FEBRUARY 2014 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

Under Michigan law, the scenario presented supports charges against Clark of armed robbery, first-degree home invasion, and carjacking.

The elements of robbery are:

(1) the use of force or violence against, or an assault on or otherwise putting in fear, any person who is present
(2) in the course of committing a larceny;
(3) of any money or other property that may be the subject of larceny. See MCL 750.530; CJI 2d 18.1.

To elevate the offense to armed robbery, an additional element requires that the robber:

(1) was armed with a dangerous weapon or an article used or fashioned in a manner to lead a reasonable person to believe it was a dangerous weapon; or
(2) represented orally or otherwise that he or she was in possession of a weapon. See MCL 750.529; CJI 2d 18.1.

The elements of home invasion, first degree are:

(1) The defendant broke and entered a dwelling, or entered the dwelling without permission.
(2) a. When the defendant broke and entered the dwelling, or entered it without permission, he or she

intended to commit a felony, larceny, or assault in the dwelling; or

b. When the defendant entered, was present in, or was leaving the dwelling, he or she committed a felony, larceny, or assault;

(3) When the defendant entered into, was present in, or was leaving the dwelling, either the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. See MCL 750.110a(2).

The elements of carjacking are:

(1) The defendant used force or violence, threatened the use of force or violence, assaulted or put another person in fear.

(2) The defendant did so while in the course of committing a larceny of a motor vehicle. A "larceny" is the taking and movement of someone else's motor vehicle with the intent to take it away from that person permanently. "In the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

(3) Another person was the operator, passenger, or otherwise in lawful possession of the motor vehicle. See MCL 750.529a.

Applying the elements listed above to the facts presented yields the following conclusions:

Armed Robbery: Clark accomplished the taking of Garrison's money by using force or instilling fear in Garrison as the facts indicate that Garrison was frightened by Clark's demand and concomitant action (an assault). This suffices to prove robbery. To aggravate robbery to armed robbery, there must be proof that Clark was armed or, more saliently, that he represented orally or otherwise that he was in possession of a dangerous weapon. Here, Clark said if he did not receive Garrison's money, Garrison would "get a bullet." This is an oral representation that Clark was in possession of a weapon (a gun). Relatedly, Clark moved his hand about inside the pocket of his sweatshirt, another non-oral representation he was armed with a gun. His oral representation concomitantly made at the time of his physical action establishes a manner of armed

robbery, even though no gun was seen by Garrison or recovered by police. *People v Jolly*, 442 Mich 458 (1993).

Home Invasion, First Degree: The broken glass demonstrates that Clark broke into Garrison's home and entered, establishing the requisite breaking and entry. While inside Garrison's home, Clark committed a robbery. Although Clark was not armed with a dangerous weapon, nor even became in possession of one, Garrison was lawfully present in his own home. All the elements of first-degree home invasion are established.

Carjacking: Garrison's daughter was in lawful possession of Garrison's vehicle, having been entrusted with it to get the oil changed. Moreover, she was the operator of the vehicle. Clark pulled her out of the vehicle and threw her aside, qualifying as the necessary force. Clark had expressed an interest in Garrison's car after he had stolen Garrison's wallet. Jumping into the car and driving it away establishes the requisite larceny. All the elements of carjacking are established.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

The court should sustain defense counsel's objection. While character evidence to prove action in conformity with good or bad character is not always inadmissible, the circumstances for admission are limited. Under MRE 404(a)(1), the character of the accused may be admitted. However, the rule demands that the prosecution limit its use of character evidence "to rebut" the defense's usage of character evidence.

The facts at hand reveal that Defendant had not yet broached the subject of his character at the point in the trial when the prosecutor sought to elicit opinion testimony as to Defendant's character. Defendant's counsel had made no opening statement but reserved making that opening statement until later. Moreover, the "character" witness was the People's first witness and proceedings were still on direct examination. As cross examination had not yet commenced, defense counsel could not yet have broached the topic of Defendant's "good character." Therefore, because the rule casts the prosecution in a rebuttive position, and because the facts indicate there was nothing yet to rebut, Defendant's objection should be sustained.

Determining the admissibility of Defendant's prior convictions is governed by MRE 609. This rule allows the use of certain prior convictions, but not all prior convictions. Under MRE 609(a)(1), a prior conviction containing an element of dishonesty or false statement is admissible without regard to the length of punishment. Under MRE 609(a)(2)(A), a prior conviction containing an element of theft is admissible, if the conviction crime was punishable by more than one year's imprisonment. Under MRE 609(c), evidence of a prior conviction is not admissible "if a period of more than ten years has elapsed" since the conviction date or release from confinement, whatever is later.

Applying MRE 609 to the facts at hand yields the conclusion that the conviction for Defendant's false statement to the police involves an element of false statement and is not time-barred by MRE 609(c) because Defendant completed his jail sentence in 2007. Defendant's sexual misconduct conviction, while within the ten-year limit, involves neither an element of false statement nor dishonesty, nor a theft element. Therefore it is not a conviction for usage under 609(a)(1) or (2).

Finally, Defendant's felony larceny conviction, while otherwise qualifying for use under 609(a)(2)(A), is nevertheless condemned to inadmissibility because of its 2000 conviction date; it is simply too old.

Therefore, only one of Defendant's prior convictions is usable under MRE 609 for impeachment purposes.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

The issue presented is whether Kelly invoked his right to remain silent by being silent, or whether he was required to do more to invoke his right to remain silent in the face of police interrogation. Kelly is correct that, if indeed he properly invoked his right to silence, the detective was obligated to cease questioning at once. *Michigan v Mosely*, 423 US 96, 103; 96 S Ct 321, 46 L Ed 2d 313 (1975). Before a state actor can interrogate an in-custody suspect, the suspect must be advised of his *Miranda* rights, which collectively allow the suspect to remain silent until counsel is present. For these rights to have meaning, once invoked, questioning must cease, and the suspect controls the interrogation by invocation.

However, precisely at issue in the given factual scenario is whether Kelly invoked his right to remain silent. He claims his right to silence was invoked by remaining silent, not by speaking any particular words.

Kelly's contention must be rejected and his suppression motion denied.

The present scenario has recently been addressed by the United States Supreme Court in *Berghuis v Thompkins*, 560 US 370, 381; 130 S Ct 2250, 176 L Ed 2d 1098 (2010). In *Thompkins*, the defendant contended that his remaining silent for two hours and 45 minutes manifested his invocation of his right to silence. In rejecting that claim, the United States Supreme Court held that Thompkins had not invoked his Fifth Amendment right to remain silent by staying silent for two hours and 45 minutes. *Id.* at 382.

In reaching this conclusion, the Court cast the analysis in the same vein as that used to evaluate invocation of the right to counsel. To invoke the right to counsel, a suspect must do so "unambiguously." An ambiguous or equivocal statement regarding counsel, or no statement at all, does not require police to cease interrogation. In this regard, the Court found a parallel between the right to silence and to counsel as embodied in *Miranda* warnings. Placing those rights on par, as they both protect the privilege against self-incrimination, requires that their invocation be treated similarly. Accordingly, to invoke the right to remain silent in a custodial

setting requires the suspect to unambiguously invoke that right. *Id.* at 381-382.

Applying *Thompkins* to the instant case yields the conclusion that Kelly did not, by his silence, unambiguously invoke his right to remain silent. More than his silence was required to exercise his right to cut off questioning. He simply never stated that he wished to remain silent or not talk to the detective.

Although not the thrust of the call of the question, answers that mention sufficiency of the waiver of *Miranda* rights and/or the voluntariness of the statement, due to the reference to God by the interrogator, will receive some credit. However, credit will only be given where these concepts are mentioned as a way-station to rejecting any claim that *Miranda* rights were not waived or that the statement was not voluntary, consistent with *Berghuis*.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

The issues raised by Ethan that Applicants are asked to evaluate are: adequacy of consideration; expiration of the offer; lack of a writing; lack of a contract term; and mitigation of damages.[1]

Adequacy of Consideration

Ethan contends that there was "no deal" because Ted "gave nothing" but a promise to give a speech "for an outrageous fee." Ethan is thus arguing that no contract was formed because there was not adequate consideration.

"An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740 (2000). "There must be a benefit on one side, or a detriment suffered, or service done on the other. Courts do not generally inquire into the sufficiency of consideration." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-39 (2002) (internal quotation marks and citations omitted). "[R]escission of the contract for inadequacy of consideration will not be ordered unless the inadequacy was so gross as to shock the conscience of the court." *Moffit v Sederlund*, 145 Mich App 1, 11 (1985). "It has been said '[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.'" *Gen Motors Corp*, 466 Mich at 239.

Here, Ted received the benefit of a promised $2,000 payment and incurred the detriment of promising to provide a wine

[1]This question is governed by common-law contract principles rather than the UCC. The contract involves services rather than goods. This question repeatedly references "services": Ethan and Ted chatted "about Ted's services"; Ethan "could not afford Ted's services"; and Ted explained to Wines R Us "that he provided his services only to discriminating wine drinkers." Under Michigan law, "if the purchaser's ultimate goal, is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service." *Neibarger v Universal Cooperatis, Inc*, 439 Mich 512, 536 (Mich 1992). Here, the "purchaser" of the tasting services was Ethan (not the people attending the tasting).

tasting; Ethan received the benefit of the promised wine tasting and incurred the detriment of promising to pay $2,000. Thus, the agreement was supported by legal consideration. A court would not consider Ethan's argument that $2,000 was an "outrageous fee," as any inadequacy in the price was not so gross as to shock the court's conscience. Ethan's contention is meritless.

Expiration of offer

Ethan contends that no contract was formed because Ted's offer, as set forth in the brochure, had expired. "An offer comes to an end at the expiration of the time given for its acceptance. . . . An offeree cannot accept, either through words or deeds, an offer that has lapsed. . . . [A]n offeror cannot waive the lapse of his offer simply by choosing to disregard it." *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 626 (2004) (internal quotation marks omitted) (brackets in original). Consequently, Ethan is correct that Ted's offer, as set forth in the brochure, had expired.

However, Ethan's statement that he would pay Ted "$2,000 for a tasting on Saturday" was itself an offer, which Ted accepted ("Great!"). See *Id.* Consequently, Ethan's contention that no contract was formed because Ted's offer had expired, is incomplete and thus incorrect.

Lack of writing

Ethan contends that no contract was formed because the agreement was never reduced to writing. However, "[w]hen the minds of the parties have met, when an offer has been made by one and accepted by the other, a contract is thereby entered into. Unless required by some positive law, it need not be reduced to writing in order to be binding upon the parties." *Pangburn v Sifford*, 216 Mich 153, 154 (1921); see also *Strom-Johnson Construction Co v Riverview Furniture Co*, 227 Mich 55, 67 (1924) ("Where the subject-matter does not require the contract to be written, oral agreements are as effective as written ones.").

Here, the agreement between Ted and Ethan was not required by the Statute of Frauds (MCL 566.132) or any other "positive law" to be in writing. (The agreement falls outside the scope of the Statute of Frauds because it was to be performed within one year from its making, and does not fit into any of the

statute's other categories of agreements required to be in writing.) The fact that Ted and Ethan agreed that they should put their understanding in writing, but never did so, does not make their oral agreement unenforceable. "[W]here agreement has been expressed on all the essential terms of the contract, the mere fact that the parties manifest an intention to prepare a written memorial of their agreement does not render the oral contract unenforceable merely because the writing is never prepared." *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 109 (1983). Ethan's contention is thus meritless.

Lack of contract term

Ethan contends that no contract was formed because he and Ted failed to specify the type of wine to be used at the tasting. "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 246 (2008) (internal quotation marks omitted). However, "when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness. . . . [T]he absence of certain terms . . . does not necessarily render a contract invalid. . . . [A] contract may be enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement . . . ." *Calhoun County v Blue Cross Blue Shield Mich*, 297 Mich App 1, 14-15 (2012); see also *Nichols v Seaks*, 296 Mich 154, 159 (1941) ("So long as the essentials are defined by the parties themselves, the law supplies the missing details by construction.").

Here, Ethan and Ted agreed on the service to be provided ("a two-hour guided wine tasting with commentary," "wine included"), the price ($2,000) and the day on which the service was to be provided (Saturday). The best conclusion is that these were the essential terms of the contract and that the type of wine to be used was merely an incidental or minor term. The fact that Ted's brochure did not specify the type of wine to be provided, and that Ethan and Ted did not discuss this during Ethan's visit, indicates that the type of wine was not an essential term of their agreement; a strong argument can be made that the parties clearly intended to be bound by the terms they agreed on, and that they could easily specify at a later point what type of wine would be used. (It is also possible that Ted could unilaterally make the decision, rendering the issue immaterial to contract formation.) Thus, Ethan's contention lacks merit.

Mitigation of damages

Ethan contends that Ted could have avoided any loss by accepting the offer from Wines R Us. "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages." *Morris v Clawson Tank Co*, 459 Mich 256, 263 (1998) (internal quotation marks omitted). *See also Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 477 (1986) ("There is no dispute that plaintiffs in tort and breach of contract actions have the duty to take reasonable steps to minimize any damages suffered as a result of a defendant's wrongful breach.").

The issue here is whether Ted was reasonably required to accept the offer from Wines R Us. One could argue that Ted provided his services only "to select groups of aficionados," such as Ethan's "best customers," and that being forced to provide his services to random customers of a mass-market retailer, would unreasonably damage his business/professional reputation. Alternatively, one could argue that requiring Ted to provide the same services that he usually provides, at the same price to a different group of wine drinkers, is entirely reasonable. Examinees will earn credit for making cogent arguments either way.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

Sam: Sam's conduct violates MRPC 3.4 (a) and (c), 4.1, 4.2, 4.4, 6.5(a), and 8.4.

MRPC 3.4(a) provides that "a lawyer shall not unlawfully obstruct another party's access to evidence." Sam violated this prohibition by taking Walter's deposition without giving Phil notice of the deposition.

MRPC 3.4(c) provides that, "A lawyer shall not . . . knowingly disobey an obligation under the rules of the tribunal except for an open refusal based on an assertion that no valid obligation exists[.]" Under the Michigan Court Rules, "A party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action." MCR 2.306(B)(1). Phil had appeared in the lawsuit on behalf of DEF. Therefore, Sam disobeyed an obligation under the Court Rules to provide Phil with written notice of the deposition.

MRPC 4.1 provides that, "In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person." Sam, in representing his client, made at least two false statements of fact to Walter: (1) that Sam was a buyer interested in DEF's products rather than an attorney who had filed suit against DEF; and (2) that DEF's counsel had been notified of the deposition, when Phil had not been notified.

MRPC 4.2 provides that, "in representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." In this case, Sam communicated with the manager of a corporate party whom Sam knew to be represented by Phil (see Comment to MRPC 4.2), without obtaining Phil's consent, on at least three occasions: (1) on the phone where Sam questioned Walter about the product at issue in the lawsuit; (2) by serving on Walter an ex parte subpoena and deposition notice in the lawsuit; and (3) by proceeding with an ex parte deposition in the lawsuit.

MRPC 4.4 provides that, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person." Here, Sam obtained a deposition of Walter under false pretenses, engaged in abusive behavior during the deposition, and engaged in assault and battery to attempt to prevent Walter from leaving the deposition.

MRPC 6.5(a) provides that "A lawyer shall treat with courtesy and respect all persons involved in the legal process." While this rule did not prohibit Sam from speaking bluntly in pursuing his client's interest with diligence (see Comment to MRPC 6.5), the rule did not permit Sam to use impermissible rudeness in pursuing Walter's testimony, such as repeatedly accusing Walter of perjury without any basis and engaging in assault and battery.

MRPC 8.4 provides "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct . . . (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; (c) engage in conduct that is prejudicial to the administration of justice. . . ."

Sam violated several Rules of Professional Conduct, in violation of MRPC 8.4(a). He also engaged in dishonesty and fraud by using an alias and misrepresenting his profession and reason for telephoning Walter for information, and by misrepresenting that he had given notice of the deposition to Phil when he had not, in violation of MRPC 8.4(b). And Sam violated MRPC 8.4(c), by yelling, screaming, and accusing Walter of perjury, as well as physically attacking Walter. This is especially true in light of evidence that Sam engaged in similar conduct in several other cases.

Phil: If Phil had any ethical responsibility, it would arise under MRPC 8.3. MRPC 8.3(a) provides that "a lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission." The Comment to MRPC 8.3 provides that whether a violation is significant is a judgment

call because a rule that requires reporting of all violations has proved unenforceable. Thus, the Comment instructs that "this rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to report." Here, Sam arguably violated six rules, not just one, and his misconduct was a repetition of misconduct in prior cases, which weighs in favor of finding that his misconduct is a significant violation.

There is also the issue of whether Sam's violation of the Rules "raises a substantial question as to [his] honesty, trustworthiness, or fitness as a lawyer," which, per the Comment to MRPC 8.3, "refers to the seriousness of the offense and not the quantum of evidence of which the lawyer is aware." The fact that Sam lied about who he was to an opposing witness, lied about why he was contacting the witness, procured an ex parte deposition without notice to his opponent, lied to the witness about having provided notice, berated and accused the witness of perjury without basis, and then physically attacked the witness when the witness attempted to leave, all raise a serious question about Sam's trustworthiness or fitness to practice which should be reported. Add to that, Phil's discovery of Sam's earlier similar misconduct in other cases, and it appears a report to the Attorney Grievance Commission would be the more prudent exercise of judgment.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

I. First Amendment Claims

A. Free Exercise of Religion

The strongest argument Ron could make is that denying him scholarship funds to pursue a degree in pastoral ministries violates his First Amendment right to free exercise of religion. However, he is unlikely to prevail on that claim.

The Religion Clauses of the First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, provide that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The former clause is known as the Establishment Clause; the latter clause is known as the Free Exercise Clause.

Generally speaking, the link between government funds and religious training is broken by the independent and private choice of fund recipients and does not violate the Establishment Clause. See *Zelman v Simmons-Harris*, 536 US 639, 652 (2002). Therefore, Michigan could *permit* students to use state scholarship funds to pursue a career in religious instruction without violating the federal constitution. The facts presented ask the converse question – whether Michigan, in accordance with the Michigan constitution, may *deny* state funds to a student pursuing a religious career without violating the Free Exercise Clause of the federal constitution.

Under identical facts, the United States Supreme Court in *Locke v Davey*, 540 US 712 (2004), held that a state *could* permissibly deny state funds to a student seeking a degree in vocational theology without violating the Free Exercise Clause. The general rule is that the Free Exercise Clause is not violated where a law that is facially neutral regarding religion and of general applicability has an incidental burden on religious practice. *Dep't of Human Resources of Oregon v Smith*, 494 US 872 (1990); *Church of the Lukumi Babalu Aye v City of*

Hialeah, 508 US 520 (1993). However, where a law is not neutral or not of general application, it must satisfy the strict scrutiny standard: it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id*.

The United States Supreme Court held that the application of strict scrutiny is not required under these facts because "[t]he State has merely chosen not to fund a distinct category of instruction." *Davey*, 540 US at 721. Denying scholarship funds to those seeking a career in religious instruction does not impose criminal or civil sanctions on a religious service or rite; does not deny clergy the right to participate in the political affairs of the community; and does not require students to choose between their religious beliefs and receiving a government benefit. The state's interest in declining to fund the training of religious professionals was not based on hostility for religion, but rather to avoid establishment of religion, a substantial and historical state interest. Moreover, the restriction placed a "minor burden" on scholarship recipients. The program permits students to attend religious schools, so long as they are accredited, and take religious courses, so long as the student was not pursuing a vocational theology degree such as pastoral ministries.

B. Right to Free Speech

Ron might make the argument that the scholarship program violates his First Amendment right to free speech, but that is a much weaker argument and would likely fail. Any claim that the scholarship program is an unconstitutional viewpoint restriction on speech should be rejected because the scholarship program is not a forum for speech. The purpose of the scholarship program is to assist qualifying students with college expenses, not to "encourage a diversity of views from private speakers." *Davey*, 540 US at 721 n 3. Therefore, Ron's right to free speech is not implicated.

II. Equal Protection

Ron might also make the claim that the scholarship program violates the Equal Protection Clause of the Fourteenth Amendment, but that claim would also likely fail. If a suspect classification or fundamental right is implicated, the strict

scrutiny standard is applied. Here, however, because there is no violation of a fundamental right (no violation of the Free Exercise Clause), rational basis scrutiny would be applied to Ron's Equal Protection claim. Davey, 540 US at 721 n 3. Michigan's classification denying scholarship funds to those pursuing religious vocation degrees would be *presumptively valid*. In order to succeed, Ron would bear the burden of proving that the state's classification is not rationally related to *any* legitimate governmental interest. This is a very difficult burden to meet, and Ron is unlikely to prevail.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

The court should reject Alice's arguments and enforce the prenuptial agreement. While a court may refuse to enforce a prenuptial agreement, its discretion to do so is limited. Regarding whether to enforce a prenuptial agreement, the court should consider 1) whether the agreement was obtained through fraud, duress, mistake, or misrepresentation or non-disclosure of a material fact; 2) whether the agreement was unconscionable when executed; and 3) whether the facts and circumstances have changed since the agreement was executed, so as to make its enforcement unfair and unreasonable. See *Booth v Booth*, 194 Mich App 284 (1992). The party challenging the enforceability of a prenuptial agreement bears the burden of proof and persuasion. *Reed v Reed*, 265 Mich App 131 (2005).

Alice's arguments cannot be squared with these limitations. First, while it may once have been a credible argument that prenuptial agreements made in contemplation of divorce were unenforceable, Michigan law has held otherwise for over twenty years. See *Rinvelt v Rinvelt*, 190 Mich App 372 (1991); *Booth*, *supra*, at 288-289; *Reed*, *supra*, at 142. Such an argument has no validity to an early 2000's prenuptial agreement and marriage.

Second, that Alice did not have counsel prior to entering into the prenuptial agreement does not, per se, preclude its enforcement. Such a contention must be viewed through the prism of fairness delineated in the three factors above. *Reed*, at 149. The naked contention that the prenuptial agreement is not enforceable because Alice had no counsel, lacks merit. Id.

Third, Alice's unconscionability argument also fails because the agreement was not unconscionable when executed. The parties' premarital assets were roughly equivalent. Each was simply to retain what they had before the marriage, plus its appreciation. Moreover, both were young professionals starting their careers and neither had school debt. Significantly, the stocks in question were also nearly equivalent. Carl told Alice his stock could have significant upside potential. That similarly situated professional young adults would simply keep the property they owned before marriage, in the event of a divorce, hardly qualifies as an unconscionable agreement. This

point is underscored by the prenuptial agreement's indication that marital assets were outside the ambit of the prenuptial agreement. Alice has failed to prove unconscionability.

Finally, Alice's argument that the prenuptial agreement is void and unenforceable because Carl's separate asset appreciated significantly more than Alice's and, consequently, that his retention of that asset and its appreciation would be unfair, must be rejected. Again, while the concept of fairness is central to the enforceability of a prenuptial agreement, the facts and circumstances of these parties since the agreement are not so changed that its enforcement is unfair or unreasonable. Alice and Carl started out on similar footing. They enjoyed a marriage that brought them relative prosperity from successful careers. They are now as they began, on similar footing and situated to continue their respective lifestyles. Enforcement of an agreement that simply dealt with Alice's and Carl's separate property is neither unfair nor unreasonable. The appreciation of Carl's property beyond that of Alice's simply does not amount to the changed circumstances sufficient to satisfy Alice's burden of proof. *Reed* at 146-147. The outcome would likely be the same even if Alice had met her burden to void the prenuptial agreement. Carl's premarital assets increased without his active involvement during the marriage. Thus, these assets were separate, non-divisible property. *Reeves v Reeves,* 226 Mich App 490 (1997).

The court should enforce the prenuptial agreement.

EXAMINERS' ANALYSIS OF QUESTION 8

With respect to the first question, the fact that Zack was negligent and LNC took all reasonable precautions, is not a valid defense to Zack's claim for worker's compensation benefits. MCL 418.141 provides "it shall not be a defense . . . [t]hat the employee was negligent, unless it shall appear that such negligence was wilful." Here, the facts state that Zack's failure to engage the safety switch was negligent, not intentional or wilful. Therefore, there is no merit to LNC's rejection of Zack's claim on this basis. A worker's compensation judge would categorically reject the defense. Indeed, a *raison d'etre* for the workers' compensation statute is to prevent employers from successfully asserting such defenses against employees. Similarly, there is no comparative negligence analysis applicable either. *Hoste v Shanty Creek Mgt Inc,* 459 Mich 561, 570 (1999); see also, Welch and Royal, *Worker's Compensation in Michigan: Law and Practice,* § 1.2, p 2 (2012). And, gross negligence by the employee does not defeat a worker's compensation claim. See *Day v Gold Star Dairy*, 307 Mich 383, 392 (1943).

In answering this question, an examinee might mention that a provision of Michigan's worker's compensation statute provides: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." MCL 418.305. However, because the question specifically indicates that Zack's failure to engage the safety switch was unintentional and merely negligent, this provision has no applicability here.

With respect to the second question, in order to receive wage loss benefits, Zack bears the burden of proving he is "unable to perform all jobs paying the maximum wage in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills." MCL 418.301(4)(a). To meet his burden of proof, Zack must "[p]rovide evidence as to the jobs, if any, he . . . is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of injury." MCL 418.301(5)(b). If Zack "is capable of performing any" such work, then he must "show that he . . .

cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment . . .” MCL 418.301(5)(d).

The Michigan Supreme Court case that served as the basis for the statute quoted above, is *Stokes v Chrysler LLC*, 481 Mich 266 (2008). *Stokes* explained that a worker’s compensation “claimant” was required . . . to show that he had considered other types of employment within his qualifications and training,” *Id* at 286, and these include appropriately paying jobs “even if he has never been employed at those particular jobs in the past.” *Id* at 282. This is how worker’s compensation appellate tribunals apply the standard. See, *e.g., Lewis* v *Darling International, Inc*, 2010, ACO #17.

Therefore, LNC’s assertion that, while it has no non-manual jobs to offer to Zack, Zack can earn a comparable wage at non-manual work can be a valid reason for rejecting Zack’s claim. It is Zack who bears the burden of proving that equal paying, non-manual work is either beyond his qualifications or training, or is unavailable.

Zack’s assertion that he cannot be required to seek work at jobs he has never previously performed is erroneous. It would be fatal to his claim for weekly wage loss benefits.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. (a) Is there a contract between Ryan Motor Company and Stanley Wiper Supply?

The first issue is whether there is a contract between Ryan Motor Company ("Ryan") and Stanley Wiper Supply ("Stanley"). It must be determined whether the UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of the contract. MCL 440.2105. Here the contract pertains to the sale of windshield wipers. Windshield wipers are moveable and therefore considered goods. Thus, the UCC applies.

The next issue is to determine whether there is a contract between Ryan and Stanley.

The elements of a contract are offer, acceptance and consideration. An offer is a manifestation of intent to enter into a contract made in such a way that the offeree knows that assent is all that is necessary to cement the deal. Here, the offer by Ryan was definite in its terms. Ryan sent a writing to Stanley to purchase 40,000 wipers for $600,000. Ryan was committed to entering into the agreement as it sent a purchase order to Stanley containing the terms. The offer was sent to Stanley via U.S. Mail and received by Stanley; it was communicated. All Stanley had to do was assent to the terms in order to make the deal. Therefore, there is a valid offer.

According to MCL 440.2207(1), "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Here there was a written confirmation that was sent by Stanley to Ryan soon after it was received. Written includes printing, typewriting, or any other intentional reduction to tangible form. MCL 440.1201(2)(qq). Sending an item by mail means that it can be touched and therefore it is tangible. It was also written because we know that the money and quantity terms were agreed to and the warranty disclaimer clause was added. These terms were

read by Ryan and therefore, the information had to be printed or typewritten. Lastly, there was no delay in sending the confirmation because the facts state that Stanley sent the written confirmation upon receipt. Therefore, the confirmation was sent within a reasonable time.

The additional terms in the confirmation disclaiming the warranty of merchantability and fitness for a particular purpose would present a problem at common law because of the mirror image rule. These additional terms would be considered a counter-offer. However, the UCC is different in this case. MCL 440.2207(1) states that these additional terms will not negate Stanley's attempted acceptance of Ryan's offer as long as the acceptance was not made expressly conditional on Ryan's assent to the additional terms. Stanley did not condition the acceptance on Ryan's assent to the new terms. Therefore, there is an acceptance.

The third element of a contract is consideration. "Consideration is defined as a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58 (2005) (internal quotations and citations omitted). Here Ryan offered $600,000 to Stanley in exchange for 40,000 windshield wipers. The promise by Ryan to pay $600,000, induced Stanley to fulfill the order and transfer ownership of 40,000 windshield wipers. Therefore, there is consideration.

Since there is an offer, acceptance and consideration, there is a contract.

1. (b) What are the terms of the contract?

In this case each of the parties are merchants. A merchant is defined as "a person that deals in goods of the kind. . . ." MCL 440.2104(1). Transactions "between merchants" means "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." MCL 440.2104(3). Here, Ryan is a car manufacturer that deals in manufacturing and assembling cars. Ryan has the ability to manufacture the wipers, however it chose to hire a supplier due to the size of the order. Stanley is an auto parts supplier that manufacturers wiper blades for the automobile manufacturing industry. Both

deal in manufacturing of parts for automobiles and are charged with the knowledge or skill of entities dealing with the goods involved in this trade, specifically wiper blades.

MCL 440.2207(2)(a) states that "when both parties are merchants, the additional terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer." Here the offeror, Ryan Motor Company, included a clause indicating that it expressly limited acceptance to the terms of the offer. Because of this express limitation, Stanley's attempt to add the disclaimer would not be successful. Therefore, the addition of the warranty disclaimer clause would not be part of the contract. The terms would be 40,000 wipers for $600,000.

Examinees can also receive credit for utilizing MCL 440.2207(b) which states another ground for concluding that the warranty disclaimer is not part of the contract. Under MCL 440.2207(b), an additional term in an acceptance does not become part of the contract if it materially alters it. Adding a warranty such as that of merchantability or fitness for a particular purpose in this case would materially alter the contract. Examinees should get full credit if they discuss either MCL 440.2207(a) or MCL 440.2207(b).

2. What damages would Ryan have to pay if it breached its obligations under the contract?

Since there is a contract between the parties, Ryan Motor Company would be in breach of contract if it attempted to avoid its obligations. Part 7 of Article 2 contains the general contract damages policy of putting the non-breaching party where it would have been had the contract been performed. MCL 440.2703 *et seq*. In a situation where the buyer breaches and the seller has the goods, the damages are measured by either (1) the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages but less expenses saved in consequence of the buyer's breach (MCL 440.2708); **or** (2) the difference between the resale price and the contract price together with any incidental damages but less expenses saved in consequence of the buyer's breach. (MCL 440.2706).

Here, Ryan, the buyer, is in breach and Stanley, the seller, is in possession of the wipers. The contract price was $600,000. It is appropriate to utilize formula (1) in the above paragraph because the facts do not support that a resale has occurred. Currently the market value of a wiper is $10.00 and 40,000 were ordered. Thus, $400,000 would reflect the current market price for the order ($10.00 x 40,000 = $400,000). The damages are measured by *contract price minus market price at the time and place of delivery.* ($600,000 - $400,000 = $200,000.) Therefore, $200,000 is the amount of damages that Ryan would have to pay Stanley.

According to the statute, the amount of damages can be increased by any incidental damages that Stanley can prove. Incidental damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." MCL 440.2710. Further, the damage amount will be reduced by any expenses which were saved in consequence of the buyer's breach. There are no supporting facts regarding incidental damages or expenses that were saved, but points should be awarded to the examinee for noting this.

In conclusion, there is a contract. The terms are $600,000 for 40,000 wipers. Ryan would pay damages to Stanley in the amount of $200,000 plus incidentals minus expenses saved.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

If a valid gift occurred, then the watch would belong to Mike. If not, then the watch became part of David's estate when he died and thus would belong to Herbie.

The elements required for a valid gift are (1) that the donor possesses the intent to pass gratuitously title to the donee; (2) that delivery be made; and (3) that the donee accept the gift. *Osius v Dingell*, 375 Mich 605, 611 (1965). To constitute a valid gift *causa mortis*, the gift must also be "made by a person in the expectation of imminent death, on condition that the donor dies as anticipated, leaving the donee surviving him" *Brooks v Gillow*, 352 Mich 189, 197 (1958). It is the apprehension or expectation of imminent death, and not the actual imminence of death, which is evaluated. See *In re Van Wormer's Estate*, 255 Mich 399, 406 (1931); *Brooks*, 352 Mich at 197; *In re Reh's Estate*, 196 Mich 210, 218 (1917). Unlike a gift *inter vivos*, a gift *causa mortis* does not transfer title to the donee until the death of the donor because such gifts are revocable during the lifetime of the donor." *Id.*

From his words and actions at dinner, David clearly intended the watch as a gift to Mike. However, because the gift was made with impending death in mind, the gift must meet the requirements of a gift causa mortis. Although a more typical case of a gift causa mortis comes from a person suffering impending death from disease or injury, see *In re Reh's Estate*, 196 Mich 210, 218-219 (1917), the Michigan Supreme Court has held that a gift made in contemplation of suicide may be a valid gift causa mortis. *In re Van Wormer's Estate*, 255 Mich at 406.

The requirement of apprehension of imminent death was satisfied. David's depressed condition and his statements at dinner, including, "I'm quite sure I'm not going to make it out of this, Mike. I can't take this depression any longer," show that David expected he would die soon. Further, that Mike took the watch with the statement, "I cannot wait to hand it back to you once you make it out of this," suggests that he understood the gift to be revocable in the event that David did not succumb to his depressed condition.

Next, David physically gave the watch to Mike and put it on Mike's wrist, so delivery was properly made.

Finally, acceptance is presumed if the gift is beneficial to the donee. *Davidson v Bugbee*, 227 Mich App 264, 268 (1997), citing *Osius, supra* at 611. The gold watch is presumably beneficial to Mike. Moreover, Mike said, "thank you," took it home with him, and wore it daily — further indications of acceptance. On the other hand, Mike said, "I cannot wait to hand it back to you once you make it out of this." It can be argued that this statement should not rebut the presumption that Mike accepted the watch, and that as such, as the statement should be interpreted as an encouraging word to his friend, and not as a rejection of the gift. However, credit will be given for a cogent analysis which concludes that acceptance was not valid.

An applicant who fully analyzes the gift elements and characterizes the gift as an *inter vivos* gift, rather than as a gift *causa mortis*, will also receive full credit. As noted above, to constitute a valid gift, there must be donative intent, actual or constructive delivery, and acceptance. Here, donative intent is established by David's words to Mike, David physically delivered the gold watch to Mike, and acceptance is arguably present because of Mike's expressed gratitude and the fact that he wore the watch daily. However, as with an analysis of the gift as *cause mortis*, it can also be argued that Mike's acceptance was conditional and thus, that under an *inter vivos* analysis, the gift would fail.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

Grace receives Greencastle as well as $3.4 million dollars in insurance proceeds; Jeanne receives nothing; Sisters of Divinity receives $1.1 million dollars.

1. Grace -- In Michigan, the general rule is that if a beneficiary predeceases the testator, the gift lapses and becomes part of the residue of the estate. This is because a will cannot distribute property to a dead person. See MCL 700.2604(1). However, the anti-lapse statute serves as an exception to this rule. MCL 700.2603(1) provides that if a devisee fails to survive the testator, and is a grandparent, a grandparent's descendant, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, then the gift will pass to the descendants of the beneficiary, provided that the descendants are alive 120 hours (5 days) after the testator's death. MCL 700.2702. "The surviving descendants take by representation the property to which the devisee *would have taken* had the devisee survived the testator." MCL 700.2603(1)(a) (emphasis added).

Here, because Otis predeceased Dwayne, the gift of Greencastle would normally lapse and become part of the residue of Dwayne's estate. However, because Otis is a descendant of Dwayne's grandparents, the anti-lapse statute operates to save the gift that would have otherwise become part of the residue and would have been distributed to Sisters of Divinity. Because Otis left a surviving descendant, the statute creates a substitute gift in that descendant. Therefore, this gift will pass to Grace under the statute.

MCL 700.2606(1) provides that a devisee has a right to the specifically devised property in the testator's estate at the time of death. Thus Grace, via the anti-lapse statute, is entitled to Greencastle. In addition to the specifically devised property, the statute further provides that the devisee is ALSO entitled to any proceeds unpaid at death (including insurance proceeds) for injury to the property. See MCL 700.2606(1)(c). Therefore, Grace is entitled to the $3.4 million dollars in insurance proceeds as well.

2. Jeanne -- Greencastle does NOT pass to Jeanne pursuant to the terms of Otis's will. The anti-lapse statute provides that "a substitute gift is created in the [predeceased] devisee's surviving *descendants*" MCL 700.2603(1)(a). Jeanne is the beneficiary of Otis's estate, but is not Otis's descendant. Thus, Otis's estate acquired no interest in Dwayne's estate that could be distributed under Otis's will to Jeanne.

3. Sisters of Divinity -- As explained above, the charity is not entitled to either Greencastle or the $3.4 in insurance proceeds. Under the terms of the will, the charity is entitled to the residuary estate of $1.1 million dollars.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Regaining Possession

Danielle's original lease created a tenancy for years. At the expiration of her lease, Danielle became a holdover tenant. *Glocksine v Mallek*, 372 Mich 115, 119 (1963); *Auto Parts v Jack Smith Beverages*, 309 Mich 735, 744 (1944); *Benfey v Congdon*, 40 Mich 283 (1879). The Landlord's acceptance of Danielle's rental payments allows the creation of a new tenancy for years or an at will tenancy to be inferred. *Id*. Under Michigan law, self-help evictions are not permitted, MCL 600.2918; MCL 600.5711, and Landlord may not lock Danielle out of the studio. *Ann Arbor Tenants Union v Ann Arbor YMCA,* 229 Mich App 431, 438 (1998); *Deroshia v Union Terminal Piers*, 151 Mich App 715 (1986). Written notice to Danielle is required to terminate the new tenancy.

Applicants should recognize that because rental payments were due monthly, Landlord may begin the process to regain possession of the property by giving Danielle a 1-month (i.e. the time equal to the payment intervals) written notice to quit as a consequence of her failure to pay rent. MCL 600.5714(1)(c)(iii); MCL 554.134(1). Danielle's failure to make rent payments also permits Landlord to terminate the tenancy by giving Danielle a 7-day written notice to quit. MCL 554.134(2). Under that scenario, Danielle has the option of either paying the rent or moving from the property. Following a 7-day written demand for possession or 1-month notice to quit, Landlord would be entitled to seek a judgment from the court for possession if Danielle has not complied with the notice demands. MCL 600.5714; MCL 600.5741. Following a judgment for possession in Landlord's favor, the court may issue a writ commanding law enforcement to restore possession of the premises to the Landlord. MCL 6003.5744.

Fixtures

Fixtures are items of personal property that are annexed or attached to real property and become regarded as part of the real property. *Wayne Co v William G Britton & Virginia M Britton Trust*, 454 Mich 608, 615 (1997); *Kent Storage Co v Grand*

Rapids Lumber Co, 239 Mich 161, 164 (1927). Michigan courts apply a three-part test when determining whether property is a fixture. Property is generally considered a fixture if it is (1) annexed, or attached, to the property; (2) if the property is adapted to the real property; and (3) if there is some intention to make the article a permanent accession to the real property. *Britton Trust*, 454 Mich at 601-21; *Morris v Alexander*, 208 Mich 387 (1919).

Unlike standard fixtures, tenants are permitted to remove trade fixtures. A trade fixture is a type of fixture that has been annexed to the leased property by a tenant to enable the practice of the tenant's trade or business. *Britton Trust*, 454 Mich at 612 n 2; *Outdoor Sys Adver, Inc v Korth*, 238 Mich App 664, 667 (1999); *Michigan Nat'l Bank, Lansing v Lansing*, 96 Mich App 551, 555 (1980). While installation of mirrors and bars indicates a level of integration and permanence suggesting they are fixtures, they enabled the space to function as a dance studio and are likely considered trade fixtures. Accordingly, Danielle would be permitted to remove both the mirrors and practice bar.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

(1) Whether Paul Ping could properly file a shareholder derivative suit.

MCL 450.1492a states in relevant part that a shareholder may not commence or maintain a derivative suit unless the shareholder (1) was a shareholder of the corporation at the time of the act or omission complained of; (2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation; and (3) continues to be a shareholder until the time of judgment. Here, the facts indicate that Paul was a shareholder in 2012, and there is nothing in the facts to indicate that Paul ceased to be a shareholder or would cease to be a shareholder prior to the time of judgment. Thus, factors (1) and (3) are satisfied.

Regarding factor (2), the determination of whether a plaintiff fairly and adequately represents the interests of the corporation, necessarily depends on the facts of the case. Generally speaking, a plaintiff must have the capacity to vigorously and conscientiously prosecute a derivative proceeding and be free from personal interests, especially economic interests, which are antagonistic to the interests of similarly situated shareholders or the corporation. Other factors to be considered include the remedy sought by the plaintiff; indications that the plaintiff is not the true party in interest; the plaintiff's unfamiliarity with the litigation; pending litigation between the plaintiff and defendants; plaintiff's vindictiveness toward the defendants; and the degree of support received by the plaintiff from other shareholders. 13 Fletcher Cyclopedia of the Law of Private Corporations § 5981.41. Here, there is no indication that Paul's interests are antagonistic to the interests of similarly situated shareholders or to the corporation. Furthermore, there is no indication that Paul is not the true party in interest, that he is unfamiliar with the litigation, that there is any pending litigation between Paul and Callen Corp, or that Paul harbors any vindictiveness toward the corporation. While the facts do not indicate the degree of support received by Paul from the other shareholders, that factor alone is not dispositive. On the whole, this factor seems to be satisfied.

MCL 450.1493a imposes additional requirements on a shareholder's derivative action. It provides that a derivative action may not be initiated until both of the following occur: (1) a written demand has been made upon the corporation to take suitable action and (2) 90 days have passed from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. Here, the facts clearly indicate that Paul made a written demand upon the corporation to reduce the director's salary to a reasonable level. While 90 days had not lapsed before Paul filed the derivative lawsuit, a judge could reasonably conclude that Paul's conversation with Sam Smith, a director of Callen Corp, served as notification that Paul's demand for reduced director compensation had been rejected. In the event that Paul's conversation with Sam is not deemed to be adequate notification of rejection, Paul's derivative suit would not be permitted to proceed.

(2) Whether the trial court properly dismissed Paul Ping's lawsuit

MCL 450.1495 provides that the court "***shall*** dismiss" a derivative proceeding if, on motion by the corporation, the court finds that one of four statutorily delineated groups has made a determination in good faith and after conducting a reasonable investigation upon which its conclusions are based that the maintenance of a derivative proceeding is not in the best interests of the corporation.

Under this statutory provision, such a determination may be made by either (1) a majority vote of disinterested directors, if disinterested directors constitute a quorum at a board meeting; (2) a majority vote of a committee consisting of 2 or more disinterested directors appointed by a majority vote of disinterested directors present at a meeting of the board, whether or not the disinterested directors constitute a quorum at the meeting; (3) a panel of 1 or more disinterested persons appointed by the court upon motion by the corporation; or (4) all disinterested independent directors.

Here, the facts indicate that, pursuant to Callen Corp's motion, the court appointed a panel of three disinterested persons to make the requisite determination. The burden of proof rested with Paul to prove that the determination made by the disinterested panel was *not* made in good faith or that the panel's investigation was *not* reasonable. MCL 450.1495(1). Because the court found the court-appointed disinterested panel made a determination in good faith after conducting a reasonable investigation that the maintenance of the derivative proceeding was not in the best interests of the corporation, the court was required to dismiss Paul's suit upon Callen Corp's motion.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

I. Diversity and Subject Matter Jurisdiction

Donaldson improperly removed Pine's action to federal court, and the U.S. District Court properly remanded the case to the Michigan circuit court.

The federal district courts are courts of limited jurisdiction. When an action is removed from state court, a federal court must consider whether it has subject matter jurisdiction. See *Curry v US Bulk Transport Inc*, 462 F3d 536, 539-540 (CA 6 2006). If a federal district court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action. *Id*. FRCP 12(h)(3). The burden of establishing jurisdiction rests with the defendant as the party removing the case and asserting federal jurisdiction. *See, e.g., Kokkonen v Guardian Life Ins Co of Am,* 511 US 375, 377 (1994). "'[A]ll doubts as to the propriety of removal are resolved in favor of remand.'" *Jacada (Europe), Ltd v Int'l Mktg Strategies, Inc,* 401 F3d 701, 704 (CA 6 2005) (quoting *Coyne v Am Tobacco Co,* 183 F3d 488, 493 (CA 6 1999)), *abrogated on other grounds by Hall St Assocs, LLC v Mattel, Inc,* 552 US 576 (2008).

Title 28, § 1441(a) of the United States Code of Judicial Conduct, permits defendants in civil actions to remove cases originally filed in state courts to federal district courts where the district court would have had original jurisdiction. Cases may be removed under federal question jurisdiction or on the basis of diversity of citizenship. 28 USC § 1441(a). When the plaintiff has not alleged a federal cause of action in his complaint, removal is proper only if the federal district court would have had original jurisdiction based on diversity of citizenship. See 28 USC § 1332.

It is axiomatic that federal diversity jurisdiction exists only when "no plaintiff and no defendant are citizens of the same state." *Jerome-Duncan, Inc. v. Auto-By-Tel, LLC,* 176 F3d 904, 907 (CA 6 1999) (citing *United States Fidelity & Guar Co v Thomas Solvent Co,* 955 F2d 1085, 1089 [CA 6 1992]). Therefore,

complete diversity of citizenship must exist "both at the time that the case is commenced and at the time that the notice of removal is filed." *Id.* (citing *Easley v. Pettibone,* 990 F2d 905, 908 (CA 6 1993)).

Here, it is clear that, at the time Pine's complaint was filed in state court, Donaldson was a Michigan resident. Donaldson was also a Michigan resident when he removed the complaint to federal court. Therefore, the federal court lacked subject matter jurisdiction of the case because complete diversity was lacking. As such, remand to the state court was required. 28 USC § 1447(c).

A point or two can also be awarded if an applicant concludes that there was no diversity jurisdiction because Donaldson was a resident of Michigan at all relevant times. 28 USC 1441(b).

II. Res Judicata

The doctrine of res judicata precludes multiple lawsuits alleging the same cause of action. *Adair v Michigan*, 470 Mich 105, 121 (2004). Application of res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Richards v Tibaldi,* 272 Mich App 522, 530-531 (2006). See also MCR 2.116(C)(7).

A voluntary dismissal of an action is without prejudice unless the order of dismissal otherwise indicates. MCR 2.504(A)(2)(b). However, an involuntary dismissal is construed as a dismissal with prejudice. *Makowski v Towles,* 195 Mich App 106, 108 (1992); MCR 2.504(B)(3). A dismissal with prejudice operates as an adjudication on the merits for purposes of res judicata. *Wilson v Knight-Ridder Newspapers, Inc,* 190 Mich App 277, 279 (1991). This includes a dismissal resulting from a decision on a motion with a court finding that a party has failed to comply with its orders. MCR 2.504; *Makowski*, 195 Mich App at 108.

Here, Pine's failure to comply with the discovery and pretrial orders resulted in the involuntary dismissal of his complaint against Donaldson. MCL 600.611; see also MCR 2.313(B)(2)(c); MCR 2.313(D)(1). Thus, under the facts: (1) the dismissal of the January 2011 action constituted an adjudication on the merits; (2) the dismissal of the January 2011 action was a final decision; (3) the claims made in the July 2012 complaint were identical to the claims made in the January 2011 complaint, and therefore, they were resolved in the prior action when the circuit court dismissed the action with prejudice; and (4) both actions involved the same parties, i.e., Pine and Donaldson. The fact that Pine appealed the dismissal order does not make it a non-final order, as the rule "in Michigan is that a judgment pending on appeal is deemed res judicata." *City of Troy v Hershberger*, 27 Mich App 123, 127 (1970).

Accordingly, res judicata precludes the filing of the July 2012 action, and the circuit court should grant Donaldson's motion to dismiss.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

A. Paula's Injuries

The first question is whether Dan's actions were entitled to the limited immunity provided by MCL 691.1501(1), which states in relevant part:

> *A* physician, physician's assistant, *registered professional nurse*, or licensed practical nurse *who in good faith renders emergency care without compensation at the scene of an emergency, if a* physician-patient relationship, physician's assistant-patient relationship, *registered professional nurse-patient relationship,* or licensed practical nurse-patient relationship *did not exist before the emergency, is not liable for civil damages as a result of acts or omissions by the* physician, physician's assistant, *registered professional nurse*, or licensed practical nurse *in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct*. [Emphasis added.]

The rule in Michigan, therefore, is that a registered professional nurse who in good faith renders emergency care without compensation – and without a pre-existing patient-nurse relationship - is immune to civil damages for acts or omissions that do not amount to gross negligence or willful and wanton misconduct.

The facts show that Dan was a registered professional nurse who rendered emergency care at the scene of an emergency. The facts indicate that Dan did not know Paula (in fact she called him "sir", not Dan), so there could be no pre-existing registered nurse-patient relationship. Finally, there is nothing to suggest that Dan's treatment of Paula was anything but in good faith, as he quickly responded to an injured person who appeared to be badly bleeding after just being hit by a bike. Indeed, Paula informed Dan that she was bleeding badly. The fact that Dan later discovered that the injury was not severe, does not detract from his initial good faith belief that there was an emergent situation requiring his assistance. See

Pemberton v Dharmani, 207 Mich App 522, 528 (1994). Additionally, Dan refused any compensation offered by Paula, i.e., the hot dog. Nothing in the facts suggest that Dan's conduct amounted to gross negligence, especially since there was only a small cut and not much real blood, and Paula's complaint only asserts that he was negligent. Consequently, Dan is immune from the negligence claim for the treatment he rendered to Paula after her accident.

B. Emotional Damages Relating to Fluffy

This issue focuses on whether Paula can recover emotional damages in her negligence claim against Dan resulting from Dan's refusal to treat Fluffy. The answer is that she cannot, because under Michigan law a pet is considered personal property, *Koester v VCA Animal Hospital*, 244 Mich App 173, 176 (2000), citing *Ten Hopen v Walker*, 96 Mich 236, 239 (1893), and non-economic damages are not recoverable for damage to property, real or personal. See *Koester*, 244 Mich App at 176-177 and *Price v High Pointe Oil Co*, 493 Mich 238, 247-249, 264 (2013). Hence, Paula's negligence claim that seeks to recover emotional distress damages for the injuries to Fluffy fails to state a claim.

Applicants may raise whether Paula can recover based upon the "bystander" tort of negligent infliction of emotional distress. That tort requires proof that:

> (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock results in actual physical harm; (3) the plaintiff is a member of the third person's immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock "fairly contemporaneous" with the accident. *Taylor v Kurapati*, 236 Mich App 315, 360 (1999).

Here, the argument would fail because the injury Paula saw was an injury to a pet, not a family member. A point or two should be given if the issue is raised but rejected.