JULY 2021 MICHIGAN BAR EXAMINATION
EXAMINER'S ANALYSES

EXAMINER'S ANALYSIS OF QUESTION NO. 1

Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq.

Latoya's Estate:

Because Latoya passed away without a will, she is deemed to have died intestate, and the statutory rules of intestate succession apply to the distribution of her estate. MCL 700.2101(1).

Where a decedent dies without a surviving spouse, as is the case here, the decedent's estate passes first to the decedent's descendants by representation. MCL 700.2103(a). Further, MCL 700.2106(1) provides:

> If, under section 2103(a), a decedent's intestate estate or a part of the estate passes by representation to the decedent's descendants, the estate or part of the estate is divided into as many equal shares as the total of the surviving descendants in the generation nearest to the decedent that contains 1 or more surviving descendants and the deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated 1 share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and

> their surviving descendants had predeceased the decedent.

In the present case, this would generally mean that Latoya's estate would pass equally to her two children, Scott and Dawn. However, "[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent's heirs are determined accordingly." MCL 700.2104. Since Scott passed away 4 days after his mother, he will be considered predeceased, and pursuant to MCL 700.2106(1), his share will pass equally to his descendants.

The statutory definition of descendant contemplates "the relationship of parent and child," MCL 700.1103(k). The statutory definition of "child" specifically excludes "a stepchild" and "a foster child." MCL 700.1103(f). However, as to an adopted child, generally the adopted individual is the child of his or her adoptive parent or parents. MCL 700.2114(2). As a result, only Ruth and Rose would be statutorily considered Scott's descendants (as his biological and adopted daughters) and permitted to take a share of Latoya's estate. And although Scott considered Patty his child, as his step-daughter, she would not be statutorily considered Scott's child. Therefore, she cannot take a share of Latoya's estate.

Thus, Latoya's estate will be distrusted as follows: $500,000 to Dawn; $250,000 to Ruth; and $250,000 to Rose.

Scott's Estate:

The analysis of how Scott's estate would be distributed depends on whether his valid will was ever revoked or changed. Revocation of a will or part of a will may be accomplished by either one of the following two ways:

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

In the instant case, neither does Scott’s handwritten notation in the margin of his valid will nor the fact that the will was crumbled due to his inability to properly organize his documents constitute a revocation of the will – as neither will 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 Scott’s displeasure with Paige’s behavior as it relates to two of his daughters, Rose and Ruth, and at most reflects mere consideration about changing the will in the future. Thus, the notation would have no revocatory effect on the will.

Further, the writing in the margin does not satisfy the requirements of MCL 700.2502 as either a traditional will or as a holographic will. The statement is missing the witnesses required for a traditional will and is missing the date that would be required for a holographic will. Moreover, it would be difficult to prove by "clear and convincing evidence" that Scott intended the writing to constitute a revocation of the valid will since his words appeared to be mere considerations about changing the will and there are no other facts to support such a showing.

Because Scott had a valid will that was neither revoked nor changed, his entire estate would be distributed to his wife, Paige, according to his will. As such, Paige will receive $50,000.

EXAMINER'S ANALYSIS OF QUESTION NO. 2

A. The Facebook Evidence is Non-Hearsay Because it is a Party Admission or Not Offered for its Truth

Dawson's MRE 801 objection should fail because the video and gang photo are not offered for the truth of the matter asserted as stated under MRE 801(c), and Dawson's comment in response to the video is a party admission pursuant to MRE 801(d)(2). As such, none is hearsay. MRE 801(d)(2) provides:

> A statement is not hearsay if -
>
> ***
>
> (2) *Admissions by party-opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) is a statement of which the party has manifested an adoption or belief in its truth, ...

Given that Dawson is the commentor responding to the video, the comment is his statement, and as such, is not hearsay. On this basis, the court should overrule Dawson's MRE 801 objection.

In addition, MRE 801(c) defines "'Hearsay' [as] a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See, e.g., *People v Flaherty,* 165 Mich App 113, 122 (1987) (statement offered to show effect on the recipient of the statement is not hearsay) overruled in part on other grounds by *People v Houthoofd*, 487 Mich 568 (2010).

Valerie's video is not offered to prove Dawson was a wimp or a coward, and a group photo that does not include any statement or even a gesture is not a statement.

B. The Court Should Deny Dawson's MRE 403 Objection to the Facebook Evidence Given Its High Probative Value Vis-à-vis Its Lesser Potential for Undue Prejudice or Juror Confusion

Pursuant to MRE 403, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Valerie's video and Dawson's comment in response to it are compelling evidence of Dawson's motive on the night in question. Evidence that is probative of a criminal defendant's motive on the night the actual violent event occurred is both relevant and highly probative. See *People v Goddard*, 429 Mich 505, 520 (1988). The comment shows Dawson's intense reaction to being disrespected and intent to engage—he is "on [his] way" to Valerie's to be sure she never again disrespects him or any of his fellow gang members. As such, the video and comment are highly probative of Dawson's motive and substantially outweigh the danger of unfair prejudice or juror confusion. *Goddard*, 429 Mich at 520-521. Nevertheless, the court has discretion to admit or exclude the videos under MRE 403, and credit will be given for a thorough analysis that reaches the opposite conclusion as well.

C. The Gang Specialist's Testimony Provides Sufficient MRE 901(a) Authentication Because It Supports a Finding That The Evidence Is What Its Proponent Claims It Is

MRE 901(a) provides:

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

The Michigan Supreme Court explained in *People v Berkey*, 437 Mich 40, 50-52 (1991) that "authenticity of an exhibit . . . is to be determined in light of MRE 901," rather than under common law evidentiary tests that pre-dated MRE 901. See also *People v McDade*, 301 Mich App 343, 353 (2013), quoting *Berkey* (Under 901, "[i]t is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt."). Authentication, however, does not equate with admissibility, and it may well be that a court may find an authenticated exhibit inadmissible under other rules. *Berkey*, 437 Mich at 53.

The law enforcement gang specialist will testify he was well acquainted with Dawson, Valerie, and their respective gangs, and that he regularly monitored and even verified the authenticity of some of their Facebook postings. As such, he can identify Dawson

and Valerie visually and by their patterns of social media usage and style.

In addition, Dawson does not deny he made the comment or viewed the video – he just claims a lack of memory. Even so, his denial or lack of memory would not defeat authentication. Rather, at most, it would create a question for the factfinder. "[C]onflicting evidence on genuineness goes to weight, not admissibility, so long as some reasonable person could believe the item is what it is claimed to be." *People v Smith*, ___ Mich App ___ (2021 WL 641725, Feb 18, 2021).

EXAMINER'S ANALYSIS OF QUESTION NO. 3

A person who signs a contract on behalf of a company that is not yet in existence is generally personally liable on the contract. *Campbell v Rukamp,* 260 Mich 43, 46 (1932). Despite this, the company (rather than the individual) can be held liable if a court determines that a de facto corporation existed at the time of the contract or the court orders that corporation by estoppel prevents the opposing party from arguing against the existence of a corporation.

1. The doctrine of defacto corporation

The de facto corporation doctrine provides that a corporation that fails to meet the technical requirements of corporate formation may attain the legal status of a de facto corporation if certain requirements are met. There are four elements needed for a de facto corporation: "When incorporators have [1.] proceeded in good faith, [2.] under a valid statute, [3.] for an authorized purpose, and [4.] have executed and acknowledged articles of association pursuant to that purpose, a corporation *de facto* instantly comes into being. A *de facto* corporation is an actual corporation. As to all the world, except the State, it enjoys the status and powers of a *de jure* corporation." *Tisch Auto Supply Co v Nelson*, 222 Mich 196, 200 (1923)(citations omitted).

Here, all of the elements are met. David Defendant - the incorporator - acted in good faith in forming Excellent Electrical, and there is no indication in the facts that the company was set up for any sort of fraudulent purpose. Rather, there was a simple misunderstanding regarding the date the paperwork was to be filed. There is no question that elements (2), (3), and (4) were also met. The Business Corporation Act is a valid statute, and David Defendant formed Excellent Electrical for the purpose of starting a new electrical contractor company, which is an authorized purpose. Third, David Defendant's attorney executed the appropriate articles pursuant to Excellent Electrical's purpose of being an electrical contractor.

Because all of the elements have been met, the de facto corporation doctrine applies to Excellent Electrical. Because a de facto corporation is an actual corporation, Excellent Electrical, and not David Defendant, is liable for the breach of the contract with Peter Plaintiff.

2. Corporation by estoppel

Corporation by estoppel, an equitable remedy, prevents a party who dealt with an association as though it were a legitimate corporation from denying the corporation's existence. "The purpose of the doctrine is so 'that one who contracts with an association as a corporation is estopped to deny its corporate existence ... so as to prevent one from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners.'" *Duray Development, LLC v Perrin*, 288 Mich App 143, 152-153 (2010)(citations omitted). Thus, where an entity "assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence." *Estey Mfg Co v Runnels*, 55 Mich 130, 133 (1884). See also *Stott v Stott Realty Co*, 288 Mich 35 (1939).

Here, the facts support application of corporation by estoppel, preventing Peter Plaintiff from denying the corporate existence of Excellent Electrical. David Defendant signed the contract as the president of Excellent Electrical and held himself out to Peter Plaintiff as the owner and person in charge of Excellent Electrical. Once signed, all parties proceeded under the contract as if Excellent Electrical were the electrical contractor for Peter Plaintiff's building project, and Peter Plaintiff paid the monthly invoices of Excellent Electrical "to the order of Excellent Electrical." Indeed, Peter Plaintiff continued to assume Excellent Electrical was a valid corporation even after the lawsuit was filed, and only learned of the filing discrepancy after litigation began and discovery was completed.

3. Whether David Defendant can be held personally liable for Peter Plaintiff's damages

Because both the doctrine of de facto corporation and the doctrine of corporation by estoppel apply here, David Defendant cannot be held personally liable for the contract damages sustained by Peter Plaintiff. Rather, Peter Plaintiff must collect from Excellent Electrical.

EXAMINER'S ANALYSIS OF QUESTION NO. 4

1. Sally's fault will have no effect on her workers' compensation claim. Sally's actions were not "intentional and willful misconduct," which would bar her claim. MCL 418.305. Negligence by an employee, even "a high degree of negligence," is not a viable defense to a workers' compensation claim. *Day v Gold Star,* 307 Mich 383, 392; 12 NWd5 (1943); see also *Daniel v Dep't of Corrections*, 468 Mich 34, 45; 658 NW2d 144 (2003). Michigan's Worker's Disability Compensation Act (Act) is a no-fault system. As the Supreme Court has explained:

> In enacting Michigan's Worker's Disability Compensation Act, the Legislature created a system that substitutes statutory compensation for common-law negligence liability and its related defenses. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 274; 330 NW2d 397 (1982). Under this system, employers provide compensation to employees for injuries suffered in the course of employment, regardless of who is at fault. MCL 418.301; MSA 17.237 (301). In return for this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer. MCL 418.131; MSA 17.237 (131). *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686-87 (1999)

Therefore, the store's first reason for rejecting Sally's claim has no merit because Sally's fault (or any fault of the store) has no effect on Sally's workers' compensation claim.

2. Second, the fact that Sally brought to the workplace preexisting right knee problems does not, in and of itself, defeat her claim. Employers take employees as they are. See, *Zaremba v Chrysler Corp*, 377 Mich 226, 230-231 (1966); *Gibbs v Keebler Co*, 56 Mich App 690, 694 (1974). While Sally's fall was work-related (arose out of and in the course of her employment), the key legal inquiry is whether her current knee problem constitutes a compensable "injury" as defined by the Act. The relevant provision provides:

> An employee, who receives a personal injury arising out of and in the course of employment by an employer subject to this act at the time of injury, shall be paid compensation as provided in this act. *A personal injury under this act is compensable if work causes,*

> *contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury.* [MCL 418.301(1) (codifying rules from *Rakestraw* and *Fahr*, both *infra*) (emphasis added).]

The Supreme Court in *Rakestraw v Gen Dynamics Land Systems* 469 Mich 220, 231 (2003) explained:

> The burden rests on the claimant to differentiate between the preexisting condition, which is *not* compensable*,* and the work-related injury, which *is* compensable. Where evidence of a medically distinguishable injury is offered, the differentiation is easily made and causation is established. . . Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition...[emphasis in original.]

In *Fahr v General Motors Corp*, 478 Mich 922 (2007), the Court elaborated:

> *Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his work has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing worsening of symptoms. Rather, to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed.

Therefore, it will be legally necessary to compare and contrast the medical condition of Sally’s knee after the fall with the condition after the soccer injury. If the post-fall pathology is medically distinguishable from the pathology created by the soccer injury, then Sally has suffered a compensable injury. If the post-fall pathology is not medically distinguishable from the pathology created by the soccer injury, then Sally has not suffered a compensable injury. An increase in Sally’s painful symptoms, standing alone, does not suffice to prove an injury covered by the Act.

EXAMINER'S ANALYSIS OF QUESTION NO. 5

1. Belinda's argument that the written prenuptial agreement should not be enforced because she did not have counsel has no merit. Prenuptial agreements are contracts and subject to rules concerning contracts. Having counsel is not a requirement for enforcement. Absent a more particularized argument about a lack of fairness – which Belinda does not make – the prenuptial agreement would not be void due to the lack of counsel. *Reed v Reed*, 265 Mich App 131, 149 (2005). Moreover, while it was once held under Michigan case law that prenuptial agreements were unenforceable if entered into in contemplation of divorce, see for example *Scherba v Scherba*, 340 Mich 228, 231 (1954), since the Court of Appeals' decision in *Rinvelt v Rinvelt*, 190 Mich App 372 (1991), no such prohibition exists under Michigan law. Accord, *Booth v Booth,* 194 Mich App 284, 288 (1992); *Reed, supra* at 142.

In sum, neither of Belinda's arguments have merit and must be rejected.

2. Belinda's request for spousal support is not precluded by enforcement of the prenuptial agreement. This is due to a couple reasons. First, there is no specific reference to spousal support in the agreement. Second, the provisions in Article Three focus on pre-owned property. Moreover, the provision that states "(A)ny other claims by a party arising by virtue of the marriage will be determined by Michigan law" can easily be read to indicate Michigan law – not the prenuptial agreement – would govern Belinda's spousal support claim.

Evaluating that claim through the prism of Michigan law dictates consideration of the various alimony factors. Case law delineates these factors in *Loutts v Loutts*, 298 Mich 21, 31 (2012). The fact pattern recited above produces evaluation of these pertinent factors:

1. <u>The past relations and conduct of the parties</u>
The facts as presented do not touch on past conduct of the parties.

2. <u>The length of the marriage</u>
The length of the marriage was five years. Because the length of the marriage informs the decision as to whether spousal dependency has emerged, five years would only moderately be involved.

3. The abilities of the parties to work
Billy and Belinda have excellent abilities to work.

4. The source and amount of property awarded to the parties
The parties maintained their separate property and were awarded seemingly equal shares in the marital estate. Clearly, Billy wound up with far more in total assets.

5. The parties' ages
Billy is now approximately 45 and Belinda 33. The 12 year age difference would likely allow Belinda a longer work career.

6. The abilities of the parties to pay alimony
Billy has a significant ability to pay alimony. He makes over twice what Belinda does and has nearly two million dollars in banked assets, plus a paid for home and vehicle.

7. The present situation of the parties
Both parties are in a good situation with solid incomes, unencumbered assets, and nice homes and vehicles.

8. The needs of the parties
Relatedly, not a lot of need emerges from these facts.

9. The parties' health
The facts report excellent health for both.

10. The prior standard of living of the parties and whether either is responsible for the support of others
When together, the parties' standard of living was equal but undoubtedly Belinda could contend that, without Billy's income, her standard of living would considerably lessen unless she receives additional income through spousal support.

11. Contributions of the parties to the joint estate
The parties contributed jointly to the marital estate and each is to receive an equal share.

12. A party's fault in causing the divorce
Fault does not seem involved.

13. The effect of cohabitation on a party's financial status
Obviously two can live much better on nearly $700,000 in income than one can on roughly $200,000 in income. Living alone after divorce is not particularly uncommon.

14. General principles of equity

General equitable principles do not seem involved.

Many of the factors, as analyzed through the stated facts, have little bearing on the spousal support request. Probably most impactful are the length of the marriage and the disparity in income. A moderate award for a short duration may be supported by these facts.

In sum, the prenuptial agreement does not prohibit an award of spousal support; refers that determination to the applicable Michigan law; and based thereon, an award of spousal support is warranted.

EXAMINER'S ANALYSIS OF QUESTION NO. 6

A. Negligence

Mark has sued John for negligence. "To establish a prima facie case of negligence, a plaintiff must prove that '(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages.' " *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660 (2012)(citation omitted).

Duty: The first question is whether John owed a duty to Mark. In that regard, "'[i]t is axiomatic that there can be no tort liability unless [a] defendant [ ] owed a duty to [a] plaintiff.' " *Id.* quoting *Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 262 (1997). "Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Hill*, 492 Mich at 660. Here, John had a duty to ensure that he did not unreasonably endanger Mark, his fishing companion, who was fishing the same pond. *Id*. at 660 – 661 (recognizing that the relationship of the parties is a significant factor in duty analysis). It was also foreseeable that, if John did not look behind him before casting, he could harm someone by hitting them with the pole and/or lure. *Id*. Hence, John had a duty of reasonable care towards Mark.

Breach: Under these facts, John breached his duty of reasonable care. He knew that Mark was in the area, he knew he was casting a lure with hooks on it, and he knew, or should have known, that casting behind himself without looking was unreasonable and could cause someone harm. Thus, John breached his duty of care to Mark.

Damage: Mark's ear was torn by the errant lure and required surgery to repair the damage. Mark is entitled to pain and suffering damages, as well as to recover the outstanding medical bills resulting from the surgery.

Proximate cause: "Proximate cause is an essential element of a negligence claim. It 'involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.'" *Ray v Swager*, 501 Mich 52, 63 (2017)(citation omitted). It was foreseeable that if John cast a lure behind his back without looking, he could harm somebody with the lure and hooks. In fact, that would be the likely consequence

of failing to look before casting when someone is walking behind a fisherman.

For these reasons, the court will find that John was negligent when he injured Mark.

B. Comparative Negligence

However, John has argued that Mark was at fault for his injuries because, like John, Mark was not paying proper attention to his surroundings when he was struck by the lure. Michigan is not a contributory negligence state, but instead applies the doctrine of comparative negligence. Comparative negligence in its pure form generally operates to reduce any damage recovery by a plaintiff "to the extent of his or her own negligent contribution to the injury." *Placek v City of Sterling Hts*, 405 Mich 638, 650 n 1, 660-661 (1979) (comparing contributory negligence with pure comparative negligence).

Comparative negligence is generally considered an affirmative defense that "encompasses aspects of both liability and damages." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79-81 (2000). "A defendant attempting to mitigate his liability through a comparative fault defense has the burden of alleging and proving that [] plaintiff's conduct was a proximate cause of" the plaintiff's damages. *Lamp v Reynolds*, 249 Mich App 591, 599 (2002). To establish the requisite causation between an alleged wrongful act and resulting damages, the actor's conduct must be shown to be both a cause in fact and a legal or proximate cause of the plaintiff's damages. *Id*. at 599-600. "The standards for determining the comparative negligence of a plaintiff are indistinguishable from the standards for determining the negligence of a defendant, and the question of a plaintiff's own negligence for failure to use due care for his own safety is a jury question...." *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 488 (1991).

Here, the court will conclude that Mark was comparatively negligent. The evidence establishes that Mark was not paying attention when he approached and walked behind John. Additionally, Mark was well aware that John was still fishing, and was having trouble casting at the time. As an experienced fisherman, he also knew that casting caused the pole and lure to swing behind the fisherman and could cause harm to those in the immediate vicinity. His failure to look before proceeding behind John was therefore negligent. Mark's damages will be reduced to an amount reflective of his negligence.

EXAMINER'S ANALYSIS OF QUESTION NO. 7

Paradise is liable for breach of contract.

Under Michigan's common law, "[the] goal in contract interpretation is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself. If the contractual language is unambiguous, courts must interpret and enforce the contract as written[.]" *Kendzierski v Macomb Cty*, 503 Mich 296, 311 (2019) (citations omitted); see also *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507 (2016) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." (citation omitted)).

The contractual provision at issue here is the clause limiting the use of Paradise lots to "strictly residential purposes only." This language must be examined "according to its plain and ordinary meaning." *In re Egbert R Smith Trust*, 480 Mich 19, 24 (2008). Such meaning may be found in dictionaries. See *Barton-Spencer v Farm Bureau Life Ins Co*, 500 Mich 32, 40 & n19 (2017) (citing dictionaries to determine "ordinary parlance"); *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 106 (2016) (citing dictionary to determine the "common meaning" of a contractual term); *Thiel v Goyings*, 504 Mich 484, 498 (2019) (citing dictionary to determine meaning of term in restrictive covenant), *reh'g denied*, 504 Mich 967 (2019). "Residential" cannot reasonably be interpreted to include "commercial" in this contract, given the dictionary definition of "residential" and the additional contractual language providing that "nothing may be erected on any lot other than a single dwelling house and necessary out-buildings (such as a garage)." See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 215 (2007).

A dog park does not constitute a "residential" use according to the plain and ordinary meaning of that word. Moreover, the fence that Paradise built on its lot does not constitute a "dwelling house" or a "necessary out-building[]." Since courts "will not create ambiguity where the terms of the contract are clear," *Kendzierski*, 503 Mich at 311 (citation omitted), and the terms of this contract are clear, the court "must enforce the contract as written," *Bank of Am*, 499 Mich at 86. Paradise is liable for breach.

The damages clause is an enforceable liquidated damages provision rather than an unenforceable penalty.

"It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement." *Curran v Williams*, 352 Mich 278, 282 (1958); see also *Barclae v Zarb*, 300 Mich App 455, 485 (2013) (same). Such a liquidated damages provision is enforceable "[w]hen it is difficult to determine the actual damages which would be suffered under such circumstances and where the determination of the actual damages for a breach are uncertain in their nature, difficult to ascertain, or impossible to estimate with certainty by any pecuniary standard[.]" *Genesee Cty Bd of Rd Comm'rs v N Am Dev Co*, 369 Mich 229, 236 (1963); see also *Solomon v Dep't of State Highways and Transp*, 131 Mich App 479, 483–484 (1984). "If the amount stipulated is reasonable with relation to the possible injury suffered" and "not unconscionable or excessive," then a court "will not disturb it." *Curran*, 352 Mich at 282–283; see also *UAW-GM Human Res Ctr v KSL Rec Corp*, 228 Mich App 486, 508 (1998). "The validity of a liquidated damages clause depends on the conditions existing when the contract was signed rather than at the time of the breach." *Barclae*, 300 Mich App at 485.

Here, it would have been difficult for Paradise and Buyer to determine the actual damages Buyer would suffer if Paradise breached the "strictly residential purposes only" clause. Such damages could depend on the nature and severity of the breach (for example, building a residential duplex or a cooperative community henhouse); the location of the lot on which the breach occurred, and its proximity to Buyer's lot; and a possible change in the value of the parcel due to circumstances other than the breach (such as a change in the value of the Paradise real estate market, which in fact occurred). Any damage to Buyer caused by a breach by Paradise was thus "impossible to estimate with certainty by any pecuniary standard." Moreover, at the time the contract was signed, the market value of Buyer's lot was $20,000; the stipulated damages of $10,000 appears to be reasonable given that a severe breach by Paradise could greatly diminish the value of Buyer's lot. Nothing in the facts suggests that such a provision was "unconscionable or excessive." Consequently, the court should find the provision to be a valid liquidated damages clause.

In addition, the court should reject Paradise's assertion that the damages clause constitutes an unlawful penalty because Buyer could mitigate her damages by selling her lot. Under the doctrine of avoidable consequences, "[w]here one person has

committed a . . . breach of contract, . . . it is incumbent upon the [wronged party] to use such means *as are reasonable under the circumstances* to avoid or minimize the damages." *Braverman v Granger*, 303 Mich App 587, 597 (2014) (emphasis added) (citation omitted); see also *Morris v Clawson Tank Co*, 459 Mich 256, 263 (1998) (same). Here, it is not reasonable to require Buyer to sell her lot in order to mitigate the damages caused by Paradise's breach, considering that she has built a home on the lot and now lives there, and especially given the parties' agreement at the time of contracting that the consequence of breach would be a $10,000 payment from Paradise to Buyer.

Buyer cannot recover mental distress damages.

"[I]t is generally held that damages for mental distress cannot be recovered in an action for breach of a contract." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 415 (1980); see also *Valentine v Gen Am Credit, Inc*, 420 Mich 256, 261–262 (1984) (stating "the general rule" that "mental distress damages for breach of contract are not recoverable"). Breach of "almost any agreement, results in some annoyance and vexation. But recovery for those consequences is generally not allowed, absent evidence that they were within the contemplation of the parties at the time the contract was made." *Kewin*, 409 Mich at 417. "Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish." *Id.* at 419.

There is no evidence that at the time of contracting, Paradise and Buyer contemplated that a breach by Paradise of the residential-only provision would cause Buyer mental distress. Indeed, there is no evidence that either party contemplated that Paradise would turn its lot into a dog park, nor is there evidence that Paradise knew Buyer was unusually afraid of dogs. Whether Buyer's mental distress is caused primarily by her fear of dogs or by frequent barking and unpleasant odors is irrelevant. Under the general rule applicable here, Buyer cannot recover mental distress damages.

EXAMINER'S ANALYSIS OF QUESTION NO. 8

The law of bailments governs this question. Under Michigan law, the elements of a "bailment" require that one person deliver personal property "to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished." *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 479–480 (1987). "Phrased another way, it is a relationship wherein a person gives to another the temporary use and possession of property other than money, the latter agreeing to return the property to the former at a later time." *Id*. at 480.

A bailee who is entrusted with the bailor's personal property is responsible for exercising a level of care over the bailed property that corresponds with the type of bailment. There are three general classifications of bailment: "(1) Those for the sole benefit of the bailor; (2) those for the sole benefit of the bailee; and (3) those for the mutual benefit of both parties. *Godfrey v City of Flint*, 284 Mich 291, 295 (1938).

A bailment for the sole benefit of the bailor (the property owner) exists when the bailor's goods are cared for by another without charge and gratuitously. A bailee who possesses property under these circumstances owes "the lowest degrees of responsibility in the triple division of neglects in bailments" and is liable only for gross negligence. *Cadwell v. Peninsular State Bank*, 195 Mich 407, 413 (1917). Thus, slight care, such as that of a person of common sense, however inattentive, would give to his or her own affairs, is required by the bailee. *Id*.

A bailment for the sole benefit of the bailee exists when the bailor's goods are loaned to the bailee for the benefit of the bailee alone. *In re George L Nadell & Co*, 294 Mich 150, 154 (1940). Under these circumstances, the bailee is required to use extraordinary care in preserving the borrowed goods from loss or damage and is liable for even slight negligence. 3 Mich Civ Jur Bailments § 6 (2021). However, since the borrower is not an insurer of the goods, negligence must be shown. *Beller v Shultz*, 44 Mich 529, 530 (1880).

Where a bailment for the mutual benefit of both parties or a bailment for hire exists, the bailee is required to exercise ordinary care (that care which a prudent man ordinarily takes of his own property) and is liable for ordinary negligence. *Godfrey*, 284 Mich at 297-298.

Lucy's Liability for the Jacket:

Lucy's will likely be liable for the missing jacket. Here, Lucy's Cleaner's took possession of Eric's jacket under a bailment relationship, as Eric left his jacket in Lucy's care without intent to transfer title. Lucy merely had possession and control of the jacket while she was to clean the jacket. Therefore, Lucy's Cleaners became the bailee of the property of Eric, who was the bailor.

The bailment here was clearly for the benefit of both parties. Eric initiated the arrangement by bringing his jacket to Lucy's Cleaner's to have it cleaned. Lucy's agreed to clean his jacket in exchange for $40. Both parties received, or intended to receive, a benefit from the bailment relationship. Because the bailment at issue is mutually beneficial, Lucy's will only be liable if she failed to recognize ordinary care and the jacket is lost or destroyed as a result of her ordinary negligence.

The fact that Lucy allowed her little cousin Amy to run around and knock down cloths that were hung up and not double check to make sure she was putting customer's items back properly (instead of picking up the items and hanging them back up in the first open spot she found) could be found to be a breach of the ordinary care that was due to Eric. Additionally, the jacket was tagged with Eric's name, so Lucy could also be found to have breached her duty by not checking the tags on the items before improperly giving the items to the wrong customer, which could be seen as something a prudent person would ordinarily do to ensure they are giving away the correct items. This will likely result in liability to Lucy's Cleaners.

Lucy's Liability for the Ring:

Lucy's will likely <u>not</u> be liable for the missing ring because Lucy's was not a legal bailee of the ring. A bailee of property does not also become a bailee for other property contained within the bailed property unless the bailor gives notice that the other property is present and the bailee accepts the bailment. See *Berry v Cadillac Storage Co*, 259 Mich 104, 108 (1932). Lucy's did not knowingly become a bailee of the ring and Eric did not intend to leave the ring in his jacket pocket to be cleaned. In fact, neither Lucy's nor Eric knew that the ring was in the jacket pocket. As a result, Lucy's was not a bailee of the ring because it had no notice that the ring was in the jacket.

EXAMINER'S ANALYSIS OF QUESTION NO. 9

Home invasion is an offense defined in three degrees. Home-invasion, first degree, is defined by statute (MCL 750.110a) and provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

People v Wilder, 485 Mich 35, 43 (2010) lists the elements of first degree home invasion:

> (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission;
>
> (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling actually commits a felony, larceny, or assault; and
>
> (3) while the defendant is entering, present in, or exiting the dwelling, either (a) the defendant is armed with a dangerous weapon, or (b) another person is lawfully present in the dwelling.

A "dwelling" is defined in the statute to include a "structure" used as a "place of abode." *Bush*, 315 Mich App at 250; MCL 750.110a(1)(a).

Second degree home invasion requires defendant break into and enter a dwelling or enter without permission and at that time had the intent to commit and committed, in this case, a larceny. MCL 750.110a.

Third degree home invasion requires defendant broke and entered or entered without permission, into a dwelling. Second, at that time defendant entered defendant intended to commit and did commit a misdemeanor. MCL 750.110a.

If applicant identifies breaking and entering MCL 710.110a or home invasion, violation of a PPO MCL 750.110a(4), (7)entering without breaking MCL 750.111 or entering without owner's permission MCL 750.115, points can be awarded.

The conclusion should be David cannot be charged with any form of home invasion when applying any of elements of home invasion. The elements of first degree applied are:

1. Breaking and entering, or entry without permission, into a dwelling requires a specific kind of entry into the house. A "breaking" does not require a physical break but does require use of some force, such as the opening of a door, raising of a window, or removal of a screen to gain access into the house. These acts are enough force to constitute a "breaking". No specific amount of force is required and any amount of force to accomplish the breaking, no matter how slight, is sufficient. *People v Wise*, 134 Mich App 82, 88 (1984). Entering a dwelling through a door or other entry that is already open without the use of some force is not a breaking.

David did not use any force to enter Pat's house. David had express permission and consent from Pat to enter the house. There is no breaking if defendant had the right to enter the house, even if defendant opened the door. *People v Bush*, 315 Mich App 237, 249 (2016); see also *People v Brownfield* (*After Remand*), 216 Mich App 429, 432 (1996) ("[B]ecause [defendant] had the right to enter the home, he did not commit a breaking and entering."); *People v Dunigan*, 299 Mich App 579, 583 (2013) ("There is no breaking if the defendant had the right to enter the building.").

2. Second, the defendant must have entered the building. It does not matter how much of David's body entered the dwelling and it does not require the entire body be inside the house. Any part of a body into the house constitutes an "entry" into the house.

David's whole body was inside the house. Therefore, David entered the house. Entry was with permission.

3. Third, that when the defendant broke and entered the building, he/she intended to commit a larceny, in this case the theft of the watch.

The facts do not indicate David intended to commit a larceny when he initially entered the house, but David certainly had it when he was inside the house.

4. Fourth, Pat was in the house when David entered. David was not armed with a dangerous weapon.

David had Pat's permission to be in Pat's house by express invitation of Pat. David did not commit any act that amounts to a "breaking and entering", or "an entry into the house without permission". The elements of the offense are not satisfied.

Pat raised the prospect that David's action of breaking and entering into the closet, an internal area of the dwelling, when he opened the closed closet door, satisfies the breaking and entering of a dwelling. David had permission to be inside Pat's house, but he did not have permission to open the closet door inside the house.

The rule of law is that breaking and entering into an internal room of a house a person is legally inside cannot serve as a basis to satisfy the legal requirement of "breaking and entering into the dwelling". *Bush*, 315 Mich App at 249. The permission granted to David to enter into the dwelling renders his presence lawful. David cannot unlawfully enter the same dwelling when he is already lawfully present inside. *Id*.

The closet door was closed and to gain entry inside it required an act of "breaking" as that term is normally defined. Michigan courts have held that a breaking of an inner portion of a dwelling while lawfully inside a dwelling does not fulfill the element of breaking and entering a dwelling for home invasion, even though the same act constitutes a breaking and entering for a school or restaurant or commercial building. See *Bush*, 315 Mich App at 249; cf. *People v Toole*, 227 Mich App 656, 658-659 (1998); *People v Clark*, 88 Mich App 88, 90-91 (1998). Pat's proposition is wrong.

CONCLUSION

While David was lawfully in Pat's house, he was not lawfully permitted to open the closet nor take any item from inside it. When David opened the closet door he satisfied the element of a breaking but that act does not satisfy the statutory requirement of home invasion of breaking and entering into a dwelling. It does not satisfy the home invasion statute. *Bush*, 315 Mich App at 249.

David must also have the specific intent to commit larceny at the time he commits the breaking and entering. See *People v Hunt*

(*After Remand*), 214 Mich App 313, 316 (1995). David did not have the specific intent to steal the watch at the time of his entry into the house but formed the specific intent to steal it while lawfully in the house.

EXAMINER'S ANALYSIS OF QUESTION NO. 10

Under Michigan law, preliminary injunctive 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).

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). A court should also consider whether a preliminary injunction will preserve the status quo. *Id.* at 376.

Applying the preliminary injunction factors, the court should grant Pamela's guardian's motion. Beginning with factors (1) (irreparable harm) and (2) (balance of harms), they both favor Pamela. Pamela's doctor has opined that her condition is already deteriorating, and that a reduction in services is likely to endanger her health. Restoring those benefits after the fact would not be an adequate legal remedy. See *Hammel v Speaker of the House of Representatives,* 297 Mich App 641, 651-652 (2012) ("'The [claimed irreparable] injury is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief.'") (citation omitted).

While D-Lux has stated a valid concern about its ability to recover any additional benefits paid if it ultimately prevails in the litigation, that financial harm is outweighed by concerns about Pamela's safety. Granting a preliminary injunction and maintaining Pamela's benefits at their current level while the parties' dispute is litigated would also serve to maintain the status quo.

As for factors (3) (likelihood of success on the merits) and (4) (public interest), they are either neutral or slightly favor Pamela. Pamela has been receiving the services at issue for over

30 years, and her treating physician, Dr. Peters, has opined that they continue to be reasonably necessary. While Dr. Dudley disagrees, his opinion is based on a single IME. Finally, the public interest supports ensuring Pamela’s safety until the litigation is resolved.

For these reasons, the court should grant a preliminary injunction.

EXAMINER'S ANALYSIS OF QUESTION NO. 11

The determination of whether a class action is an appropriate vehicle for a case is governed by MCR 3.501. MCR 3.501(A)(1)(a)-(e) sets forth the factors a court must consider in deciding whether to certify a class action:

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

To obtain class certification a plaintiff must demonstrate that all five requirements in MCR 3.501(A) are satisfied. *Hill v City of Warren*, 276 Mich App 299, 310 (2007).

A. Numerosity

In *Zine v Chrysler Corp*, 236 Mich App 261, 287-288 (1999), the court recognized that "[t]here is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large." Here, there are at a minimum 500 potential class members, and a potential 5,000, given the size of the university and the initial reaction to Jane's outreach, so this factor is met.

B. Common Issues

The second factor is whether the case presents common issues of law and fact. In *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599 (2002), the court noted that:

> The common question factor is concerned with whether there "is a common issue the resolution of which will advance the litigation." *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998). It requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are

subject only to individualized proof." *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA11, 1989).

This factor is also established, as Jane and each of the potential class members would be asserting a breach of contract claim based upon the failure to receive the education they paid for through their tuition. Although there certainly will be some disparity amongst class members regarding how the tuition was paid - by themselves, their parents paying, or use of loans - the overarching principle is that each will be asserting that consideration was paid for a certain type of education that they allege was not received. In other words, the predominant issue will be the existence of a contract and any breach, and will not be the source of the tuition payments.

C. Typicality

MCR 3.501(A)(1)(c) requires that the claims or defenses of representative parties be typical of the claims or defenses of the class. As noted above, both Jane and the proposed class members would be asserting the same legal claim based upon similar facts. Typicality is met.

D. Adequacy

MCR 3.501(A)(1)(d), the fourth class action factor, requires the trial court to scrutinize whether the representative parties will fairly and adequately assert and protect the interests of the class. Here, there is really no issue that Jane will adequately assert and protect the interests of the proposed class. She initiated the cause, sought out others who may have similar interests, and obtained counsel to handle the matter.

E. Superiority

MCR 3.501(2) sets out the standards for determining whether a class action is the superior method of litigating the matter, and provides the following factors for a court to consider:

> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
> > (ii) adjudications with respect to individual members of the class that would as a practical

> matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
> (c) whether the action will be manageable as a class action;
> (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and
> (f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

Though an applicant need not articulate all these specific factors, it is important to note under this factor that each potential class member would likely have at least $4,000 at issue, making the amount at issue large enough to justify the cost of a class action, and that very likely none of the proposed class members have individualized issues such that the class should not be certified. The case involves a single claim based on the same facts against a single defendant.

The class action should be certified.

EXAMINER'S ANALYSIS OF QUESTION NO. 12

The law of fixtures governs whether Sam is entitled to remove the listed property.

Fixtures are generally regarded as being a part of the land and belonging to the person or persons owning the land. *Wood Hydraulic Hoist & Body Co v Norton*, 269 Mich 341, 346 (1934). Michigan courts apply a three-part test when determining whether property is a fixture. Property is a fixture if the following three criteria exist: "first, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold." *Morris v Alexander*, 208 Mich 387, 390-391 (1919); *Wayne Co v William G Britton & Virginia M Britton Tr.*, 454 Mich 608, 618 (1997).

Even if an item is considered a fixture, an exception is made for trade fixtures which are considered to be the tenant's personal property to which the tenant is entitled and can remove from the realty. *Outdoor Sys Adver, Inc v Korth*, 238 Mich App 664, 668 (1999). "A trade fixture is merely a fixture which has been annexed to leased property by a lessee for the purpose of enabling him [or her] to engage in a business." *Id.* at 667–668 (1999), quoting *Michigan Nat'l Bank Lansing v Lansing*, 96 Mich App 551, 555 (1980), aff'd. 414 Mich 851 (1982).

Speakers: The speakers will likely be considered a trade fixture. While an argument could be made that the speakers mounted on the wall might be considered fixtures under the general rule to which Laura would be entitled as the real property owner, the facts do not show that Sam had the intention to make those items "a permanent accession to the realty," especially given that he intended to use the same speakers for a different purpose (for use at his annual outdoor event). Additionally, a strong argument could be made that Sam mounted the speakers specifically for the purpose of conducting the live music performances for his wine and cigar bar business. Therefore, the speakers would be considered trade fixtures to which Sam is entitled.

Glass Bar: The glass bar will also likely be considered a trade fixture, to which Sam will be entitled. The form and size of a fixture is not determinative as to whether such fixture will be considered a trade fixture. *Outdoor Sys Adver, Inc*, 238 Mich App at 672. Further, if a fixture is attached to the property for the purpose of trade, the degree as to which it is attached does not

matter in the determination as to whether a fixture is a trade fixture. *Cameron v Oakland Co Gas & Oil Co*, 277 Mich 442, 459–460 (1936) ("Whatever is affixed to the land by the lessee for the purpose of trade, whether it be made of brick or wood, is removable at the end of the term. Indeed, it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the sole purpose of trade, may not be removed at the end of the term."). There is no doubt that the glass bar was installed for the purpose of conducting Sam's wine and cigar bar business. In fact, the previous bar was too small and outdated for Sam's growing business, so a new bar was absolutely necessary for Sam's business purposes (design choice aside).

A/C Unit: The A/C unit will probably be considered a fixture, to which Laura would be entitled as the real property owner. An argument could be made that the A/C unit was installed for the purposes of Sam's business (especially since his patrons were complaining that it was too hot before the A/C was installed), but that argument is weakened because an A/C unit will generally benefit the building and is not specific to the needs of Sam's business. The stronger argument, however, is that the A/C unit is a general fixture – it was actually attached to the roof of the building, has a general application to the use of the building (it services to the benefit of the entire property and not just the specific needs of Sam's wine and cigar bar business); and the act of installing the A/C unit to the roof can be seen to show an objective desire to make the A/C unit "a permanent accession to the freehold." Michigan courts will examine the objective visible facts to determine whether there is an intention to make a specific object a permanent accession to the realty. *William G Britton & Virginia M Britton Tr, 454 Mich at 619.* "The surrounding circumstances determine the intent of the party making the annexation, not the annexor's secret subjective intent." *Id*. "Intent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation." *Id*.

Desk: The desk will be considered personal property, regardless of how heavy or massive the furniture may be, to which Sam will be entitled. Ordinary movable office furniture and equipment is considered personal property and not fixtures. *Colton v Michigan Lafayette Bldg Co*, 267 Mich 122, 127 (1934).

Barber/Salon Chair: The barber/salon chair will likely be considered a fixture, to which Laura would be entitled as the real property owner. The barber/salon chair is likely a fixture because it was actually attached (bolted) to the bathroom floor; there is

a reasonable application of the chair in the bathroom; and the act of bolting the chair to the floor can be seen to show an objective desire to make the chair “a permanent accession to the freehold.” The question becomes whether the barber/salon chair can be considered a trade fixture. Sam installed the chair for personal reasons only and not for purposes of conducting his business, thus the trade fixture exception will not apply. Some may consider the barber/salon chair a trade fixture because it is a commonly used item in the course of the trade of his barber (whom Sam used to shave and cut his hair), but it was not used in the course of Sam’s business.

If raised by an applicant, the timing of when Sam was attempting to collect the items should not be at issue. Under Michigan law, generally a tenant must remove personal property and trade fixtures that the tenant has placed on the leased premises within the term, and if that is not done within that time period, it will be presumed that the tenant has abandoned such items. *Waverly Park Amusement Co v Michigan United Traction Co*, 197 Mich 92, 95 (1917). However, where the right to remove personal property and trade fixtures at the end of a term is reserved, the lessee is entitled to a means of ingress to and egress from the premises for a reasonable time after the lease's expiration for the purpose of removing the items. *Davidson v Crump Mfg Co*, 99 Mich 501, 503 (1894). Sam reserved the right to remove “any property belonging to him after the end of the term of the lease within a reasonable time.” Sam was attempting to remove the items within two to three days after the lease expired. This will likely be considered a “reasonable time” period.

In conclusion, Sam will likely be entitled to the speakers, glass bar, and desk. And Laura, as the property owner, will likely be entitled to keep the A/C unit and the barber/salon chair.

Cogent answers reaching an opposite conclusion as to whether any property should be considered a fixture or trade fixture will be given credit.

EXAMINER'S ANALYSIS OF QUESTION NO. 13

A defendant in a criminal trial has a right to the effective assistance of counsel under both the United States and Michigan Constitutions. *People v Schrauben,* 314 Mich App 181, 189-190 (2016); US Const, Am VI; Const 1963, art 1, § 20 ("[i]n every criminal prosecution, the accused shall have ... assistance of counsel for his or her defense ..."); See *Strickland v Washington*, 466 US 668, 686 (1984)("[T]he right to counsel is the right to the effective assistance of counsel."); *People v Pickens*, 446 Mich 298, 338 (1994); *People v Aceval*, 282 Mich App 379, 386 (2009). The right to counsel is one of the most important rights given to a person accused of a crime. *Pickens*, 446 Mich at 311.

A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). If the claim of ineffective assistance involves facts that are not on the record, the defendant must move for an evidentiary hearing to create a record. MCR 7.211(C)(1)(a). The Court stated:

> To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately. [*People v Ginther*, 390 Mich 436, 443 (1973) quoting *People v Jelks*, 33 Mich App 425, 431 (1971)].

If the necessary facts are of record, the examination is limited to the record. *People v Riley (After Remand)*, 468 Mich 135, 139 (2003).

Effective assistance of counsel is presumed. *People v Trakhtenberg*, 493 Mich 38, 52 (2012); *Strickland*, 466 US at 689; *People v Rockey*, 237 Mich App 74, 76 (1999). Therefore, a defendant has a heavy burden to prove effective assistance of counsel was not provided and establish the factual predicate of his claim. *People v Carbin*, 463 Mich 590, 599 (2001).

Defendant must demonstrate:

1. Counsel's performance was below an objective standard of reasonableness, (that it did not meet the representation guaranteed by the 6th Amendment). *Id.* at 600.

The court must examine defense counsel's performance to determine objectively "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

professionally competent assistance." *People v Jackson (On Reconsideration),* 313 Mich App 409, 431 (2015), quoting *Strickland*, 466 US at 690. Counsel had the obligation to determine if the DNA expert and Walter would have been helpful to Dan at trial.

2. Prejudice to defendant, by showing there is a reasonable probability but for the deficient performance of counsel the outcome would have been different. *People v Johnson*, 451 Mich 115, 124 (1996); *People v Armstrong*, 490 Mich 281, 290 (2011). 'Prejudice' is also defined as being denied the right to a fair trial, *Pickens*, 446 Mich at 338, or, a reasonable doubt respecting defendant's guilt. *Strickland*, 466 US at 695.

Witnesses

The decision to call or question witnesses is presumed to be a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190 (2009)*; People v Russell*, 297 Mich App 707, 716 (2012). That presumption can be overcome. The rule of law is:

> "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." [*People v Muhammad*, 326 Mich App 40, 66 (2018) quoting *People v Davis*, 250 Mich App 357, 368 (2002).]

The calling or failure to call a witness at trial constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398 (2004). A defense is substantial if it could have made a difference in the result of trial. *People v Chapo*, 283, Mich App 360, 371 (2009). Defense counsel has great discretion on decisions of trial strategy. *People v Unger*, 278 Mich App 210, 242-243 (2008); *Strickland*, 466 US at 689. The failure of a trial strategy is not per se ineffective assistance of counsel*. People v Williams*, 240 Mich App 316, 332 (2000).

However, defense "[c]ounsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant's defenses" by performing a reasonable investigation of the case, including interviewing witnesses to determine if any have evidence to help defendant's case. *People v Lane*, 308 Mich App 38, 68 (2014).

1. Investigation. Counsel had a duty to talk to Walter to determine if he could have been helpful to Dan. The failure to do

so is a breach of that duty. Counsel made his decision based on his conversation with Dan alone.

2. Expert. Dan wanted his attorney to call a DNA expert witness at trial. Dan does not have a legal or factual basis for calling an expert, only his belief that jurors like expert testimony. That is not a legal nor factual basis to call the witness. It was not objectively unreasonable not to call an expert when DNA is not an issue in the case. There is no prejudice from not doing so.

3. Walter. Dan told his lawyer that Walter did not see the incident and Walter had no knowledge of the incident. Walter had no testimony helpful to Dan. Walter could put Dan at the scene of the crime when the neighbor said he was there, which is not helpful to Dan.

Although counsel did not talk to Walter, Walter could not testify to any fact helpful to Dan. Walter's testimony could have hurt Dan's case by putting Dan at the crime scene and that he saw Dan go in the backyard. The failure to call Walter is not prejudicial to Dan's case.

The court must determine whether the "strategic choices [were] made after less than complete investigation," and any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 US at 690-691. Counsel is required to make a reasonable investigation of the facts presented to counsel by the client.

In this case, counsel breached his duty to talk to Walter and investigate the case. Dan did not suffer prejudice from that failure to investigate or call Walter as a witness. There was no basis for counsel to present expert testimony. Dan did not receive ineffective assistance of counsel.

EXAMINER'S ANALYSIS OF QUESTION NO. 14

Consideration of the Michigan Rules of Professional Conduct (MRPC) guides the analysis in this area of inquiry.

Maddie

With respect to Maddie, MRPC 1.8 relating to prohibited transactions, which constitutes conflict of interest, provides in part that:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> (3) the client consents in writing thereto.
>
> * * *
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client; and
> (2) a lawyer representing and indigent client may pay court costs and expenses of litigation on behalf of the client.

Thus, while a lawyer may enter a business transaction with a client provided that certain conditions are met, financial assistance to a client is prohibited except in certain narrow circumstances of advancing costs and expenses of litigation. There is no exception for personal living expenses or other financial hardship. Accordingly, Olivia would be prohibited under MRPC 1.8(e) from loaning money to Maddie to help with such expenses during the pendency of the litigation. While an outreach of that sort could be considered generous and kind, it is not ethically permissible.

Norman

Regarding Norman, MRPC 7.3 governing solicitation provides that

> (a) A lawyer shall not solicit professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero* v *Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988).
>
> (b) A lawyer shall not solicit professional employment from a person by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:
>
> (1) The person has made known to the lawyer a desire not to be solicited by the lawyer; or
>
> (2) The solicitation involves coercion, duress or harassment.

At first glance, the letter that Olivia is contemplating sending to Norman would be considered a generally prohibited solicitation under MRPC 7.3(a), as it is personal in nature directed specifically and only to Norman to particularly address his circumstances of unease with the legal system and experience with Company Y. It contrasts with the permissible solicitations for legal business from a family member or prior client as Olivia has had no previous contact with Norman according to the facts. Also, the letter would be distinct from permissible letters and advertisements distributed to the general public. However, as set forth above, the term "solicit" does not include sending "truthful and nondeceptive letters to potential clients known to face particular legal problems" as set forth in the United States Supreme Court case of *Shapero, Id.,* referenced in the Rule 7.3(a).

Olivia’s proposed truthful and non-deceptive letter would fall into that permissible category regarding her knowledge of his possible legal recourse against Company Y.

Even if permissible under that section of the rule, no such solicitation is allowed if Norman has made known to Olivia that he does not wish to be solicited by her. An argument could be made that because Olivia knows that Norman does not trust the legal system, sending the proposed letter to him would be a prohibited solicitation under 7.3(b)(1). However, the facts do not indicate that Norman has specifically made known to Olivia any desire not to receive any solicitation from her for legal services. Consequently, it appears that at least a one-time overture to Norman with the proposed letter is permissible.

EXAMINER'S ANALYSIS OF QUESTION NO. 15

The Sixth Amendment to the United States Constitution provides: "... [i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him ...." US Const, Am VI. The right to confrontation applies to both federal and state prosecutions. *Pointer v Texas*, 380 US 400, 406 (1965).

Article 1, § 20 of Michigan's 1963 Constitution states that "[i]n every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, . . . to be confronted with the witnesses against him or her. . ." Michigan grants criminal defendants "the right to 'be confronted with the witnesses against him,' [by] adopting" the language of the federal Confrontation Clause verbatim" in its state constitution. *People v Fackelman*, 489 Mich 515, 529 (2011). The protections of the Confrontation Clause apply "only to statements used as substantive evidence." *Fackelman*, 489 Mich at 528.

The primary objective of the Confrontation Clause is to compel witnesses to "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v United States*, 156 US 237, 242-243 (1895). The Confrontation Clause includes the right to confront and cross-examine witnesses face-to-face. *People v Nunley*, 491 Mich 686, 697 (2012). It is "primarily a functional right" aimed at "truth-seeking and promoting reliability in criminal trials." *Id.* Confrontation is an essential requirement for a fair trial. *Barber v Paige*, 390 US 719, 721 (1968). It requires: (1) physical presence, (2) an oath, (3) cross-examination, and (4) "observation of demeanor by the trier of fact..." *Maryland v Craig*, 497 US 836, 846 (1990).

"[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Nunley*, 491 Mich at 697, quoting *Crawford v Washington*, 541 US 36, 50 (2004).

Crawford, 541 US at 68, held the Confrontation Clause requires face-to-face cross-examination for testimonial evidence unless a witness is unavailable and the defendant had a prior opportunity for cross-examination. See *People v Jemison*, 505 Mich 352 at 356, 360 (2020); *Nunley,* 491 Mich at 698. The Confrontation Clause does not guarantee reliable evidence but a specific trial procedure, including face-to-face confrontation to assure reliable evidence at trial. *Jemison*, 505 Mich at 361, quoting *Crawford*, 541 US at 68.

The Confrontation Clause applies to testimonial evidence from "witnesses" ("those who bear testimony") against the defendant. *Crawford*, 541 US at 51. "Testimony," is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 US at 51.

"Testimonial statements" focus on two characteristics: "(1) . . . out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (2) . . . formalized statements such as affidavits, depositions, prior testimony or confessions." *Williams v Illinois*, 567 US 50, 82 (2012) adopted in *Nunley*, 491 Mich at 706; *People v Fontenot,* __ Mich App__ (2020), 2020 Mich App Lexis 5989. See *Davis v Washington,* 547 US 813, 817 (2006).

Several cases have examined video testimony and documentary evidence introduced without a witness. *Craig* held a child abuse victim can testify by a one-way video if the trial court finds on a case-specific basis a showing of necessity that the child needs special protection. *Craig*, 497 US at 860; *Jemison* limited *Craig* to its facts. *Jemison*, 505 Mich at 365.

Jemison held the trial testimony of a forensic analyst by two-way, interactive video violated the Confrontation Clause. The witness's evidence was both testimonial and was not face to face. *Jemison,* 505 Mich at 366-367. *Jemison* further held that saving costs is an insufficient justification to extend *Craig. Jemison,* 505 Mich at 364.

Nunley held a certificate of mailing was not testimonial because its primary purpose was notice to the recipient not testimonial. *Nunley,* 491 Mich at 689. *Fontenot* held the record of a DataMaster log of an alcohol breath machine at trial was not testimonial but administrative in nature, because it attested to the accuracy of the machine and certified that the machine was in working order. *Fontenot,* at 2.

The United States Supreme Court refused to adopt an amendment to the Federal Rules of Criminal Procedure that allowed trial by video. Order Amending the Federal Rules of Criminal Procedure, 535 U.S. 1159, 1159 (2002) (statement of Scalia, J.). "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Id.* at 1160. *Jemison*, 505 Mich 362 n 5.

In this case, the arresting officer was the primary witness to the crime of OUIL and his evidence was testimonial under the definitions above. Dale had the right to confront that officer at trial, face to face, and not by video. The presentation of the officer at trial by video was a violation of Dale's right to confront witnesses against him, the officer, at trial.

The cost savings to the court realized by allowing the officer to testify by video is not a justification for allowing it.

Jemison, supra. Dale’s right to confrontation was violated by this ruling. Dale will prevail on this issue.