JULY 2017 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

1. Foreclosure of mortgages by advertisement is governed by statute in Michigan. MCL 600.3201 et seq. A creditor on a note secured by a mortgage on real estate may, pursuant to a power of sale clause, foreclose on that mortgage by advertisement. MCL 600.3201 states in part that "[e]very mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter." The following four requirements must be satisfied before a party may foreclose on a mortgage by advertisement:

(a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.

(b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage or, if an action or proceeding has been instituted, either the action or proceeding has been discontinued or an execution on a judgment rendered in the action or proceeding has been returned unsatisfied, in whole or in part.

(c) The mortgage containing the power of sale has been properly recorded.

(d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

MCL 600.3204(1). According to the facts presented, all of the preliminary criteria are met to allow Better Bank to foreclose on the Clarks' mortgage in this manner.

To proceed, notice of the impending foreclosure sale of the property must be published at least once per week for four consecutive weeks in a newspaper published in the county where the property is situated. Additionally, notice of the sale must be posted in a "conspicuous place" on the property within 15 days from the first published notice. MCL 600.3208. A public sale of the property would be held in the circuit court for the county where the property is located, and be conducted either by a specifically appointed person as designated by the mortgage document, or by the county sheriff, with the property sold to the "highest bidder." MCL 600.3216. As mortgagee, the Bank would be entitled to bid on the Clarks' property at the sale, and would only be responsible for paying in cash any portion of the sale amount that exceeded the mortgage balance due if it bought the property as the highest bidder. MCL 600.3228. See *Bank of America v First American Title Ins Co,* 499 Mich 74, 88 (2016).

The person conducting the sale would issue a deed (commonly known as a sheriff's deed) to the highest bidder (including the Bank if it successfully bid), conveying to any such purchaser only voidable equitable title in the property. MCL 600.3232. Before the foreclosure sale was complete, the Clarks would have an equitable right to redeem their mortgage and save their home from foreclosure. *Blackwell Ford, Inc v* Calhoun, 219 Mich App 203, 208-209 (1996) (acknowledging the equity of redemption that permits the mortgagor to redeem the property from the lien of the mortgage by making payment on the debt owed under the mortgage). The Clarks would also have the statutory right to redeem the property within 6 months from the sale date by paying the noticed and specified redemption amount. MCL 600.3240(1) and (8). If the Clarks redeem the property timely, the sheriff's deed to the Bank (assuming it successfully bids) would be destroyed. If there is no redemption, the sheriff's deed would become "operative" reflecting full legal title in the Bank. MCL 600.3232.

2. If the Bank (or whomever) is the highest bidder, it may institute a summary proceedings action, but only if and until the six-month redemption period has expired for the Clarks to regain their full property interests. The Michigan summary proceedings act allows a person entitled to possession of premises to file a summary proceedings action to recover that possession in certain

instances including "[w]hen a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises." MCL 600.5714(1)(g).

EXAMINERS' ANALYSIS OF QUESTION NO. 2

The court should overrule all of Paul's objections. Pursuant to MRE 703,

"The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

1. The Expert's Experience, Training, and Education Are Not Facts and Data Particular to the Case.

MRE 703, by its terms, applies to "facts or data in the particular case," not the expert's qualifications pursuant to MRE 702 to offer opinion testimony in general. "[B]ecause MRE 703 addresses only the facts or data 'in the particular case,' neither the current rule nor the proposed amendment requires independent proof of the sources of knowledge that qualify the witness as an expert in the first instance." Special Order entered October 10, 2000, 463 Mich 1212-1217, 1214 (2000) (Committee Report and Staff Comment amending MRE 703. MRE 703 revisions adopted March 25, 2003, effective September 1, 2003. 467 Mich xcv [2003]). Moreover, the court already determined the expert had sufficient experience, training, and education. It is within the expert's personal knowledge for him to testify to those qualifications in order to put them "in evidence," if necessary.

2. The Court May Conditionally Allow the Expert's Testimony Under MRE 703 Provided Denise Calls Wilma as a Witness.

As expressly stated in MRE 703, the court has discretion to allow the expert's testimony subject to the condition that

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[I]MRE 703 differs from FRE 703 because MRE 703 expressly requires that the facts and data on which the expert relies "be in evidence." FRE 703, in contrast, does not require that facts or data be in evidence or even admissible, provided they are "the kind of facts or data" on which experts in the particular field "would reasonably rely."

Denise must call Wilma as a witness before the case is submitted to the jury. Denise cannot rely on the former testimony exception under MRE 804, because that exception applies only to unavailable witnesses, and the parties agree that Wilma is available to testify at trial.

3. The Certified Hospital Record Is An Exception to Hearsay As Record of Regularly Conducted Activity Pursuant to MRE 803(6).

MRE 803(6) excepts from hearsay:

"Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

At least for purposes of ascertaining the hospital diagnosis, the hospital submission contains the regularly recorded entries of each medical provider or other employee rendering a hospital service to Paul during the course of his stay. Paul's objection to the record is not that the entries were not made at or near the time in question, that they lacked trustworthiness, or that they otherwise were not a record of regularly conducted activity, his only objection was that the particular surgeon who recorded the diagnosis is unavailable for cross-examination at trial. But MRE 803(6) allows any custodian of the record or other qualified witness to testify at trial or through a certification, which is what has occurred here. The certified hospital record is a "record ... of ... transactions [and] diagnoses, made at or near the time by ... a person with knowledge [and] kept in the course of a regularly conducted business activity ... as shown by ... certification that complies with a rule promulgated by the supreme court ... per-

mitting certification." Thus, while hearsay, it falls within a recognized exception and is admissible.

4. The Certified Hospital Record Is Self-Authenticating Under MRE 902.

The hospital record does not require authentication under MRE 901 because it is self-authenticating. Pursuant to MRE 902, as amended, "extrinsic evidence of authenticity is not required with respect to . . . Certified Records of Regularly Conducted Activity." MRE 902(11). In order to be self-authenticating, the record (1) must be admissible under MRE 803(6); and (2) accompanied by a sworn declaration that it was made at or near the time of the occurrence, kept in the course of the regularly conducted business activity and that it was the regular practice of the business activity to make the record. In addition, before offering it into evidence, the offering party must have given the adverse party advance notice and made the record and sworn declaration available for inspection.

Because all of the foregoing occurred in this case, the record is self-authenticating. It is immaterial that the hospital surgeon is now deceased or that Paul decided against inspecting it, as long as he was given the opportunity. The sworn declaration can be made by the hospital's records custodian or other qualified person, *id.,* which is what has occurred here.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

Holly's claim

The covenant between Holly and the subdivision association constitutes a contract. *Hickory Pointe Homeowners Ass'n v Smyk,* 262 Mich App 512, 515 (2004) ("Under Michigan law, a covenant constitutes a contract, created by the parties with the intent to enhance the value of property."). Holly's claim for breach of that contract should succeed because the association exercised its contractual discretion in bad faith.

"Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank of Detroit,* 57 Mich App 649, 652 (1975) (citing Corbin on Contracts); *see also Ferrell v Vic Tanny Int'l, Inc,* 137 Mich App 238, 243 (1984) (same). The party must exercise its discretion "reasonably," *Conlin v Upton,* 313 Mich App 243, 268 (2015), and not "capriciously" or "arbitrarily," *Woods v Gaar, Scott & Co,* 93 Mich 143, 147 (1892). Whether discretion was exercised in good faith depends on "all the facts, circumstances, and conditions..." *Id.*

Here, the association did not act reasonably in denying approval based on the paint color, since the association recently approved the use of the same color on numerous other houses in the subdivision. Consequently, denial of Holly's request to use the color on her house was arbitrary and capricious. Alternatively, candidates could successfully argue that the association may have acted reasonably in denying Holly's request--for example, because the association desired a variety of house colors and too many houses were already painted the color she requested.

Contractor's claims

Breach of contract:

The contractor's claim for breach of contract should be denied because the condition precedent in the contract was not satisfied and thus the contractor had no right to enforce the contract.

"A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. ... If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Knox v Knox,* 337 Mich 109, 118 (1953) (internal quotation marks omitted). *See also Harbor Park Mkt, Inc v Gronda,* 277 Mich App 126, 131 (2007) (same); *Able Demolition, Inc v City of Pontiac,* 275 Mich App 577, 583 (2007) ("Failure to satisfy a condition precedent prevents a cause of action for failure of performance." [internal quotation marks omitted]); Restatement (Second) of Contracts § 225(1) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.").

Here, the agreement between the contractor and Holly stated that neither party was obligated to perform unless the association approved both the new roof and the painting. Since the association rejected the painting, neither party was obligated to perform. Thus, Holly had no contractual duty to pay the contractor.

Breach of the covenant of good faith and fair dealing:

The contractor's claim for breach of the implied covenant of good faith and fair dealing should fail because Michigan does not recognize such claim as a cause of action independent of a contract. "It has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. However, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Bank of Am, NA v Fid Nat'l Title Ins Co,* 316 Mich App 480, 500-01 (2016) [internal quotation marks and citation omitted]. *See also, e.g., Triplett v Perry (In re Leix Estate),* 289 Mich App 574, 591 (2010) ("Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." (internal quotation marks and citation omitted)); *Fodale v Waste Mgmt of Mich, Inc,* 271 Mich App 11, 35 (2006) (same); *Hearn v Ricken-backer,* 428 Mich 32, 37 (1987) (noting that breach of duty to act in good faith is "a tort not recognized in this state").

Consequently, the contractor's claim for breach of the covenant of good faith and fair dealing should be denied. *See*

Rodgers v JP Morgan Chase Bank NA, 315 Mich App 301, 310 (2016) ("[B]ecause no contract was formed, plaintiffs' reliance on the implied covenant of good faith and fair dealing is unavailing.").

Another remedy for contractor

Because the contractor has no enforceable contract with Holly, the contractor could instead seek payment under the theory of quantum meruit/unjust enrichment.

"Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' Restatement Restitution, § 1, p 12. The remedy is one by which the law sometimes indulges in the fiction of a quasi or constructive, contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Kammer Asphalt Paving Co v E China Twp Sch,* 443 Mich 176, 185-86 (1993) (brackets in original; internal quotation marks omitted).

"'The essential elements of a quasi contractual obligation . are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain.'" *Mich Ed Employees Mut Ins Co v Morris,* 460 Mich 180, 198 (1999) (quoting *Moll v Wayne Co,* 332 Mich 274, 278-79 (1952)). "Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc,* 273 Mich App 187, 195 (2006).

Here, Holly clearly received a benefit from the contractor: installation of a new roof. Whether the contractor can recover in quantum meruit for the roof work depends on whether it would be inequitable to the contractor if Holly retained the benefit of the new roof without paying the contractor for it. The agreement between Holly and the contractor envisioned that either both projects (roof and painting) would be approved or neither project would be undertaken, and the parties assumed both would be approved. But when she learned that this assumption was wrong, Holly did not inform the contractor until the contractor finished replacing the roof. In other words, Holly waited until she received the entire benefit of a new roof

before informing the contractor that the paint project had been rejected (and thus there was no enforceable contract). A strong argument can be made that under these circumstances, it would be inequitable for Holly to retain this benefit without compensating the contractor for it.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

The search incident to arrest exception will justify the seizure of the phone but not the search of its contents.

The search incident to arrest exception to the warrant requirement allows the arresting officer to search the arrestee. While typically the justification for such a search is officer safety and/or to prevent the destruction of evidence, the searching officer need not have the specific belief the one arrested is intending to harm the officer or is about to destroy evidence. *United States v Robinson,* 414 U.S. 218 (1973). However, the exception limits the search of the person as well as those areas within the person's "wingspan." See *Arizona v Gant,* 556 US 332 (2012); *Chimel v California,* 395 US 752 (1969).

Here Officer Meadows could legitimately search Paul without a warrant. Paul had been arrested for the misdemeanor offenses, but was not completely secured. The pat down was appropriate, as was Officer Meadow's removal of the hard object -- the phone -- from Paul's jacket. No "wingspan" issues are presented, given the search was of Paul's person and was for personal property immediately associated with Paul. See *United States v Chadwick,* 433 US 1, 151 97 S Ct. 2476, 53 L Ed 2d 538 (1977), abrogated on other grounds by *California v Acevedo,* 500 US 565 (1991).

The search of the cellphone's contents, however, is another matter. In *Riley v California,* U.S. _, 134 S Ct 2473, 189 L Ed 2d 430 (2014), the Supreme Court disallowed the search of the contents of a cellphone taken at the arrest of the cellphone's possessor under the search incident to arrest exception to the warrant requirement. The Court considered the purposes of the exception - to prevent harm to the officer and/or destruction of the evidence by the arrestee. The Court concluded that, even given the broad justification of the exception described in *Robinson* (i.e. the risks identified in *Chimel* are present in all custodial arrests even without a specific concern about the loss of evidence or threat to officers), a search of the contents of the cellphone could not be countenanced.

The facts here do not lend themselves in any way to the use of the search incident to arrest exception. Paul is secured and

the phone is not within his wingspan- when Officer Meadows is searching it. Destruction of the contents of the cellphone from the backseat of the cruiser is unlikely, as is the use of the cellphone to harm the officer. *Robinson's* teaching that all custodial arrests carry with them general concerns about loss of evidence or harm to the officers does not extend the exception to cellphone contents. As *Riley* explained, Paul would have an expectation of privacy in the contents of his phone protected by the Fourth Amendment, and *Riley* concluded the police should simply get a warrant in order to search a cellphone.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

New lawyer Larry has given Derek horribly inaccurate advice under Michigan's No Fault Act. Derek having "full coverage" means that he was in compliance with the requirement under statute that he carry personal injury insurance benefits, as well as liability coverage. MCL 500.3101(1). Lawyer Larry's focus on Derek being at fault reflects his misunderstanding of Michigan's no fault law. He then gives inaccurate advice even beyond this basic mistake.

Derek's Benefits

Under Michigan's no fault law, an insured driver such as Derek looks to his own carrier for personal injury protection (PIP) benefits. These are payable even if Derek is at fault. These benefits include payments for lost wages, medical expenses, replacement services, and rehabilitation expenses. These are payable on a demonstration that they were incurred as a result of the accident. Medical expenses, rehabilitation expenses and replacement services must be customary and reasonable in the amount charged and reasonably necessary to the treatment or service in question. MCL 500.3107. Loss of earning from work the person would have performed had he not been injured are as well payable. MCL 500.3107(1)(b). Derek, being at fault, does not negate his statutory and policy rights.

Moreover, aside from not losing his rights because he was at fault, Derek is entitled to his lost wages up to the statutory maximum, less up to 150. MCL 500.3107(1)(b). His physical therapy would be covered as a rehabilitative expense. Additionally, a family member is allowed to provide replacement services up to $20 per day. MCL 500.3107(1)(c). Transportation costs would similarly fall under these reimbursable costs. As to the $25,000 hospital bill, not having health insurance has no bearing on Derek's carrier's obligation to cover that bill.

In sum, Lawyer Larry has totally misadvised Derek on his ability to collect his PIP benefits. The whole point of Michigan's no fault law in this area is to take fault out of a claim for PIP benefits.

Derek's Liability

Similarly, Lawyer Larry misadvised Derek on his personal liability to other parties. He has insurance coverage so his carrier must defend him and cover his liability up to the policy limits. Being at fault does not invalidate the carrier's duty. If it were otherwise, the carrier would only be obligated when the insured was not at fault; in other words, when the insured needed no defense.

Aside from this errant advice, Lawyer Larry should have advised Derek that when someone is involved in a motor vehicle accident they can only sue the negligent driver or owner, if a death occurs, or the plaintiff has a serious impairment of a body function or a serious, permanent disfigurement. In Michigan's no fault law scheme, tort liability for non-economic damages has been retained but only on showing one or more of the "threshold" injuries. *McCormick v Carrier,* 487 Mich 180 (2010) and MCL 500.3135.

Of the three categories statutorily delineated, two at most are arguably in play: Polly's as to serious impairment of a bodily function and Kent's as to a permanent, serious disfigurement. Injuries of these types are often the subject of dispute as to whether or not the threshold has been met. While subject to dispute and capable of resolution either in favor of Derek or against him, it is his insurance carrier that must take up his defense including any argument that the threshold has not been met. While Derek should be advised that he may have potential liability, should an award transcend policy limits, his fault in the accident does not negate his coverage in the first instance.

In sum, Lawyer Larry's central conclusion, i.e. that fault vitiates coverage, poisoned the advice he gave Derek. Rather than let fault guide his analysis, Lawyer Larry should have advised Derek as described above: (1) Derek can make a claim against his carrier for lost wages, medical expenses, replacement services, and transportation costs; and (2) his carrier is obligated to defend him and pay any liability up to his policy limits.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Defendant's first argument, i.e. that there can be no conspiracy to commit arson without a completed arson, does not warrant dismissal. The elements of the crime of conspiracy are (1) an agreement, expressed or implied, between two or more persons; (2) to commit an illegal act; or (3) to commit a legal act in an illegal manner. *People v* Ailey, 392 Mich 298 (1974)(overruled on other grounds by *People v Hardiman,* 466 Mich 417 [20021); MCL 750.157a. The crime of conspiracy is typically complete on proof of an agreement. *Ailey, supra,* at 310-311. Accord *People v Seewald,* 499 Mich 111, 117 (2016).

As can be gleaned, the elements for conspiracy do not require a completion of the object of the conspiracy. *People v Chambers,* 279 Mich 73, 77 (1937). The conspiracy and the arson are separate crimes. That the coffee shop was not burned, would not prompt dismissal of the conspiracy charge for lack of proof. Defense counsels' motions on this ground should not be granted.

Defendants' second argument, i.e. that proof of conspiracy requires an overt act in addition to the agreement, is also unpersuasive under Michigan law. As stated, the crime of conspiracy is completed on proof of an agreement to commit an illegal act. The prosecution need not show acts were taken, consistent with that agreement. (For example, buying gasoline to accomplish the arson.) See *Seewald,* at 117, citing *People v Asta,* 337 Mich 590 (1953). While overt acts may help establish an agreement, their absence does not nullify proof of an agreement.

Here, as with the absence of the completed arson, the absence of overt acts does not negate the agreement. *People v Carter,* 415 Mich 558, 568 (1982); *Seewald, supra,* at 117. ("Michigan law requires no proof of an overt act taken in furtherance of the conspiracy.") The motion should be denied on this basis as well.

Defendants' third argument presents a closer question. The issue is whether Sam and Smitty's words and actions establish an agreement. Without an agreement, no conspiracy can be found.

As stated, the agreement in question may be expressed or implied. A formal agreement need not be proven. *Atley,* at 311. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. Conspiracy may be established by circumstantial evidence and may be based on inferences. Conspiracy requires a two-fold specific intent: the intent to combine with others and the intent to accomplish the illegal objective. *People v Justice* (After Remand), 454 Mich 334, 346-347 (1997).

The facts presented can be summarized as follows: The partners had three meetings having a central purpose, to discuss their failing business and what to do about it. The first meeting focused on legitimate solutions to the problem. The second meeting was mixed, comprising yet another legitimate solution, selling the building/business to their competitor. But it also included a directive by Sam to Smitty to bring their business insurance policy, and set another meeting. The third meeting was the first where the partners' moods were upbeat. And what prompted their lifted spirits was their fire loss coverage. This meeting ended with the joint statement, "better call Sparky," albeit said in laughter.

Conspiracies are clandestine in nature and no reasonable view of the proof of a conspiracy would require vivid, clear discussion on how to burn down one's business to collect insurance proceeds in an open setting like a bar open to the public. And neither does the law require such formality and coherence.

The true issue, therefore, is whether the partners' words or deeds prove an agreement to commit the arson, even by implication. The defense motion to dismiss because proof of an agreement is lacking is the strongest of the three arguments made for dismissal for a number of reasons.

Stringing together the inculpating facts, the parties have business troubles, legal solutions do not appear effective, an illegal solution seems effective (to end the business by arson), and a means (calling Sparky) seems plausible. But these facts stop short of being even an implied agreement. No evidence exists as to who Sparky is, what he is supposed to do, how he is supposed to do it, and the like. Moreover, the facts are silent as to who is to call Sparky and what he is to be told. While in

total the facts reflect a motivation and a discussion, they fall short of establishing an agreement. Indeed, even the most damaging fact, "better call Sparky" was said amidst joint laughter, undermining its significance.

While by no means clear, dismissal is warranted based on the third argument, if at all, for failure to establish an agreement to commit an illegal act, the gist of conspiracy.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

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

"A person who finds lost property shall report the finding or deliver the property to a law enforcement agency in the jurisdiction where the property is found. * * * If the person wishes to receive the property if it is not claimed by the legal owner as provided in this act, the person shall provide his or her name and current address to the law enforcement agency and shall inform the agency of any change in his or her address."

MCL 434.22 (1). Law enforcement is responsible for taking certain steps pursuant to the Act to establish the legal owner. The property is classified by law enforcement in one of nine categories, one of which is "property of major value." MCL 434.22(2). Property of major value is statutorily defined as "any property that is not collectible currency, contraband, currency, evidence, hazardous material, junk, perishable property, or property of minor value." MCL 434.21(j). Law enforcement would be required to mail notice to any known legal owner of major value property identifying, among other things, its location, the date found, type of property, etc. MCL 434.25(1). Property categorized as having major value may be returned to the finder if the owner fails to claim it within six months from the date of the notice. MCL 434.25(2) and 434.26(1). Similarly, if a legal owner cannot be established or located, the finder is entitled to return of the property from law enforcement.

Because Melinda purposely placed her phone behind the chairs outside of the testing room, intending to later retrieve it but forgetting to do so, she mislaid the phone. Therefore, Roger had no automatic legal right to the phone as the finder. It should have been obvious to Roger that the phone was mislaid.

It was positioned and hidden in such a way that evidences that Melinda was "storing" the phone for safekeeping so as to avoid its discovery before she was able to retrieve it following the exam. Moreover, it was the latest model of the phone which would not likely have been deliberately discarded. Under such circumstances, Roger would be required to follow the requirements of the Act and report his find or deliver the cellphone to the local law enforcement agency. It is likely that the phone would be classified as a major value item under the Act since the facts state that it was of considerable value. As such, Roger will only be entitled to return of the cellphone if the law enforcement agency is unable to determine ownership, unable to locate Melinda or Melinda does not claim the phone within six months after the notice date.

2. **MARCUS.** It appears that Dillon abandoned her bar review materials. Personal property is deemed abandoned when the owner (1) intends to relinquish all rights to the property, and (2) carries out an external act which effectuates that intent. *Emmons v Easter,* 62 Mich App 226, 237 (1975). *See also, Sparling Plastic Industries v Sparling,* 229 Mich App 704, 717-718 (1998). According to the facts, Dillon's intent was to part with the course materials because she was "very confident" that she had passed the exam and that she would not need the materials again. She acted on that intention by purposefully removing the materials from her car and placing them in a public area next to a receptacle for disposal. That act was indicative of her desire to permanently part with the materials and of a disregard for what would later happen with them (e.g. disposal, retrieval, etc.). There are no statutory or other legal proscriptions with respect to a private party who finds abandoned property of that nature. Therefore, as a (non-governmental) private party finder of this abandoned property, Marcus acquired full ownership interests in the materials once found and retrieved, and may legally keep them.

EXAMINERS' ANALYSIS OF QUESTION 8

The issues presented by this fact pattern include whether Elaine's valid June 1, 2000 will was ever revoked. Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq. Revocation of a will or part of a will may be accomplished by either of the following 2 ways:

(1) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.

(2) Performance of a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or a part of the will or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or a part of the will. A burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touches any of the words on the will.

MCL 700.2507(1).

In order to be valid, a subsequent will would require a writing signed by the testator, and signed by two witnesses. A will that is not witnessed would still be considered valid if its material portions are in the handwriting of the testator, signed by the testator and dated. MCL 700.2502 (1) and (2). Additionally, even if a document or writing added to a document does not conform to these requirements, it will be considered compliant if shown by clear and convincing evidence that the decedent's intent was that the writing is a will, a revocation, alteration, or revival of a formerly revoked will. MCL 700.2503.

1(a). In the instant case, Elaine's 7-14-2007 handwritten notation in the margin of the valid 2000 will does not constitute a revocation as it did not rise to the level of a "revocatory act" as set forth in EPIC. There was no burning, obliteration of language, tearing, etc. that would be consistent

with a revocation. That notation simply expresses Elaine's displeasure over Devin's behavior as it relates to his sister Amy, and at most reflects mere *consideration* about changing the will in the future. Moreover, Elaine's subsequent writing in 2009 confirms that even she did not believe that the original will had been revoked by the 2007 notation. Thus, the notation would have no revocatory effect on the will.

1(b). With respect to the 2009 writing, the issue is whether it constitutes a subsequent will that revokes the original one because it is completely inconsistent with the devise in the earlier will. While the 2009 writing is more testamentary in nature than the earlier notation, it does not satisfy the requirements of MCL 700.2502 as either a traditional will or as a holographic one. It is missing the witnesses required for a traditional will and is missing the date that would be required for a holographic will. However, Amy might be able to prove by "clear and convincing evidence" that Elaine intended the 2009 writing to constitute a revocation of the 2000 will, especially since she had earlier expressed contemplation about doing just that in the notation on the will, and appeared to be even more dissatisfied with Devin.

2. If Amy can clearly and convincingly prove that the 2009 writing constituted a valid will which revoked the 2000 will by complete inconsistency, Amy would be entitled to Elaine's estate. Otherwise, Devin would receive assets from the estate. However, regardless of which document governs, Sam would be entitled to elect to receive a portion of the estate under EPIC as a surviving spouse. In pertinent part, MCL 700.2202(2) specifically provides that:

"The surviving spouse of a decedent who was domiciled in this state and who dies testate may file with the court an election in writing that the spouse elects 1 of the following:

"a. That the spouse will abide by the terms of the will.

"b. That the spouse will take 3 of the sum or share that would have passed to the spouse had the testator died intestate, reduced by % of the value of all property derived by the spouse from the decedent by any other means other than testate or intestate succession upon the decedent's death."

Thus, if Sam elects option (b) above, he would receive a portion of Elaine's estate, with either Amy or Devin receiving the remainder under the applicable will.

Credit is given for an alternative discussion of Sam's possible entitlement to a portion of Elaine's estate under EPIC pursuant to the homestead allowance (MCL 700.2402); the family allowance (MCL 700.2403); or the marriage after testator executes will provisions (MCL 700.2301).

EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. Chad's claim to a property interest in Lena's pathway by adverse possession, likely would not be successful. Adverse possession is a method of acquiring property that is based on the Michigan statute of limitations proscription that a property owner must file an action to recover possession of that property from another within 15 years from the date of accrual of the claim. MCL 600.5801(4). In other words, Chad would be required to show that Lena as the property owner, had a claim against him that accrued over 15 years ago to recover possession of the pathway, and that she let that claim lapse. As explained by the Michigan Court of Appeals in *Wengel v Wengel,* 270 Mich App 86, 92 (2006), *quoting Kipka v Fountain,* 198 Mich App 435, 438 (1993):

"A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership."

The *Wengel* court further explained that there is case law support for a requirement that a person's possession of the property must also be "hostile" to successfully sustain a cause for adverse possession. In this sense the term hostile means possession "which is 'inconsistent with the right of the owner, without permission asked or given,' and which 'would entitle the owner to a cause of action against the intruder.'" *Id* at 92, *quoting MUmrow v Riddle,* 67 Mich App 693, 698 (1976).

While Chad used the property pathway continuously for 20 years, his use was not exclusive and did not interfere with

Lena's possessory and ownership rights. Chad's use did not displace Lena from the pathway. The facts state that Lena often used the pathway herself during that same relevant time period. Moreover, the facts suggest that Lena was aware of Chad's routine use of the pathway, was not bothered by it, and at least passively permitted it. Thus, a claim to recover possession of the pathway from Chad never accrued and therefore the 15-year statute of limitations for filing such action has never expired. As such, there is no basis for Chad's claim that he acquired the pathway by adverse possession.

2. Michigan is a "race notice" state with respect to determining disputes regarding multiple conveyances of the same parcel of property. Michigan's race notice statute (the "statute") provides in relevant part that:

"Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. MCL 565.29. A good faith purchaser under the statute is one who buys property without notice that title to the property is compromised. *Michigan National Bank & Trust Co v Morren,* 194 Mich App 407, 410 (1992). Notice of a title defect may be actual or constructive. *Richards v Tibaldi,* 272 Mich App 522, 539 (2006). Thus, even though a person may have been the first to purchase a parcel of property, if he fails to record his interest before the recording of a subsequent purchase of the property for value and without notice of the previous purchaser's interest, the conveyance to the first purchaser is void as to that subsequent purchaser."

In the instant case, Harold would have superior rights to Carmen's in the property. While Harold did not record his interest in the property before Carmen, Carmen did not pay any consideration for her acquisition of the property since it was a gift from Lena. Moreover, Carmen had actual notice of the property sale to Harold before Lena gifted her the property. Therefore, Carmen is not considered a "subsequent purchaser in good faith and for valuable consideration" which would have otherwise entitled her to the property under the statute because she recorded her property interest before Harold.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

Under Michigan law, "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1, 8 (2008) (citations and internal quotation marks omitted).

In determining whether to grant a preliminary injunction, the court must consider four factors: "whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit,* 482 Mich 18, 34 (2008).

Applying the preliminary injunction factors, the court should deny Pax's motion. The focus of the analysis should be on factors (1) and (2), as the Michigan Supreme Court has held that "[a] particularized showing of irreparable harm" is "an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters,* 482 Mich at 9 (quotation omitted). Without such a showing, a plaintiff's likelihood of success on the merits is irrelevant. *Id.* at 13 n 21. To establish irreparable injury, a plaintiff must demonstrate "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp v Borzym,* 227 Mich App 366, 377 (1998).

Here, Pax arguably cannot show irreparable harm. Pax argues that if Delta's restaurant is allowed to open, Pax's revenues will decline, its property will lose value, and it will eventually go out of business. These are economic injuries that can be remedied by money damages. *See Pontiac Fire Fighters,* 482 Mich at 10 ("Granting extraordinary equitable relief to remedy these economic injuries is unnecessary and inappropriate because they can be remedied by damages at law."); *Thermatool Corp,* 227 Mich App at 377 ("Economic injuries are not irreparable because

they can be remedied by damages at law."). Moreover, Pax's asserted harm is speculative. "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters,* 482 Mich at 9. Instead, "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp,* 227 Mich App at 377.

Any claimed harm to Pax would also be outweighed by the potential of irreparable harm to Delta. Delta had already begun construction of its new restaurant and entered into contracts with subcontractors and suppliers. Not only would Delta lose anticipated revenue if construction were delayed, it would be at risk of breaching contracts with other parties.

Factor (3) also weighs against granting preliminary injunctive relief. Under the facts as given, the Dakota City Planning Commission had authority to grant a variance, and found a variance was justified under the circumstances. The planning commission found that the variance was consistent with other similar variances that had previously been granted, that the location of Delta's proposed restaurant would not cause traffic problems, that allowing the restaurant to be built would put the property to productive use, and that the building was set back as far as possible and was situated so as to allow for efficient drive-through operations. There is no indication in the facts that Pax has any basis for challenging the planning commission's decision.

Regarding factor (4), issuance of a preliminary injunction would arguably be against the public interest. A preliminary injunction would result in a partially finished construction site, whereas completion of construction would provide for the creation of a viable business on formerly vacant land. Halting completion of Delta's restaurant would also stifle healthy business competition, which Michigan's public policy favors. See *Michigan Beer & Wine Wholesalers Ass'n v Attorney General,* 142 Mich App 294, 303 (1985) (recognizing the "express state public policy of competition in the market place"). Finally, public policy supports enforcement of a duly-issued zoning variance. See *Dingeman Advertising, Inc v Algoma Twp,* 393 Mich 89, 98 (1974) ("Once a city or township issues a valid permit to an applicant, that applicant has every reason and right to rely thereon in his business dealings.").

While not necessary to achieve a perfect score, some credit may be given for also recognizing that laches weighs against granting Pax's requested preliminary injunction. "The doctrine of laches applies where the passage of time combined with a change in condition makes it inequitable to enforce a claim." *City of Jackson v Thomson-McCully Company, LLC,* 239 Mich App 482, 494 (2000). It requires a showing of "a lack of due diligence on the part of the plaintiff resulting in prejudice to the defendant." *Id.* Here, Pax waited more than two months after construction began to seek injunctive relief. That lack of diligence further supports denial of Pax's motion. See *City of Hancock v Hueter,* 118 Mich App 811, 818 (1982) (applying laches to bar the city's action to enjoin the defendants' use of a house as a three-family residence in violation of the city's zoning ordinance because the city "failed to take any action for an undue length of time").

With respect to the four-factor preliminary injunction test, some credit may be given for well-reasoned arguments contrary to the above analysis.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

The Uniform Commercial Code (UCC) governs this question, specifically Article 9 of the UCC. This UCC article applies because the controversy involves secured transactions in personal property or goods. MCL 440.9109(1) (a). Personal property or goods become collateral when subject to a security interest. MCL 440.9102(1) (1). A security interest is a legal claim on collateral which secures payment or performance of an obligation. MCL 440.1201(2) (ii). A security interest must attach to be enforceable. MCL 440.9203 (1). Here, the security interests attached under the facts and attachment is not at issue.

With respect to the first question, SBS has an unperfected purchase money security interest (PMSI) in the credit card machine. A PMSI is a particular type of secured interest, a security interest taken in a specific good to secure the purchase price of that good. MCL 440.9103. The credit card machine would be considered "equipment" used in JJ's business. MCL 440.9102(1) (gg). Here, JJ gave and SBS took a security interest in the equipment. Security interests should be perfected to provide notice to others and to preserve rights against other creditors who may also have an interest in the good. MCL 440.9308. Perfection typically occurs via the filing of a financing statement with the appropriate governmental agency. MCL 440.9310; MCL 440.9501(1). Here, SBS did not file a financing statement. Therefore, the PMSI was not perfected. (If the credit card machine were a consumer good rather than equipment, then no filing of a financing statement would be necessary because a PMSI in consumer goods perfects automatically upon attachment. MCL 440.9309 [a]).

With respect to the second question, BF did obtain a security interest in the T-shirts JJ purchased with the loan money. The UCC allows security interests to be created in after acquired property, i.e., collateral the debtor does not own at the time of the agreement. MCL 440.9204. And, with inventory, such as the T-shirts, contractual language need not be explicit in describing the goods as inventory is expected to turn over.

With respect to the third question, a lien creditor is a creditor who acquires a lien through the judicial process, such as via attachment or levy. A judgment lien creditor (JLC) obtains priority if its lien is established before a security interest is perfected. On the other hand, a JLC is subordinate to a secured creditor who perfects its security interest before the lien is acquired. MCL 440.9317 (1) (b) (i). This reflects the general "first-in-time" rule. MCL 440.9322. Applying these principles, JLC has the superior claim to the credit card machine because SBS never perfected its security interest. And, BF has the superior claim to the T-shirt inventory because it did perfect its security interest by filing a financing statement prior to the lien.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Legal principles of property distribution in divorce cases shed light on the parties' positions and ultimately call for both acceptance and rejection of those positions, but only one in part.

When called on to divide property in a divorce case, the court's first task is to determine what property is marital property and what is separate property. *Reeves v Reeves,* 226 Mich App 490, 493-494 (1997), citing *Byington v Byington,* 224 Mich App 103, 114, n. 4 (1997). Marital property is property that came "to either party by reason of the marriage..." (MCL 552.19) and is subject to division equitably but not necessarily evenly. *Byington,* at 114-115. Separate property typically is maintained by the owner and not subject to distribution, unless "invasion" of the separate assets is countenanced by statutory exceptions in MCL 552.23 and MCL 552.401, on a showing of need or contribution to the value of the separate asset. The marital estate is to be divided equitably under a list of factors delineated in *Sparks v Sparks,* 440 Mich 141, 159-160 (1992).

The parties' positions have validity only to the extent that they can be squared with the principles enunciated above. As stated, Michigan law requires initially a determination of what is marital and what is separate property, an equitable distribution of marital property, and a determination as to whether separate property should be invaded due to need or contribution. There are four items of property in question: the business and its marital appreciation, the home and its appreciation.

The business had both separate and marital property components. Because the business came to Thomas prior to the marriage, it came to neither spouse by reason of the marriage. *Byington,* at 114-115. *Reeves,* at 495-496. Therefore, the first $2.5 million of the business's value is separate, not marital property. The $1.5 million appreciation during the marriage is a different story because the appreciation occurred during the marriage. The appreciation would be characterized as marital. Even if not so characterized, appreciation in a separate asset

may be equitably distributed to the non-owning spouse on a showing of need or contribution.

Applying these principles to the parties' positions yields the conclusion the positions are untenable. Connie's position that she is entitled to half of the pre-marital portion of the business cannot be sustained. She has not established that she is in need of an award of Thomas's pre-marital property, MCL 552.23 (need), or that she contributed to the business, MCL 552.401 (contribution). Her proffered reason ("because he cheated on me and that is all that matters") fits into neither category.

Thomas's claim that he gets "every dollar" of the business, i.e. that Connie gets none of the increased value because "he built that business," misses the mark as well. Pursuant to *Reeves,* the appreciation of a separate asset during the course of the marriage makes that appreciation marital, *Reeves,* at 495, unless that appreciation is passive, e.g. shares in a publicly traded stock. Even if the appreciation could be classified as separate property, Connie creating a home, raising and taking care of the children, and otherwise being supportive so as to allow Thomas to increase the business's value, establishes her contribution to the increased value. MCL 552.401, *Reeves,* at 495, citing *Hanaway v Hanaway,* 208 Mich App 278, 294 (1995).

The claims regarding the marital home are easier to decide. Every bit of the parties' residence -- shared and lived in together -- is a marital asset. It was purchased during the marriage, therefore coming to the parties by reason of the marriage and within its duration. See *Reeves,* at 495-496; *Bone v Bone,* 148 Mich App 834 (1986). Thomas's claim that "he paid for it" and should retain its value entirely lacks merit because the earnings or wages of the parties during the marriage are marital assets not separate property. See *Skelly v Skelly,* 286 Mich App 578 (2009); *Darwish v Darwish,* 100 Mich App 758 (1980). Thomas's argument cannot be squared with Michigan law.

Finally, as to the affairs, *Sparks* makes fault in the breakdown a factor applicable to property distribution. It is, however, only one of the factors. Connie seems to argue that she should get the entire value of the house due to fault. However, under Michigan law, fault is not to be inequitably weighted. Fault is an element in search of an equitable

distribution, not punishment for an inequitable distribution. See *Sparks, supra; McDougal v McDougal,* 451 Mich 80 (1996); *Vance v Vance,* 159 Mich App 381 (1987); and *Berger v Berger,* 277 Mich App 700 (2008), all speaking uniformly on limiting fault to its proper measure in property distribution. Connie overstates, improperly, the role of fault in this matter.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

Plaintiff's claim is neglige nce. To prove negligence, plaintiff must present evidence of: (1) a duty owed from defendant to the plaintiff, (2) breach of that duty, (3) proximate cause, and (4) damages. *Case v Consumers Power Co,* 463 Mich 1, 6 (2000).

The first element plaintiff must establish is the existence of a duty that defendant owed to her. "`Duty' is defined as the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury." *Lelito v Monroe,* 273 Mich App 416, 419 (2006). Here, the facts state that a Michigan statute provides that a boat owner can be liable for negligence, and that every boat owner has to act with due care to others using the waters. Thus, the statute requires that defendant act with "due regard" for the safety of others, while a duty in negligence would require that defendant act as a reasonably prudent person under the circumstances. *Bonin v Gralewicz,* 378 Mich 521, 526 (1966).

But another doctrine was raised by defendant, which is what duty defendant had in light of the impending collision **with** the other boat. Defendant's argument raises the issue of sudden emergency. In *Socony Vacuum Oil Co v Marvin,* 313 Mich **528, 546** (1946), the Court described this common law doctrine as follows:

"One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence."

The sudden-emergency doctrine is not an affirmative defense, but an extension of the reasonably prudent person rule, and "the test to be applied is what that hypothetical, reasonably prudent person would have done under all the circumstances of the accident, whatever they were." *Baker v* Alt, 374 Mich 492, 496 (1965); *White v Taylor Distributing Co,* 275 Mich App 615, 622 (2007) aff'd 482 Mich 136 (2008). "To

come within the purview of this rule the circumstances attending the accident must present a situation that is 'unusual or unsuspected.'" *Vander* Laan *v Miedema,* 385 Mich 226, 232 (1971). To be "unusual," the circumstances must vary "from the everyday traffic routine confronting the motorist." *Id.* An "unsuspected" hazard is one that "connotes a potential peril within the everyday movement of traffic." *Id.* However, "it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected." *Id.* A sudden loss of consciousness can constitute a sudden emergency. *White v Taylor Distributing Co,* 482 Mich 136, 140 n 4 (2008), citing *Soule v Grimshaw,* 266 Mich 117, 119 (1934).

In light of this law, the best argument is that defendant was confronted by a sudden emergency. The facts show that because Smith suffered a heart attack, he immediately lost consciousness and lost control of his boat. Being faced with a boat that quickly turned toward him, and at a high rate of speed, presented defendant with an unsuspected and unexpected peril. It was not of defendant's making. Thus, the sudden emergency doctrine applies in the context of defendant's liability, i.e., breach of duty, toward plaintiff. See *Baker* 374 Mich at 496 ("In actuality, the doctrine of 'sudden emergency' is nothing but a logical extension of the 'reasonably prudent person' rule.").

The next question is whether, under that doctrine, defendant can be liable for negligence under these facts. Defendant acted as a reasonably prudent person would have under the circumstances, as he turned his boat away from what was soon to be a collision between two motor boats. He had no time to reflect on the best course of action. Instead, he had to make a split-second decision as Smith's boat unexpectedly surged right at his boat. Turning away from that boat was a reasonable decision under the circumstances, even if he did not know plaintiff was in close proximity to his boat. Because "a person confronted by a sudden emergency is not guilty of negligence if he or she fails to adopt what subsequently and upon reflection may appear to have been a better method...." *White,* 275 Mich App at 623, the best answer is defendant cannot be held liable.

Although this analysis ends the possibility of defendant's liability, an applicant may still discuss for the sake of thoroughness the remaining two elements. As to proximate cause,

if defendant had arguably breached his duty to plaintiff, his actions were clearly a proximate cause of plaintiff's injuries. Defendant purposefully steered his boat in plaintiff's direction, resulting in his boat hitting her. Causation is clear, but a reasonable argument could be made that Smith having a heart attack while driving the boat could have been foreseeable, and an intervening cause of the accident and relieving defendant of any liability. See *Heitch v Hampton,* 167 Mich App 629, 632 (1988). As to the last element, damages, as the facts state that as a result of the accident, plaintiff suffered severe physical injury.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Whether Davy could properly file a shareholder derivative suit.

A "derivative proceeding" is "a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a(a). "Any recovery runs in favor of the corporation, for the shareholders do not sue in their own right. They derive only an incidental benefit. If the defendants account, it must be to the corporation and not to the shareholders." *Futernick v Statler Builders, Inc,* 365 Mich 378, 386 (1961), quoting *Dean v Kellogg,* 294 Mich 200, 207 (1940) (citations omitted).

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 Davy was a "long time" shareholder when he filed suit in 2016. Therefore, factor (1) appears to be satisfied.

Regarding factor (2), whether Davy "fairly and adequately represents the interests of the corporation in enforcing the right of the corporation" depends on the facts of the case. Davy must have the capacity to vigorously and conscientiously prosecute a derivative proceeding free from personal interests, which are antagonistic to the interests of similarly situated shareholders or the corporation. Other factors considered include the remedy sought; 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 from other shareholders. 13 Fletcher Cyclopedia of the Law of Private Corporations § 5981.41. Here, there is no indication that Davy's interests are antagonistic to the interests of shareholders or to the corporation. Furthermore, there is no indication that Davy is not the true party in interest, that he is unfamiliar with the litigation,

that there is any pending litigation between Davy and AWC, or that Davy harbors any vindictiveness toward AWC. All in all, factor (2) appears to be satisfied.

Regarding factor (3), nothing in the facts indicates that Davy ever ceased to be a shareholder or would cease to be a shareholder prior to the time of judgment. Thus, factor (3) appears to be satisfied.

In addition, MCL 450.1493a imposes procedural requirements on a shareholder's derivative action. It provides that a derivative action may not be initiated until: (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." *Id.* at (b). Here, the facts clearly indicate that Davy made a written demand upon the corporation to require Bernie to reimburse the corporation for the costs of his "frivolous freebie vacations." The facts also indicate that more than 90 days had passed before Davy filed the derivative lawsuit. Therefore, the procedural requirements for a derivative suit have been met.

2. **Whether the court may order AMC to pay Davy's expenses**

Under the "American rule," attorney fees generally are *not recoverable* from the losing party absent an exception set forth in a statute or court rule expressly authorizing such an award. *Pirgu v United Services Auto Assin,* 499 Mich 269, 274-275 (2016); *Haliw v City of Sterling Heights,* 471 Mich 700, 707 (2005).

However, MCL 450.1497 provides for such an exception. Section 1497(b) provides that, at the conclusion of the derivative proceeding, the court may order "[t]he corporation to pay the plaintiff's reasonable expenses, including reasonable attorney fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation." Thus assuming Davy prevails, and assuming the court finds that Davy's derivative suit "resulted in a substantial benefit to the corporation," the court has the

discretion to award reasonable expenses, including reasonable attorney fees.

Section 1497(b) goes on to require that Davy "account to the corporation for any proceeds received in excess of expenses awarded by the court, except that this shall not apply to a judgment rendered for the benefit of an injured shareholder only and limited to a recovery of the loss or damage sustained by him or her." Thus, assuming Bernie is required to reimburse the corporation for the costs of his "frivolous freebie vacations," the amount that is awarded in excess of Davy's reasonable expenses and attorney's fees must be returned to AWC.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

A. DIT's Motion

The circuit court should conclude that it has limited personal jurisdiction over DIT and thus deny DIT's motion for summary disposition.

"A plaintiff bears the burden of establishing jurisdiction over a defendant; however, the plaintiff need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition." *Oberlies v Searchmont Resort, Inc,* 246 Mich App 424, 427 (2001).

"Before a court may obligate a party to comply with its orders, the court must have in personam jurisdiction over the party." *Id.* "Jurisdiction over the person may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction." *Electrolines, Inc v Prudential Assurance Co,* Ltd, 260 Mich App 144, 166 (2003). "The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum state." *Id.* A Michigan court can exercise general personal jurisdiction over a corporation if any of the following is true: (1) the corporation is incorporated under Michigan law, (2) the corporation consents to the court's exercise of jurisdiction over it (but such consent is "subject to the limitations provided in" MCL 600.745), or (3) the corporation "carr[ies] on . . . a continuous and systematic part of its general business within" Michigan. MCL 600.711 ("Corporations; general personal jurisdiction"); *Electrolines,* 260 Mich App at 166-167.

Here, DIT is neither a Michigan corporation nor do the facts bear any indication that it has consented to the circuit court's exercise of jurisdiction over it. Thus, the pertinent inquiry is whether DIT is subject to general personal jurisdiction because of "continuous and systematic" contacts with Michigan.

For a state court to exercise general personal jurisdiction over a foreign corporation on this basis, the corporation must have "affiliations with the State" that "are so continuous and systematic as to render [the foreign corporation] essentially at home in the forum State." *Daimler AG v Bauman,* ___ US ___; 134 S Ct 746, 761; 187 L Ed 2d 624 (2014) (quotation marks and citations omitted). This inquiry "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n 20. It will be an "exceptional case" in which "a corporation's operations in a forum other than its formal place of incorporation or principal place of business might] be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761 n 19.

Here, given the fairly limited nature of DIT's contacts with Michigan, the trial court will most likely decide that it cannot exercise general personal jurisdiction over DIT. The facts demonstrate that DIT (1) has distributed marketing materials "throughout Michigan," (2) awards an average of 900 degrees to Michigan residents each year (i.e., 9% of its annual average of 10,000 degrees), and (3) hosted a job fair in Detroit in December 2015. The court will most likely conclude that these contacts with Michigan are not so continuous and systematic as to render DIT essentially at home in Michigan.

But, even if it decides that it cannot exercise *general* personal jurisdiction over DIT, the circuit court should still conclude that it can exercise *limited* personal jurisdiction. "When a defendant's contacts with the forum state are insufficient to confer general jurisdiction, jurisdiction may be based on the defendant's specific acts or contacts with the forum state." *Electrolines,* 260 Mich App at 166.

When examining whether a Michigan court may exercise limited personal jurisdiction over a defendant, this Court employs a two-step analysis. First, this Court ascertains whether jurisdiction is authorized by Michigan's long-arm statute. Second, this Court determines if the exercise of jurisdiction is consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. Both prongs of this analysis must be satisfied for a Michigan court to properly exercise limited personal jurisdiction over a nonresident.

Long-arm statutes establish the nature, character, and types of contacts that must exist for purposes of exercising personal jurisdiction. Due process, on the other hand, restricts permissible long-arm jurisdiction by defining the quality of contacts necessary to justify personal jurisdiction under the constitution. *[Yoost v Caspari,* 295 Mich App 209, 222-223 (2012).]

The long-arm statute applicable to corporations is MCL 600.715, which provides as follows:

"The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

"1. The transaction of any business within the state.

"2. The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

"3. The ownership, use, or possession of any real or tangible personal property situated within the state.

"4. Contracting to insure any person, property, or risk located within this state at the time of contracting.

"5. Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

Here, the long-arm statute is satisfied in several respects. Pierrot's claims against DIT arise out of (1) DIT's transaction of business within the state (i.e., marketing, the job fair, and sale of a diploma), (2) the doing or causing to be done of an act and consequences that resulted in an action for tort, and (3) the entering into of a contract to provide Pierrot with a diploma to be furnished by DIT in Michigan.

The crucial inquiry for purposes of limited personal jurisdiction is whether the exercise of personal jurisdiction over DIT is consistent with the demands of due process. Because

the due process analysis focuses on broad, somewhat malleable concepts of "reasonableness" and "fairness," it is fact-specific and "[e]ach case . . . must turn on its own merits." *Jeffrey v Rapid American Corp,* 448 Mich 178, 186 (1995).

The "constitutional touchstone" of the due process inquiry "is whether the defendant purposely established the minimum contacts with the forum state necessary to make the exercise of jurisdiction over the defendant fair and reasonable." *City of Fraser v Almeda Univ,* 314 Mich App 79, 88 (2016). A three-prong analysis is employed to determine whether sufficient minimum contacts exist:

"First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. *[Jeffrey,* 448 Mich at 186.]"

"[P]urposeful availment is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities." *Khalaf v Bankers & Shippers Ins Co,* 404 Mich 134, 153-154 (1978).

"[F]oreseeable effects alone are not purposeful availment." *Id.* at 155. "[W]hen a party reaches out beyond one state and creates continuing relationships and obligations with citizens of another state, the party has availed itself of the privilege of conducting business there[.]" *City of Fraser,* 314 Mich App at 89.

"[I]t is the relationship of the defendant, the forum, and the litigation that is significant." *Jeffrey,* 448 Mich at 187. In other words, "[t]he defendant's own conduct and connection with the forum must be examined in order to determine whether the defendant should reasonably anticipate being haled into court there." *Id.*

Even after "the threshold requirement of minimum contacts is satisfied, a court must still consider whether the exercise of personal jurisdiction comports with fair play and substantial justice." *Id.* at 188-189. Due consideration should be paid, when appropriate under the circumstances of the individual case, to:

"the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. These factors may sometime serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts. To defeat jurisdiction, a defendant who has purposefully directed its activities at forum residents must present a compelling case that the presence of some other considerations render jurisdiction unreasonable. *[Id.* at 188-189.1"

Applying these principles to the facts presented, the most likely outcome -- albeit not the only one -- is that the trial court will decide that its exercise of limited personal jurisdiction over DIT is consistent with the constraints of due process.

First, the trial court will likely conclude that DIT has purposefully availed itself of the privilege of conducting activities in Michigan. DIT deliberately took steps to market its degree programs in Michigan, held a job fair in Detroit, and sold a significant amount of its degrees to Michigan residents. In doing so, it reached out beyond North Dakota and created continuing relationships and obligations with citizens of Michigan. See *City of Fraser,* 314 Mich App at 89 ("By accepting applications and payments from plaintiff's employees through its website, even after learning that they lived in Michigan -- and subsequently continuing to transact business with those employees in Michigan by awarding them degrees, mailing diplomas to Michigan addresses, and offering additional alumni products and services -- defendant purposefully availed itself of the privilege of conducting activities in Michigan").

Second, and as noted under the long-arm analysis, the trial court should conclude that Pierrot's claims arise out of DIT's activities in Michigan.

Finally, the trial court will also determine that DIT's activities were substantially connected with Michigan to make the exercise of limited personal jurisdiction over DIT both reasonable and consistent with notions of fair play and substantial justice. There is nothing in the facts clearly implicating either the interstate judicial system's interest in obtaining the most efficient resolution of controversies or the shared interest of the several states in furthering fundamental substantive social policies. Similarly, the facts provide neither evidence nor even an allegation that adjudication in Michigan poses a substantial burden to DIT. Contrastingly, Michigan has a clear interest in adjudicating the dispute, and plaintiff certainly has an interest in such adjudication. Finally, the facts provide no basis to conclude that DIT has presented a compelling case that the presence of some other considerations render jurisdiction unreasonable.

In sum, the circuit court should decide that its exercise of personal jurisdiction over DIT is warranted and thus deny DIT's motion for summary disposition.

B. Dirk's Motion

Because Dirk filed a general appearance and failed to raise the personal jurisdiction defense in his first responsive pleading, the circuit court should conclude that it has general personal jurisdiction over Dirk and that he has waived any argument to the contrary.

A Michigan court can exercise general personal jurisdiction over persons present in Michigan at the time process is served on them, MCL 600.701, and "[a] general appearance waives all questions of the service of process, and is equivalent to a personal service," *Nelson v McCormick,* 334 Mich 387, 390 (1952). In other words, "[t]he entering of a general appearance by the principal defendant gives the court jurisdiction *in personam."* *Id.* at 389. Moreover, "[j]urisdictional irregularities are waived by a general appearance." *Ovavez v Patrons' Mutual Fire Ins Co,* 233 Mich 305, 308 (1925). See also *Fisher v Fisher,* 224 Mich 147, 149-150 (1923) ("There can be no question that one who

enters a general appearance or files an answer or plea in a pending cause thereby submits himself to the jurisdiction of the court[.]"); *Teran v Rittley,* 313 Mich App 197, 208 (2015) (holding that by "voluntarily enter[ing] his appearance in th[e] action," a defendant had submitted to the lower court's jurisdiction over his person, and further noting that he had "waived any challenge to the court's personal jurisdiction over him when he failed to raise it in his first responsive pleading.").

Here, Dirk filed a general appearance and an answer denying the allegations of Pierrot's complaint, and Dirk failed to assert lack of personal jurisdiction as a defense in his initial responsive pleading. Thus, Dirk has submitted to the court's exercise of jurisdiction over him, and he has waived any argument that the court's exercise of jurisdiction over him is improper.