forth at MCL 722.23:

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

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

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

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

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

(f) The moral fitness of the parties involved.

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

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

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

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

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

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

Specifically, the following factors should be noted: (a) Lisa is likely to have more significant emotional ties with the children since she has been raising them without Larry; (b) Larry's explosive temper would arguably impact his ability to provide love, affection and guidance; (c) the parties' incomes are equal, so neither is in a better position to provide for the children's physical needs, and in fact Lisa might be better positioned because of the support from her parents; (d) stability and continuity favor Lisa; and (f) Larry's "moral fitness" could be questioned because he left his wife and children, and he threatened a custody fight after Lisa requested child support.

Given that the known factors tend to weigh in Lisa's favor, and the established custodial environment is with Lisa in Michigan, she would very likely be awarded physical custody of the children.

ANSWER TO QUESTION NO. 9

Cashrich Company will likely recover the $50,000 from Battery Corporation if it is a holder in due course and exercised ordinary care in taking the instrument.

To acquire holder in due course status, the instrument must satisfy the requirements of a negotiable instrument under the Uniform Commercial Code. Pursuant to MCL 440.3104(1), a negotiable instrument is an unconditional promise or order to pay a fixed amount of money, if the following apply:

(a) Must be payable to bearer or to order at the time it is issued or first comes in to possession of a holder.

(b) Must be payable on demand or at a definite time.

(c) Must not state any other undertaking by the person promising payment to do any act in addition to the payment of money.

Based on the facts, the instrument is a negotiable instrument because it is payable on demand on the order of Tom Lion and does not state any other condition to payment. Bill Buck's statement that he would not present the instrument for payment until after he was employed by Battery for six months does not change this result because the condition was not contained on the face of the instrument.

If Cashrich is a holder in due course, it takes the negotiable instrument free of any defenses by the maker, Battery Corporation. MCL 440.3305(2). To establish status as a holder in due course, the holder must have taken the instrument for value, in good faith, and without notice that the instrument contains an unauthorized signature or that any party has a defense to payment on the instrument. MCL 440.3302(1) (b). Also, when the instrument was negotiated to the holder, it does not bear apparent evidence of forgery to call into question its authenticity. MCL 440.3302(1)(a).

Based on the facts, Cashrich likely is a holder in due course because it (a) gave value ($45,000), (b) took the instrument in good faith and (c) did not have notice of Battery's defenses that Bill Buck (Tom Lion) would not demand payment until he had been employed by Battery for six months or that Bill Buck impersonated

Tom Lion in acquiring the negotiable instrument (Cashrich was presented with Tom Lion's social security number and fake identification).

Cashrich must exercise ordinary care in paying and taking the instrument from an imposter, such as Bill Buck. so that it does not substantially contribute to the loss. MCL 440.3404(4). Cashrich likely exercised ordinary care in accepting the instrument from Bill Buck, since in purchasing the instrument it was presented with Tom Lion's social security number and fake identification and only charged its usual service fee.

ANSWER TO QUESTION NO. 10

Pursuant to Michigan law, MCL 700.2502(1), a will is only valid if it is (1) in writing; (2) signed by the testator and (3) signed by at least 2 individuals who witnessed the testator's signature. Here, Dennis Dwayne's will was in writing, and signed by Dwayne, but it was only witnessed by one witness, Jean. Because the will was only signed by one witness, the document does not qualify as a valid will.

While a holographic will does not need to be witnessed, MCL 700.2502(2), it must be dated, signed by the testator, and the material portions of the will must be in the testator's handwriting. Here, the facts indicate that the will was created and printed on a computer. Because the material portions of the will were not in the testator's handwriting, the document fails as a holographic will.

It is irrelevant that Jean, an interested party, witnessed the will. The signing of a will by an interested witness does not invalidate the will. MCL 700.2505(2).

Jean will argue the validity of the will despite its noncompliance with the precise requirements of MCL 700.2502 because MCL 700.2503 provides that a testamentary document will be treated as if it is in compliance with the law if the proponent of the will (in this case, Jean) establishes by clear and convincing evidence that the decedent intended the document to constitute his will. If Jean's argument is successful, the will of Dennis Dwayne will be upheld as valid, and Jean will take 50% of Dennis' estate.

However, Michigan has an elective share statute, designed to protect spouses against disinheritance. Under MCL 700.2202(2), Barbie may choose to (1) abide by the terms of the will; (2) take her dower right of a 1/3 life estate in all land owned by Dennis at any time during the marriage, MCL 558.1; or (3) take 1/2 of the amount she would have received had Dennis died intestate (discussed below), reduced by 1/2 of the value of all property Barbie received from Dennis by any means other than testate or intestate succession. This includes jointly held bank accounts, life insurance proceeds, and large transfers made within 2 years before the decedent's death. MCL 700.2202(7).

In addition to the elective share statute, Barbie is entitled to a homestead allowance of at least $15,000, MCL 700.2402, an

exempt property allowance of at least $10,000, MCL 700.2404, and a reasonable family allowance, MCL 700.2403. The family allowance may be paid as a lump sum of $18,000, MCL 700.2405(2). All of the allowances are adjusted annually for inflation, MCL 700.1210, and have priority over all claims against the estate except for administration costs and reasonable funeral and burial expenses. §2402; §2403(2); and §2404(2). Thus, Jean's 50% share of Dennis' estate is reduced by Barbie's elective share, as well as the statutory allowances.

Barbie will argue that Dennis' will is invalid because it neither qualifies as a will nor a holographic will, for the reasons discussed above. Further, Barbie will argue that Jean failed to prove by clear and convincing evidence that Dennis intended the document to constitute his will.

In the event that Barbie's arguments are successful, then Dennis will have died intestate. As a surviving spouse with shared descendants, Barbie will take the first $150,000, plus 1/2 of the remainder of the estate. MCL 700.2102. The minimum amount is adjusted annually for inflation. MCL 700.1210.

The remainder of Dennis' estate goes to his descendants by representation. MCL 700.2103(a). Ronnie and Paulie, as children of Dennis, will clearly take a portion of the estate. Kathleen, as a stepchild, will be unable to take a portion of Dennis' estate because a stepchild is specifically excluded as a child entitled to take by intestate succession. MCL 700.1103(f).

Lastly, the unborn baby (Dale) will most likely take a portion of Dennis' estate. A child conceived by a married woman with the consent of her husband using reproductive technology is considered to be the couple's child for the purposes of intestate succession. While Dennis was unaware that Barbie had a frozen embryo implanted in October 2009, his consent to the child's conception is presumed unless the contrary is shown by clear and convincing evidence. MCL 700.2114(1)(a). Here, the facts indicate that the couple planned to have more children before Dennis received his diagnosis. However, a contrary argument could be made that Dennis could not have consented to the conception of the child where he was unaware of the implantation procedure that occurred in October.

While baby Dale was not alive at the time his father died, he is treated as though he were living for the purposes of intestate succession if Dale survives for 120 hours (5 days) after his birth. MCL 700.2108.

ANSWER TO QUESTION NO. 11

(a) Parker cannot prevent people from walking along land held in public trust by the state. The Great Lakes, as large navigable bodies of water, are natural resources and routes of commerce that are held in trust by the state for the benefit of the public. The state may convey "littoral" property (land abutting the Great Lakes) to private citizens, but only subject to the public trust. Pursuant to the public trust doctrine, the land between the "ordinary high water mark" and the water's edge is held in trust by the state for the use of all citizens. The "ordinary high water mark" is created by the changing water levels in the Great Lakes over time (not by the actions of tides as occurs for ocean-side property). That mark is described as the point where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Glass v Goeckel,* 473 Mich 667 (2005).

Parker has fee simple title to the water's edge. However, that fee simple overlaps with the public trust between the water's edge and the "ordinary high water mark." Parker may prevent the public from trespassing onto his private property above the "ordinary high water mark," but has no recourse to prevent the public from walking the shore between the "ordinary high water mark" and the water's edge.

(b) Whether Parker has a claim against Drake for the incorrect statement on the Seller's Disclosure Statement depends on whether Drake had knowledge of the termites. Under the Seller Disclosure Act, MCL 565.950 et *seq.,* a party transferring property is required to provide a written disclosure statement to the purchaser. MCL 565.954(1). The statutory disclosure form requires the transferor to disclose any history of infestation, including termites. MCL 565.957(1). The party transferring the property is required to make each disclosure in "good faith," defined as "honesty in fact in the conduct of the transaction." MCL 565.960. However, the transferor is not liable for inaccuracies or errors in the disclosure statement if the information "was not within the personal knowledge of the transferor, or was based entirely on information provided by . . . [an expert], and ordinary care was exercised in transmitting the information." MCL 565.955(1). The transferor also cannot be held liable if the failure to disclose related to information "that could be obtained only through inspection or observation of inaccessible portions of real estate

or could be discovered only" by an expert. MCL 565.955(1), (3).

Drake asserted that she had recently installed fresh wall paneling in the home. When that paneling was removed, the structural damage caused by the since-departed termite infestation was immediately visible. This evidence suggests that the damage and prior infestation by termites was within the personal knowledge of Drake and that she did not act honestly in failing to disclose that information in the Seller's Disclosure Statement.

Consistent with the Seller Disclosure Act, Parker can pursue a claim against Drake for fraudulent misrepresentation alleging that Drake (1) made a material representation; (2) that was false; (3) that Drake knew the representation was false at the time or recklessly made the statement as a positive assertion without knowledge; (4) Drake intended Parker to act on the statement; (5) Parker actually did act in reliance; and (6) Parker was injured as a result. However, if Parker cannot prove that Drake actually knew about the prior termite infestation, Parker's claim will fail. The provisions of the Seller Disclosure Act preclude a claim for "innocent misrepresentation" because that claim does not require proof of knowledge. *Roberts v Saffell,* 280 Mich App 397 (2008), affd 483 Mich 1089 (2009).

ANSWER TO QUESTION NO. 12

(a) Biff will not be able to recover his comic book collection from Tammy. MCL 600.2920 codifies the common law action for replevin and allows a property owner to recover specific personal property that has been "unlawfully taken or unlawfully detained." Under the common law, even a good faith purchaser of property unlawfully taken or detained lacked title to that property as against the owner whose property has been converted. *Ward v Carey,* 200 Mich 217, 223 (1918). Thus, in the absence of any statute that precludes an action under MCL 600.2920, Biff can recover the comic book collection from Tammy if Greg unlawfully detained or took Biff's comic book collection.

However, the Self-Service Storage Facility Act, MCL 570.521 et *seq,* precludes Biff's recovery of the comic books. The Act creates a property right in "a purchase in good faith of the personal property sold" to enforce a lien created under the Act, "despite noncompliance by the owner with the [notice] requirements" of the Act. MCL 570.525(12). Thus, because the lien created under the Act applies to "all personal property . . . located at [a] self-service storage facility," MCL 570.523(1), if Tammy is a good faith purchaser of the comic books, she owns them free and clear of any claim by Biff. A good faith purchaser is one who is an "innocent purchaser of the property for value." *Bellows v Goodfellow,* 276 Mich 471, 475 (1936). There is nothing in the facts given to indicate that Tammy is not a good faith purchaser. However, if she had either *actual* or *constructive* knowledge that Greg's sale violated the Self-Service Storage Facility Act, she is not a good faith purchaser, and, therefore would not have a property interest in the comic books superior to Biff. In that event, MCL 600.2920 allows Biff to recover the comic books from Tammy as explained above.

(b) Biff will be able to recover monetary damages from Greg for the sale of his comic books. Under the common law, a lien is "a right or claim against some interest in property created by law as an incident of [a] contract." *Chaff v Haan,* 269 Mich 593, 598 (1934). An essential characteristic of a lien is the right of enforcement by sale of the encumbered property. *McClintic-Marshall Co v Ford Motor Co,* 254 Mich 305, 323 (1931). However, such sale only occurs when allowed by statute or approved by court order. *Aldine Manufacturing Co v Phillips,* 118 Mich 162, 164 (1898). Accordingly, under the common law, Greg would only have been able

to *detain* Biff's property until the debt is paid. He is therefore without authority to sell Biff's property under the common law, absent a court order, and would be liable to Biff for conversion in the absence of statutory authority to sell the property.

The Self-Service Storage Facility Act, MCL 570.521 et *seq,* gives Greg the authority to sell Biff's property in certain circumstances. The Act gives a statutory lien to the owner of a self-storage facility on all personal property held at such facilities. MCL 570.525 provides a mechanism for enforcing the lien by sale and is the exclusive means of enforcing the statutory lien. MCL 570.525(1). However, the statute requires Greg to demand payment through "a written notice delivered in person or by certified mail," MCL 570.525(2)(b), to give Biff "no less than 14 days" to pay his debt to Greg, MCL 570.525(2)(c), and requires publication of an advertisement of the sale of Biff's property "once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the self-storage facility . . . is located." MCL 570.525(5).

The Self-Service Storage Facility Act also provides Biff with a remedy for Greg's violation of the enforcement provisions of the Self-Service Storage Facility Act. MCL 570.526(1) allows Biff to "bring an action in a court of appropriate jurisdiction for the actual amount of the damages or $250.00, whichever is greater, together with reasonable attorney fees." He will be able to recover the full $10,000 value of his comic book collection (minus the $75.00 in rent owed Greg), plus reasonable attorney fees, if he can show that he would have paid the requested debt but for Greg's illegal sale in violation of the Self-Service Storage Facility Act's notice requirements. Given that he knew about the debt and sale immediately upon his return to Michigan on December 10, 4 days before the earliest payment deadline to which Biff is statutorily entitled, MCL 570.525(2) (b), he is likely to show such compliance. Moreover, even if Biff cannot show that he would have paid the requested debt prior to a lawful sale under the Self-Service Storage Facility Act, he is statutorily entitled to any remaining proceeds of the sale after satisfying Greg's lien and any other "outstanding balances owed perfecting lienholders." MCL 570.525(13) and (14).

ANSWER TO QUESTION NO. 13

Jack's best argument is to challenge the constitutionality of the ordinance as a violation of the free speech guarantee of the First Amendment to the United States Constitution. Applicable to state and local governments through the Fourteenth Amendment, the First Amendment provides that government shall make no law abridging the freedom of speech. Here, the City of South Pointe has implemented an ordinance that bars the placement of "For Sale" signs on residential property. Such signs are a form of commercial speech. *Linmark Assoc, Inc v Township of Willingboro,* 431 US 85 (1977).

Commercial speech is not entitled to the same scope of protection as political speech or expressive speech. *Rochester Hills v Schultz,* 459 Mich 486, 489 (1999). Nonetheless, commercial speech is constitutionally protected from unwarranted governmental regulation. *Id.* A determination whether commercial speech has been unconstitutionally regulated turns on consideration of four factors. A reviewing court must consider whether: (1) the speech concerns lawful activity and is not misleading; (2) the government's restriction is justified by a substantial governmental interest; (3) the regulation directly advances the asserted governmental interest; and (4) the regulation is more extensive than necessary to serve the governmental interest. *Id.* citing *Central Hudson Gas & Electric Corp v Public Service Comm of New York,* 447 US 557, 561 (1980).

Here, the speech subject to restriction concerns the sale of real property, a lawful activity. No reasonable argument may be advanced that "For Sale" signs are misleading. This factor weighs in favor of striking down the ordinance.

The government interests that caused the City Council to enact the ordinance were substantial. A local government has a substantial interest in the value of property within the community. This is particularly true in Michigan, where the ability of a local government to fund basic services is directly tied to the value of the property within the community. Const 1963, art 9, §3. Additionally, a local government has a substantial interest in encouraging people to maintain residence within the community. *Linmark Assoc, supra* at 96. Thus, the second factor weighs in favor of upholding the ordinance.

However, the ban on "For Sale" signs does not directly advance

these vital government interests. The mere fact that homes display "For Sale" signs, will not cause the value of other homes within a community to decrease. The precipitous fall in real estate values is the product of a bad economy and an excess in the supply of homes offered for sale, regardless of whether the offer to sell is advertised by the placement of a sign in front of the home. Thus, the third factor weighs in favor of striking down the ordinance.

Finally, to the extent it may be argued that the ordinance serves one or more of the above described governmental interests, the regulation of speech contained in the ordinance is far more extensive than necessary. The regulation bans the dissemination of truthful information that promotes and facilitates the exchange of residential property. The exchange of residential property relates to one of the most important decisions a person can make: where to live and raise a family. *Id.* Additionally, the ordinance is premised on the notion that residents of South Pointe who are provided this information will act contrary to their best interests and the best interests of the City by selling their property and moving out of South Pointe. However, the protection afforded speech by the First Amendment to the United States Constitution is based on the notion that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them". *Id.* at 97, quoting *Virginia Pharmacy Bd v Virginia Citizens Consumer Council,* 425 US 748, 770 (1976).

Considering the four factors described above, it is likely that a reviewing court would strike down the ordinance because it is an unwarranted restriction on truthful and legitimate commercial speech, contrary to the First Amendment to the United States Constitution.

ANSWER TO QUESTION 14

The Criminal Liability of Betty: The crime of arson is statutorily defined in Michigan. MCL 750.71 through 750.80. In regard to the facts presented here, the Michigan Legislature has imposed criminal liability on persons who willfully or maliciously burn a dwelling house, MCL 750.72 (a 20-year felony), or insured property, MCL 750.75 (a 10-year felony). In order to be guilty of arson of a dwelling, there must be proof beyond a reasonable doubt that a home or a building within the curtilage of the home was intentionally set on fire. MCL 750.72. The home need not be occupied. *Id.* In order to be convicted of arson of an insured property, there must be proof beyond a reasonable doubt that an insured property was intentionally set on fire for the purpose of making a claim of insurance with the insurer. MCL 750.75. Here, Betty can be charged with violating both of the above-referenced statutory provisions. The facts establish that she intentionally set fire to her home, an insured property, so that she could make an insurance claim.

Convictions for arson of a dwelling house and for arson of an insured property do not violate state and federal constitutional guarantees against double jeopardy. *People v Ayers,* 213 Mich App 708 (1995). These two arson statutes protect against different harms, and impose different and escalating penalties. One protects those endangered by dwelling fires and requires proof of the burning within the curtilage of a home and the other protects insurers and requires proof that the perpetrator of the act intended to defraud the insurer. *Id.*

The Criminal Liability of Hanna: Hanna did not burn anything. Nonetheless, Hanna may be guilty of arson of a dwelling, MCL 750.72, and arson of an insured property, MCL 750.75, as an alder and abettor of Betty. MCL 767.39. Aiding and abetting is not a separate offense. Rather, it is a statutorily defined theory of prosecution that imposes vicarious criminal liability. *Id. People v Robinson,* 475 Mich 1, 6 (2006). One who procures, counsels, aids or abets in the commission of an offense may be convicted and punished as if she directly committed the offense. *Id.* To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime

or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Moore,* 470 Mich 56, 67-68 cert den sub nom *Harris v Mich,* 543 US 947 (2004).

Here, the facts indicate that Betty committed the crimes of arson of a dwelling and arson of insured property. Hanna, notwithstanding her protestations, assisted the commission of these crimes by allowing Betty to use Hanna's gasoline to commit the arson. At the time Hanna aided Betty, Hanna knew that Betty intended to commit these crimes. Accordingly, Hanna may be convicted of MCL 750.71 and MCL 750.75 as an aider and abettor.

The Criminal Liability of Bob: Bob did not burn his home and he did not aid in the commission of the arson committed by Betty. The facts tell us Bob was shocked to see Betty distribute the last few ounces of gasoline and ignite the fire. Bob grabbed Betty by the arm and escorted her out of harms way. While Bob came upon Betty in the course of the commission of her crime and he did nothing to stop her from completing the crime, Bob cannot be guilty of arson as an aider and abettor. A defendant's mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make him an aider and abettor. *People v Norris,* 236 Mich App 411, 419-420 (1999). Some advice, aid or encouragement is required. Here, nothing provided in these facts supports the conclusion that Bob aided Betty in the commission of the arson. Accordingly, Bob is not guilty of any criminal conduct.

ANSWER TO QUESTION 15

Bob has sought the assistance of trial counsel after his jury conviction but before imposition of his sentence. Bob's newly retained counsel should immediately file a motion for new trial pursuant to MCR 6.431 and MCL 770.1. A motion for new trial in a criminal proceeding may be made at any time before the filing of a claim of appeal. MCR 6.431(A). Here, because the time for filing a claim of appeal has not passed, a motion for new trial would be timely.

The trial court may grant a motion for new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). MCL 770.1 similarly provides that a judge "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done."

Bob has a significant appellate issue relating to his self-representation.

The right to self-representation is implied in the Sixth Amendment to the United States Constitution and expressly guaranteed by Michigan statute, MCL 763.1, and the Michigan Constitution, Const 1963, art 1, §13. However, the right to self-representation must be measured against the right to counsel. Thus, before allowing a defendant to represent himself the trial court must comply with the waiver of counsel procedures set forth by the Michigan Supreme Court in *People v Anderson,* 398 Mich 361, 367-368 (1976). Specifically, a trial court must: (1) make sure the waiver request is unequivocal; (2) make sure the waiver is knowingly, intelligently, and voluntarily made; and (3) be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business.

Further, the trial court must comply with MCR 6.005(D), which requires the trial court to inform a would be pro per criminal defendant of the charges, the potential maximum prison sentence and any mandatory minimum sentence required by law; to advise him of the risks inherent in self-representation; and to afford him the opportunity to consult with counsel before deciding to proceed without counsel. Strict compliance with the requirements of the court rule and case law is not required. *People v Russell,* 471 Mich 182, 191 (2004). However, in order to substantially comply

with the requirements of the court rule and case law, "the court [must] disclose the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 191. Courts must indulge every reasonable presumption against the waiver of the right to counsel. *Id.* at 193.

Here, the colloquy between the defendant and the trial court fell far short of the minimum requirements of Michigan law. While the prosecutor will point out the trial court asked defendant one question to see if the request was voluntary, "Is anyone making you say this", the judge did not follow up or ask any questions to determine if the request was knowingly or intelligently made. The trial court failed to test whether defendant's declaration of his right to represent himself was without equivocation. The trial court should have inquired of the defendant the reasons supporting his conclusion that he would be more effective in presenting his defense than would "any lawyer." The court failed to inform the defendant of the dangers of self-representation. The trial court should have informed defendant that the trial is governed by rules of procedure and evidence and that it is exceedingly difficult for a person untrained in the law to comply with these procedural requirements. In failing to discuss these procedural aspects of the trial, the court also lacked any basis to support a conclusion that defendant would "not disrupt, unduly inconvenience, and burden the court or the administration of court business." *Anderson* at 368. The court also failed to inquire whether defendant had a grasp of the substantive aspects of the charges asserted against him or the potential defenses that may be available to him. While the prosecutor will point out that the court reminded defendant he was charged with a felony, the court made no mention of whether defendant understood the ramifications of a felony conviction. There was no discussion of the specific charge asserted against defendant, nor the maximum or potential penalty defendant could face upon a conviction. Defendant was not afforded an opportunity to discuss his decision with his lawyer before the trial court accepted his waiver of the right to counsel and his assertion of his right to self-representation. While defendant stated that he knew his rights, defendant is not a lawyer. Thus, absent inquiry by the court, it would be impossible to determine whether defendant actually was aware of his many rights and intelligently waived those rights when defendant stated, "I am aware of my rights." Simply put, the exchange between defendant and the trial court does not establish that defendant made a knowing and intelligent waiver of his right to counsel and his assertion of his right to self-representation.

Because there exist strong appellate grounds to support reversal of Bob's conviction, the motion for new trial should be granted. Upon the granting of the motion for new trial, Bob's new counsel should move for reinstatement of his release bond. The court should grant such a motion, as a criminal defendant not charged with murder or treason is generally entitled to have a reasonable release bond established pending trial. Const 1963, art 1, §§15, 16; MCL §§765.5, 765.6.