FEBRUARY 2011 MICHIGAN BAR EXAMINATION MODEL ANSWERS

ANSWER TO QUESTION NO. 1

The No-Fault Act generally bars actions for noneconomic damages, unless the injured person suffered an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. MCL 500.3135(7).

Although there is no factual dispute regarding the nature and extent of Meredith's injuries, she will still need to meet the serious impairment threshold test in order to be able to collect non-economic damages.

The court uses a three-prong test in order to determine whether a plaintiff meets the threshold for recovery of non-economic damages under the No-Fault Act. The court determines whether there has been: (1) an objectively manifested impairment, that is, observable or perceivable from actual symptoms or conditions; (2) of an important body function, that is, a body function of great value, significance, or consequence to the injured person; that (3) affects the person's general ability to lead his or her normal life, that is, influences some of the plaintiff's capacity to live in his or her normal manner of living; *McCormick v Carrier,* 487 Mich 180 (2010) overruling *Kreiner v Fischer,* 471 Mich 109 (2004), and *Netter v Bowman,* 272 Mich App 289 (2006). MCL 500.3135(7).

For purposes of determining whether a plaintiff has sustained an "objectively manifested impairment" under the No-Fault Act, the focus is not on the injuries themselves, but how the injuries affected a particular body function. *Id.*

Under the "serious impairment of body function" threshold, the requirement that the impairment "affects the person's general ability to lead his or her normal life" requires that a person's general ability to lead his or her normal life has been affected, not destroyed; thus, courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected. *Id.* There is no temporal requirement as to how long an impairment must last in order to have an effect on the person's general ability to live her normal life. *Id.*

There is no dispute that Meredith fractured her leg, was in a cast, had a metal rod surgically inserted, and was off work for approximately two months. A broken leg is observable. Meredith went to the hospital, there were presumably x-rays taken, a metal rod was surgically inserted into her leg, and she wore a cast for approximately two months. Her injury affected the use of her leg which is a body function that is of significance to her. She was on crutches temporarily and still has difficulty sitting or standing for prolonged periods of time.

The main issue is whether Meredith's injury affected her ability to lead her normal life. The facts suggest that Meredith was in a cast, then on crutches and unable to have unrestricted use of her leg for approximately two months. Additionally, she was unable to lift anything or do household chores for approximately three months. And lastly, she is unable to bicycle post-accident because of the pain. Although her injury was not extensive and her recovery period was relatively short, her ability to lead her normal life is nonetheless affected. As such, it appears that Meredith may have suffered a serious impairment of a body function for purposes of the statute and will be able to request noneconomic damages.

Meredith will be able to sue both McDreamy and his mother, Abby, for her damages. Under Michigan law, both the owner and operator of a motor vehicle are liable for "an injury caused by the negligent operation of [a] motor vehicle" if the owner expressly or impliedly consents or knows about the use of the vehicle. MCL 257.401(1). Here, the facts indicate that McDreamy's mother, Abby, consented to the use of her car. As such, Meredith could sue both

McDreamy and Abby, as both could be held liable for her damages.

ANSWER TO QUESTION NO. 2

Voting weight: Pursuant to MCL 450.1301, a corporation may issue the number of shares authorized in its articles of incorporation. Here, DDD's articles of incorporation permit only 100 shares. Furthermore, MCL 450.1301 specifically indicates that "[t]he shares may be all of 1 class or may be divided into 2 or more classes." Thus, having only one class of shares is explicitly permissible under Michigan law. Additionally, in the absence of any limitation or designation applicable to separate series contained within a class of shares, "each share shall be equal to every other share of the same class." Thus, despite Dan's claim that his creative genius should be afforded some additional quantum of voting weight, nothing in DDD's articles of incorporation or Michigan law supports this claim.

Amendment of the Articles of Incorporation: A corporation may amend its articles of incorporation if "the amendment contains only provisions that might lawfully be contained in the original articles of incorporation filed at the time of making the amendment." MCL 450.1601. Specifically, a corporation may amend its articles of incorporation in order to "[e]nlarge, limit, or otherwise change its corporate purposes or powers." MCL 450.1602(b). Thus, DDD's articles of incorporation may be permissibly amended to include dealing in vintage automobiles, so long as that purpose would have been proper originally. See also *Detroit & Canada Tunnel Corp v Martin,* 353 Mich 219 (1958). Although unrelated to its confectionary business, dealing in vintage automobiles is a legal enterprise and could have been included in the original articles of incorporation.

As far as the procedure regarding shareholder amendment of the articles of incorporation is concerned, MCL 450.1611(4) requires that notice be given to each shareholder entitled to vote "within the time and in the manner" provided in the Corporation Act for giving notice of shareholder meetings. MCL 450.1404(1) permits notice "not less than 10 nor more than 60 days" before the date of the shareholder meeting, and allows notice to be given "personally, by mail, or by electronic transmission." Thus, the 30-day personal notice provided by DDD to Dan and the other voting shareholders is sufficient.

The articles of incorporation are amended "upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote on the proposed amendment and, in addition, if any class or

series of shares is entitled to vote on the proposed amendment as a class, the affirmative vote of a majority of the outstanding shares of that class or series." MCL 450.1611(5). It is noteworthy that the voting requirements for amending the articles of incorporation "are subject to any higher voting requirements" provided in the Corporation Act for specific amendments or in DDD's articles of incorporation. Once the amendment is approved by a majority of the shares entitled to vote, a certificate of amendment must be filed with the state. MCL 450.1611(7); MCL 450.1631.

A shareholder who does not vote for (or consent in writing to) a proposed amendment of a corporation's articles may dissent and is entitled to receive payment for his shares, if amending the articles of incorporation either: (a) "[m]aterially alters or abolishes a preferential right of the shares having preferences;" or (b) "[c]reates, alters, or abolishes a material provision or right in respect of the redemption of the shares or a sinking fund for the redemption or purchase of the shares." MCL 450.1621(1). Nothing in the fact pattern indicates that amending DDD's articles of incorporation to include dealing in vintage cars has any impact on Dan's shares or affects Dan's redemption of his shares. Thus, he is not entitled to receive payment for his shares pursuant to MCL 450.1621 and 450.1762.

Shareholder agreement restricting share transfer: Pursuant to MCL 450.1472(1) a restriction on the transfer of corporate shares may be imposed by "the articles of incorporation, the bylaws, or an agreement among any number of holders or among the holders and the corporation." A transfer restriction is not binding with respect to shares issued before the restriction was adopted "unless the holders are parties to an agreement or voted in favor of the restriction." Thus, while the shares issued in 1985 would not ordinarily be bound by the 1999 shareholder agreement, Dan's shares are affected by the agreement because he was party to the unanimous agreement.

MCL 450.1473(a) explicitly permits restrictions on the transfer of shares of a corporation if the restriction"[o]bligates the holders of the restricted instruments to offer to the corporation or to any other holders of bonds or shares of the corporation or to any other person or to any combination thereof, a prior opportunity to acquire the restricted instruments." Thus, Dan may properly be precluded from transferring his 30% interest in DDD to his friend Faye, and may be required to sell his shares to the other shareholders of DDD.

ANSWER TO QUESTION NO. 3

The general rule is that a party normally bears the cost of their own attorney. However, a court may order a party or counsel to pay for the other party's attorney fees if a statute or court rule allows, or if provided by the common law. *Smith v Khouri,* 481 Mich 519, 526 (2008).

Statutory authority exists for the award of attorney fees. MCL 600.2591. To come within the ambit of the statute, a claim or defense must be deemed frivolous. Not every losing claim or defense is automatically deemed frivolous. Rather, "frivolous" is defined in the statute as meaning that at least one of the following conditions is met: (1) the primary purpose of the party's action or defense was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true; or (3) the party's position was devoid of legal merit. Sanctions under the statute can be imposed against the party and the attorney.

The Michigan Court Rules also allow for the imposition of an attorney fee award. MCR 2.114(D), (E) and (F) allow an award against a party or their counsel for violation of MCR 2.114(D). Subsections (D)(2) and (3) provide that the attorney's signature constitutes a certification that to the best of the attorney's knowledge, information and belief, formed after reasonable inquiry, that the document is well grounded in fact, and is not interposed for any improper purpose. For a violation of these requirements, sanctions, including reasonable attorney fees, may be awarded under subsection (E). Additionally, under subsection (F), sanctions may be awarded for a frivolous claim or defense as provided under MCR 2.625(A) (2), which allows for the imposition of costs as provided by MCL 600.2591.

Applying the foregoing principles to the facts at hand, Chips could seek an attorney fee award against both Warbucks and its counsel. To prevail, however, Chips would have to establish that the Warbucks defense was frivolous and/or that Warbucks' lawyer signed the answer and response to the motion in violation of the court rule. This should not be too difficult to establish because Warbucks' counsel all but conceded at oral argument on the summary disposition motion that he did virtually nothing in the way of reasonable inquiry into his client's only defense, i.e., the recipe change. Accordingly, Warbucks' answer and response to the motion

could not be the product of a "belief well-grounded in fact," as MCR 2.114(D) (2) requires, for signature. Likewise, it appears the defense was frivolous as defined by statute.

Additionally, and irrespective of a finding of frivolousness, because the case went to case evaluation, MCR 2.403(0) applies. Chips accepted the case evaluation of $24,700. Warbucks rejected. Chips was awarded $28,800 by the trial court's granting its summary disposition motion. Because Warbucks did not better the case evaluation award by more than 10% and the evaluation was unanimous, Chips is entitled to attorney fees necessitated by Warbucks' rejection of the case evaluation. Under the facts provided, this would include the fees involved in preparing and arguing the motion for summary disposition. Under MCR 2.403, case evaluation sanctions are awarded only against the party, not the attorney. Lastly, MCR 2.403(0)(11) provides that where the "verdict" is the result of a motion as provided in MCR 2.403(0) (2)(c), the court may, "in the interest of justice" refuse to award actual costs. The facts presented, however, do not indicate that such a declination is called for. *Haliw v Sterling Heights, 266 Mich App 444 (2005).*

In sum, Chips has a very good chance to prevail in its efforts for reimbursement of attorney fees by arguing that Warbucks' defense should be deemed frivolous and because Warbucks defense was advance without adherence to 2.114. Chips also has an excellent chance of recovering a portion of the total attorneys' fee as case evaluation sanctions.

ANSWER TO QUESTION NO. 4

Defendant was charged with first-degree premeditated murder. Second-degree murder and involuntary manslaughter are necessarily included lesser offenses to first-degree premeditated murder. A trial court must instruct on the primary charge plus any lesser included offenses that are supported by a rational view of the evidence. *People v Mendoza,* 468 Mich 527, 541 (2003).

Should the trial court give the jury an instruction on second-degree murder?

As stated above, the trial court must instruct on second-degree murder if that instruction is supported by a rational view of the evidence. The elements of second-degree murder are:

1. Defendant caused the death of the decedent.
2. Defendant had one of the following three states of mind:
    a. defendant intended to kill the decedent;
    b. defendant intended to do great bodily harm to the decedent; or
    c. defendant knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be a likely result of his actions.
3. The killing was not justified, excused or done under circumstances that reduce it to a lesser crime. CJI2d 16.5; See *People v Roper,* 286 Mich App 77, 84 (2009).

Here a rational view of the evidence would support giving a second-degree murder instruction. The evidence presented at trial establishes that Dan Defendant shot the bullet that killed Victor Victim. Therefore, the first element of second-degree murder is satisfied. The evidence may also support the second element of second-degree murder--that Dan had the state of mind required for a second-degree murder conviction. Specifically, the evidence established that Dan threatened that Victor "will not make it home alive." Dan waited in his car with a loaded handgun for three hours, until Victor exited the casino. Upon seeing Victor, Dan fired his gun repeatedly in the direction of Victor, ultimately killing him with a bullet to the head. The final element of second-degree murder is one of exclusion by factual finding. That is, the fact finder must conclude as a matter of fact that the killing was not justified, excused or done under circumstances that reduce it to a lesser crime. There is no evidence that would suggest the killing was justified or excused. As discussed below,

Dan's testimony that he did not intend to harm Victor may support an involuntary manslaughter conviction. The mere possibility of a lesser conviction, however, is not enough to keep the trial court from instructing on second-degree murder. If the jury rejects Dan's testimony, there is ample evidence to support a second-degree murder conviction.

For these reasons, the trial court should give an instruction on second-degree murder.

Should the trial court give the jury an instruction on involuntary manslaughter?

Pertinent to the facts presented here, the elements of involuntary manslaughter are:

1. Defendant caused the death of the decedent.
2. Defendant acted in a grossly negligent manner in doing the act that caused the death.
3. Defendant caused the death without lawful excuse or justification. CJI2d 16.10; See People v *Herron,* 464 Mich 593, 604 (2001).

Elements one and three are not at issue. Dan Defendant shot the bullet that resulted in the death of Victor Victim and nothing presented at trial suggests that Dan Defendant had a legal justification or excuse for killing Victor. Thus, whether the trial court should instruct the jury on involuntary manslaughter will turn on whether a rational view of the evidence supports the conclusion that Dan Defendant acted in a grossly negligent manner when causing the death of Victor.

Gross negligence, by its terms, means something more than carelessness. "It means willfully disregarding the results to others that might flow from an act or failure to act." CJI2d 16.18; see *People v Orr,* 243 Mich 300, 307 (1928). In order to establish gross negligence in criminal law, a prosecutor must establish the following elements beyond a reasonable doubt:

1. Defendant knew of the danger to another.
2. Defendant could have avoided injuring another by using ordinary care.
3. A reasonable person would conclude that a likely result of defendant's conduct was serious injury. *Id.*

Here, based on the proofs admitted by Dan Defendant at trial, a fact finder could reasonably conclude that firing a gun in a public area results in danger to those in the area. A reasonable

person exercising ordinary care and good judgment would not fire a gun in a public area under the circumstances presented in this case. Finally, a reasonable person would recognize the substantial risk of serious injury that likely would result from Dan's actions. Dan Defendant testified that he intended "only to scare Victor by shooting over his head, into the wall of the casino." If the fact finder accepts this testimony, there would be sufficient evidence to support the conclusion that Dan did not act with the intent to kill. Nonetheless, Dan's conduct could be deemed grossly negligent and sufficient to support a conviction of involuntary manslaughter.

For this reason, the trial court should also give an instruction on involuntary manslaughter.

ANSWER TO QUESTION NO. 5

I. Article IV of the United States Constitution.

A group of people who own property within Michigan but reside outside of Michigan allege they are being discriminated against because of their non-residence status. This argument implicates the Privileges and Immunities Clause of the United States Constitution, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." US Const, art IV, §2. The object of the clause is said to place "the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v New York Tax Appeals Tribunal,* 522 US 287, 296 (1998), quoting *Paul v Virginia,* 75 US 168, 179 (1869). Plaintiffs will argue that they are being "subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to." *Lunding,* 522 US at 296, quoting *Shaffer v Carter,* 252 US 37, 56 (1920).

The school board will argue that the statutory terms under attack do not distinguish between residents and nonresidents of Michigan. Rather, the statute awards a homestead exemption to persons who utilize their property as their principal residence. Thus, Michigan residents who do not utilize their Cherry Hill property as their principal residence are treated the same as the non-resident plaintiffs. *Citizens for Uniform Taxation v Northport Public School Dist,* 239 Mich App 284 (2000). Likewise, persons who utilize their property as "recreational" as that term is defined under the statute would also be entitled to the recreational exemption, regardless of whether they reside within Michigan. The school board's argument has legal merit. Because nonresidents and residents are not treated differently, the Privileges and Immunities Clause is not violated.

Even though plaintiff, under the facts of this question, may correctly assert that the statute "impose[s] substantially the entire tax burden on nonresident property owners," the actual amount of the tax paid by nonresidents is not relevant under the Privileges and Immunities Clause. The relevant question is whether nonresidents do not pay taxes that are "more onerous in effect than those imposed *under like circumstances* upon citizens of [Michigan]" *Lunding,* 522 US at 297 (emphasis added). Here, the statute imposes the very same amount of tax upon Michigan citizens that choose to

purchase a vacation (non-homestead) home within the school district as those residents from other states. Simply because more nonresidents happen to live within the school district does not render the statute violative of the Privileges and Immunities Clause.

II. 14th Amendment of the United States Constitution and Michigan Const 1963, art 1, §2.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions, US Const, AM XIV; Const 1963, art 1, §2. Both guarantees afford similar protection. *Shepherd Montessori Ctr Milan v Ann Arbor Twp,* 486 Mich 311, 318 (2010). The purpose of the equal protection guarantee is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution. *Village of Willowbrook v Olech,* 528 US 562, 564 (2000). The equal protection guarantee requires that persons under similar circumstances be treated alike; it does not require that persons under different circumstances be treated the same. *Shepherd Montessori, supra,* 486 Mich at 318.

When a legislative classification is challenged as violative of equal protection, the validity of the classification is measured by one of three tests. *Crego v Coleman,* 463 Mich 248, 259 (2000). Crucial to the analysis under the Equal Protection Clause is the applicable standard of review to be applied to the challenged statute. *Dep't of Civil Rights ex rel Forton v Waterford Twp,* 425 Mich 173, 190 (1986).

An inherently suspect classification is one encompassing a discrete and insular minority that has been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection. *San Antonio Independent School Dist v Rodriguez,* 411 US 1, 28 (1973). Here, the statute does not implicate any of the suspect classifications, which include race, ethnicity, national origin, or alienage.

Neither does the statute implicate other classifications, which are suspect but not inherently suspect, including gender, mental capacity or illegitimacy, which are subject to the middle-level substantial relationship test. *Shepherd Montessori, supra,* 486 Mich at 319.

Accordingly, the statute should be examined under the traditional rational basis test. *Phillips v Mirac, Inc,* 470 Mich

415, 434 (2004). Under the rational basis test, legislation is examined for whether it creates a classification scheme rationally related to a legitimate governmental purpose, and the legislation is presumed to be constitutional. *Shepherd Montessori Ctr Milan v Ann Arbor Twp,* 486 Mich at 318-319. The burden of proof is on the person attacking the legislation to show that the classification is arbitrary. Shepherd *Montessori*, *supra,* 486 Mich 319; *Idziak, supra,* 484 Mich 570; *Clark, supra,* 243 Mich App 427. A rational basis for legislation exists when any set of facts is known or can be reasonably assumed to justify the discrimination.

Under the rational basis test, plaintiff would be hard pressed to show that the exemption for homestead properties is arbitrary. Ownership of a primary residence is an indeed compelling state interest which is promoted by decreasing the burden of property taxes on homesteads. Thus, the exemption from the property tax authorized by the statute is rationally related to a legitimate state interest.

Under the rational basis test, plaintiff would be unable to show that the exemption for the listed recreational properties is arbitrary. Although the promotion of the listed "recreational properties" is certainly not as compelling as government's interest in police power or home ownership, the exemption of those properties from the tax cannot be said to be illegitimate. These facilities are all open to the general public and, widely speaking, can be said to have some benefit, whether educational, physical or social. On the other hand, non-homestead properties can have uses other than recreation and need not be open to the public. Unlike the listed types of property, non-homestead properties can readily be imagined as used for purposes unrelated to social welfare, such as a convenient second home, a private guesthouse, storage area, etc.

Notably, the above analysis does not preclude legitimate argument noting potential weaknesses of a rational basis finding, including that the "recreational purposes" exemption is under inclusive. In other words, the statute does not regulate all those that own property and use it strictly for recreational purposes similarly. Further, there may be argument suggesting that the statute may unfairly exempt those with political clout, despite a real factual basis for this conclusion. However, these arguments have routinely been rejected. For example, in *Railway Express Agency, Inc v New York,* 336 US 106 (1949), the United States Supreme Court upheld an ordinance that banned all advertising from the side of trucks except to advertise the truck owner's business. The Court stated that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

Id., at 110. Given this steady trend toward deference to government regularity, and the strong presumption of constitutionality given to tax legislation under these circumstances, *Citizens for Uniform Taxation,* 239 Mich App at 290, plaintiff's claims have little chance of success.

ANSWER TO QUESTION NO. 6

How should the court rule on the motion to suppress Peter's statement?

The trial court should deny the motion to suppress Peter's statement to Officer Jones.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, §17; *Dickerson v US,* 530 US 428, 433 (2000); *People v Cheatham,* 453 Mich 1, 9 (Boyle, J.), 44 (Weaver, J.) (1996); *People* v *Bassage,* 274 Mich App 321, 324 (2007).

Where a defendant decides to speak and waive his *Miranda* rights, anything he says, or does not say, is admissible until he invokes his right to silence. *People vMcReavy,* 436 Mich 197, 217-218 (1990). Here, the facts inform us that defendant was informed of his *Miranda* rights and that "Peter understood his *Miranda* rights." Further, there is insufficient evidence indicating that Peter invoked his *Miranda* right to remain silent. Although Peter did not say anything for a significant amount of time while in custody, he did not unambiguously or unequivocally invoke the *Miranda* right to remain silent. *Berghuis v Thompkins,* US ; 130 S Ct 2250, 2260; 176 L Ed 2d 1098, 1112-1113 (2010). At most, Peter only indicated that he was tired and that he wanted to go to bed. At no point did Peter state that he wanted to remain silent or that he did not want to talk to police. *Id.* Thus, Peter did not invoke his "right to cut off questioning." *Id.* citing *Michigan v Mosley,* 423 US 96, 103 (1975).

Notwithstanding a defendant's failure to invoke his *Miranda* right to remain silent, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waives his Fifth Amendment rights. *Miranda v Arizona,* 384 US 436, 444 (1966); *People v Gipson,* 287 Mich App 261, 264 (2010). Waiver can be implied when a defendant who has been advised of his *Miranda* rights and has understood them makes an uncoerced statement. *Berghuis,* 130 S Ct 16 2261. The prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Harris,* 261 Mich App 44, 55 (2004).

Again, the facts inform us that Peter was informed of his

Miranda rights and that "Peter understood his *Miranda* rights." From this, it follows that "he knew what he gave up when he spoke." *Berghuis,* 130 S Ct at 2262. Further, Peter's answer to Jones revealed his intent to mitigate his own culpability in the crime. Peter could have simply ignored Jones but he instead attempted to lessen his culpability, stating, "I was not drunk. I only had two beers. I was distracted by my cell phone and that is why I ran the red light. I am so sorry." Further, there is no evidence at all that Peter's statement was coerced. Although he had been interrogated the night before, Peter had only been asked the one question the next morning and was clearly rested when he made the statement.

For these reasons, the trial court should deny the motion to suppress Peter's statement to Officer Jones.

How **should the court rule on the motion to dismiss with prejudice the charges against Peter?**

The trial court should deny the motion to dismiss.

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, §20; MCL 768.1; NCR 6.004(A); *People v Williams,* 475 Mich 245, 261 (2006). A formal charge or restraint of the defendant is necessary to invoke speedy trial guarantees, *People v Rosengren,* 159 Mich App 492, 506 n 16 (1987). The delay period commences at the arrest of the defendant. *Williams,* 475 Mich at 261.

The defendant must prove prejudice when the delay is less than 18 months. *People v Collins,* 388 Mich 680, 695 (1972); *People v Waclawski,* 286 Mich App 634, 665 (2009). A delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecutor. *Williams,* 475 Mich at 262. In determining whether a defendant has been denied a speedy trial, a court must weigh the conduct of the parties. Relevant factors include: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Vermont v Brillon,* _____ US ____ ; 129 S Ct 1283, 1290; 173 L Ed 2d 231, 239-240 (2009); *Williams,* 475 Mich at 261. Prejudice to the defense occurs when there is a substantial chance that the defense to the charge is substantially impaired by the delay. *Williams,* 475 Mich at 264; *People v Gilmore,* 222 Mich App 442, 461-462 (1997); *People v Ovegian,* 106 Mich App 279, 285 (1981).

Here, the length of the delay is significant and weighs in favor of granting defendant's motion. If the court sticks to its most recent schedule, the trial will not commence until 21 months after the accident date. The reason for the delay is neglect by the court system. This type of delay cannot in any way be attributed to the defendant. To the contrary, scheduling delays and delays caused by the court system are attributed to the prosecution. However, such delay weighs only slightly in favor of granting the motion, as delays caused by the court system are generally given minimal weight. *Williams,* 475 Mich at 263. Moreover, defendant cannot be blamed for failing to assert his speedy trial rights in a more timely fashion. The trial court found that defendant was indigent and entitled to appointed counsel. The trial court also knew that the counsel originally appointed to represent defendant had died and that defendant was in need of new counsel. Once appointed, Lisa Lawyer acted with due diligence in bringing a motion to dismiss. Thus, this factor weighs in favor of granting defendant's motion. The final factor, however, weighs strongly in favor of denying defendant's motion. Because the delay exceeds 18 months, the burden rests on the prosecution to establish a lack of prejudice to defendant's case. Defendant will argue that his case is crippled without Wendy, who would have testified that he was not driving the car. However, this assertion flies in the face of defendant's statement that he ran the red light because he was distracted by his cell phone. Further, Wendy has no first-hand knowledge of who was driving Peter's car at the time of the accident. The prosecution will point out that nobody knows what Wendy would have testified to, since she never gave a statement to the police or the defense. However, reviewing the facts in a light most favorable to defendant, all Wendy could testify to was that Oscar drove the car when leaving the pub. Wendy did not witness the accident. Any inference drawn from Wendy's putative testimony would be defeated by Peter's statement to Officer Jones.

For these reasons, the court should deny Peter's motion to dismiss.

ANSWER TO OUESTION NO. 7

(1) National Bank properly foreclosed on Jamie's mortgage.

Michigan law allows for a mortgagee to *foreclose by advertisement,* which thereby allows mortgagees to forego judicial proceedings where there has been a default in the mortgage, such as failure to pay. MCL 600.3201; MCL 600.3204. However, in order to do so, certain conditions must be met. First, because non-judicial foreclosure is contract-based, there must be a power of sale clause in the mortgage; also, the mortgage must have been properly recorded, and it must not otherwise be in foreclosure at the time the mortgagee seeks to foreclose. MCL 600.3201; MCL 600.3204(1)(c); MCL 600.3204(1) (b). Second, the mortgagee must *publish notice* that the mortgage will be foreclosed by sale "by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated." MCL 600.3208, see also MCL 600.3212. Third, within 15 days after the first publication of the notice, the mortgagee must post a *copy of the notice* in a conspicuous place upon a part of the premises. MCL 600.3208. A *public foreclosure sale* must be held on the set date, and within 20 days of the sale, the purchaser must record the deed with an accompanying affidavit setting forth the information regarding redemption, MCL 600.3216; MCL 600.3232.

In this case, National Bank properly foreclosed by advertisement on Jamie's property after Jamie defaulted on her mortgage. The facts specifically note that the mortgage document contained a power of sale clause and was properly recorded by National Bank. National Bank properly published for four consecutive weeks in the local newspaper notice of the sale, and properly posted notice of the sale prominently on the property within 15 days of the first publication. (Note: it is irrelevant if Jamie received actual notice of the sale either through publication or as located on the property.) Finally, National Bank purchased the property on the set date at the sheriff's sale and properly recorded its new deed. A mortgagee may, in good faith, purchase the property at the sale. MCL 600.3228.

Note also: because this property is not Jamie's principal residence, separate notice by mail and other services are not required to be given pursuant to MCL 600.3205a in order to foreclose by advertisement. MCL 600.3205a has otherwise been

repealed by the Legislature, which will become effective on July 5, 2011.

(2) Even though the property has been properly foreclosed, Jamie may exercise her right to redeem the property.

The statutory right of redemption provides the homeowner of a foreclosed property the right to recover the property from the purchaser by paying the amount the purchaser paid for the property, taxes, insurance, fees, and interest that has accumulated. MCL 600.3240(1)-(2); *Gerasimos v Continental Bank,* 237 Mich 513, 518519 (1927). In order to exercise the right of redemption, however, a homeowner must act within the time period set by statute. See MCL 600.3240(7)-(12). Subject to exceptions not applicable here *(e.g.,* abandonment), for a residential home subject to a mortgage excused after January 1, 1965, where the outstanding balance is more than 66-2/3% of the original indebtedness secured by the mortgage, the redemption period is 6 months from the date of the sale. MCL 600.3240(8).

Even though the property has been validly foreclosed, Jamie may redeem the property by paying National Bank the purchase price, as well as taxes, insurance, and other fees and interest accumulated within the statutory period. Because Jamie's mortgage was executed after January 1, 1965, and because the outstanding balance ($80,000) is more than 66-2/3% of the original mortgage ($100,000), and because none of the other statutory exceptions regarding the redemption period apply here, the redemption period applicable here is 6 months from the date of the sale. Jamie must thus actually tender the redemption amount to a proper person within 6 months, and by doing so she can recover the property and enjoy full privileges and liabilities of ownership. See *Flynn v Korneffel,* 451 Mich 186 (1996);1 *Schulthies v Barron,* 16 Mich App 246 (1969). Jamie thus has until September 15, 2011 to redeem.

(3) Local Bank's preexisting mortgage remains as a valid encumbrance on the property.

Generally, foreclosures wipe out junior interests (those that come later in time), but do not displace senior interests (those that came earlier), and thus the purchaser of a property at a foreclosure sale takes the property subject to senior interests. Michigan statutory law explicitly provides that "no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such [foreclosure] sale, nor shall his rights or interests be in any way affected thereby." MCL 600.3236.

Here, Local Bank's mortgage was executed and validly recorded prior to the mortgage of National Bank. Therefore, even though National Bank has foreclosed on its mortgage, Local Bank's mortgage (a senior interest) remains as a valid encumbrance on the property, to which National Bank (as the purchaser at the foreclosure sale) or Jamie (if she redeems within the redemption period) will be subject.

ANSWER TO QUESTION 8

Paul's Capacity to Challenge the Trust:

Under the doctrine of election (also termed estoppel by acceptance) a beneficiary who elects to accept the benefits of a trust is thereafter barred from challenging the validity of the trust, including claims of insufficient capacity or undue influence. *In re Beglinger Trust,* 221 Mich App 273 (1997); *Holzbaugh v Detroit Bank & Trust Co,* 371 Mich 432 (1963). Thus, under the doctrine of election, Paul would be precluded from challenging the validity of the trust because he elected to accept benefits under the trust.

However, a recent amendment to the Michigan Trust Code may permit Paul to challenge the trust based on undue influence. Public Act 2009, No. 46, applies to "all trusts created before, on, or after" the statutory effective date of April 1, 2010. MCL 700.8206(1)(a). MCL 700.7406 was amended to simply state that a "trust is void to the extent its creation was induced by fraud, duress, or undue influence." The statutory provision contains no exception or exclusion for those who have accepted trust benefits. Therefore, a plausible argument could be made that Paul retains the ability to challenge the trust based on a claim of undue influence under the new statutory amendment, despite accepting the $25,000 annual benefit.

Spendthrift Clause:

The clause described in the fact pattern is a "spendthrift provision," a trust provision that "restrains either the voluntary or involuntary transfer of a trust beneficiary's interest." MCL 700.7103(j). Spendthrift provisions are valid and enforceable in Michigan. MCL 700.7502(1). Spendthrift provisions generally preclude the beneficiary's creditors from satisfying the beneficiary's debt with the beneficiary's trust interest.

However, there are several exceptions to this rule. MCL 7007504(1) (a)-(c) states that a trust beneficiary's interest may be reached to satisfy an enforceable claim where the claims involve:

(a) A trust beneficiary's child or former spouse who has a judgment or court order against the trust beneficiary for support or maintenance.
(b) A judgment creditor who has provided services that

enhance, preserve, or protect a trust beneficiary's interest in the trust.

(c) This state or the United States.

Because Sara has a "judgment or court order against the trust beneficiary for support or maintenance," Sara may reach Paul's trust interest despite the spendthrift provision in order to satisfy the child support obligation.

However, Sara will not be able to recoup the entire amount of the arrearage all at once. MCL 700.7504(2) states that the court shall order all or part of a judgment satisfied "only out of all or part of distributions of income or principal as they become due." Because Paul's annual trust distribution is only $25,000 per year, the most Sara could receive is $25,000 when the distribution is due on January 1. However, the remainder of the arrearage can be paid in subsequent years.

Discretionary Trust Provision:

The alternate clause described in the fact pattern is a "discretionary trust provision." Such a provision exists where the trustee is given the discretion to determine whether, or in what amount, to distribute trust assets to beneficiaries. MCL 700.7103(d) (i-v).

If the trust contained a discretionary trust provision, Sara could not file a claim against Paul's trust distribution. MCL 700.7504, the statutory provision permitting certain types of claims to be enforced against a beneficiary's trust interests, specifically does not apply to a trust containing a discretionary trust provision. MCL 700.7504(3). Rather, where a discretionary trust provision exists, a trust beneficiary's creditor does not have a right to any amount of trust assets, and trust property cannot be reached until the assets are "distributed directly to the trust beneficiary." MCL 700.7505. Thus, Sara would be required to attempt to collect the past due child support from Paul after he receives the trust distribution.

ANSWER TO QUESTION NO. 9

The Pearl Necklace: Whether Nancy is required to return the pearl necklace to Gina turns on whether a valid *inter vivos* gift occurred. A valid *inter vivos* gift transfer title to the donee and requires three elements: (1) the donor must have the present intent to transfer title gratuitously to the donee; (2) actual or constructive delivery of the subject matter to the donee must occur, unless it is already in the donee's possession; and (3) the donee must accept the gift. *Detroit Bank v Bradfield,* 324 Mich 124, 130-131 (1949). It appears that Nancy will be entitled to keep the pearl necklace. The facts indicate that Gina intended to give Nancy the necklace, that it was actually delivered to Nancy, and that Nancy accepted the necklace. Because the necklace is a valid *inter vivos* gift, Nancy will not be required to return the necklace to Gina.

The Diamond Bracelet: Whether Nancy is required to return the diamond bracelet turns on whether the bracelet was an *inter vivos* gift or a gift *causa mortis.* A gift *causa mortis* does not transfer title to the donee until the death of the donor because it is "revocable during the lifetime of the donor." *In re Reh's Estate,* 196 Mich 210, 218 (1917). A gift *causa mortis* requires three elements: (1) the gift must be made with a view of the donor's death from a present sickness or peril; (2) such actual or constructive delivery of the subject matter must occur as the circumstances permit; and (3) the donor's intent must be conditioned to become absolute only upon the donor's death. *Id.* Here, the facts indicate that each of the three elements of a gift *causa mortis* is met. First, Gina made the gift in view of her death. Second, she actually delivered the bracelet to Nancy. Finally, Gina's donative intent was expressly conditional on her death. Accordingly, the bracelet was the subject of a gift *causa mortis* and not an *inter vivos* gift. Gina can revoke the gift at any time before her death, and her demand that Nancy return the bracelet shows her intent to do so. Therefore, Nancy will not be entitled to keep the bracelet.

The $20,000: Whether Nancy is entitled to receive the money turns on whether a valid *inter vivos* gift occurred merely by Gina's intent to give the gift in the future. As stated, the elements of an *inter vivos* gift are: (1) the donor must have the present intent to transfer title gratuitously to the donee; (2) actual or constructive delivery of the subject matter to the donee must

occur, unless it is already in the donee's possession; and (3) the donee must accept the gift. Even if Gina intended to give Nancy the money at some point in the future, Gina did not have the *present* intent to transfer the money. Furthermore, no actual or constructive delivery occurred to effect the transfer of title in the money. Mere expressions of the intention to give a gift do not legally transfer title without actual or constructive delivery of the subject matter. *Loop v DesAutell,* 294 Mich 527, 532 (1940). This is true even when the intent is accompanied by a promise. See *Sanilac Co v Aplin,* 68 Mich 659 (1888). Moreover, the promise to make a future gift is not itself enforceable. *White v Grismore,* 333 Mich 568, 574 (1952).

ANSWER TO QUESTION NO. 10

With respect to the first question, Claire's preexisting soccer related injury does not act as a bar to workers' compensation benefits because employers take their employees as they are. *E.g., Deziel v Difco Laboratories,* 394 Mich 466, 476 (1975). This is true even if the soccer injury is the primary cause of the problem. Employers can be held responsible for aggravation of preexisting non-work related conditions. *Id.* However, an employer is not liable for a work event that aggravates just the symptoms of a preexisting problem. *Rakestraw v General Dynamics Land Systems, Inc,* 469 Mich 220, 228 (2003). The employer is only responsible if the event aggravates the preexisting condition so as to create a distinct problem "that is medically distinguishable from the preexisting non-work related condition." *Rakestraw,* 469 Mich at 234. "[T]o demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that, condition has changed." *Fahr v General Motors Corp,* 478 Mich 922 (2007).

Applying these rules, Claire's preexisting soccer injury is not a bar to recovery. And, her torn ligament would constitute a pathological change, a problem medically distinguishable from her preexisting soccer injury, so as to qualify as a compensable injury for workers' compensation purposes as required by *Rakestraw/Fahr.*

With respect to the second question, the injury must be one "arising out of and in the course of employment" to be covered by the Workers' Disability Compensation Act. MCL 418.301(1). This is a bifurcated requirement. The "arising out of" component is an inquiry into the risk created by the employment. *Pierce v Michigan Home and Training School,* 231 Mich 536, 537-538 (1925); *Hopkins v Michigan Sugar Company,* 184 Mich 87, 90-91 (1915). The "in the course of" component is an inquiry into the time and place of injury. *Id.* Both requirements must be met for there to be workers' compensation coverage. *Ruthruff v Tower Holding Corp (On Reconsideration)* 261 Mich App 613, 618-623 (2004); *Thomason v Contour Fabricators, Inc,* 255 Mich App 121 (2003), *as modified* 469 Mich 960 (2003).

Generally speaking, injuries sustained while going to or coming from work are not compensable. *E.g., Burchett v Delton-Kellogg School,* 378 Mich 231, 235 (1966). But, there is a statutory presumption relating to the "in the course of" component.

The statutory presumption says:

> An employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. MCL 418.301(3) (first sentence).

Case law has extended the meaning of "premises" for purposes of this provision to include parking lots owned, leased or maintained by the employer. *Simkins v General Motors Corp (after remand),* 453 Mich 703, 727 (1996); *Ruthruff, supra.*

Applying these rules, Claire was in the parking lot (on the premises) within a reasonable time before her work hours (20 minutes). Therefore, the statutory presumption applies and the injury occurred "in the course of" her employment. The "arising out of" requirement is also satisfied because it is a risk of employment that employees may stumble on debris on employer premises. Compare, *Dulyea v Shaw Worker Co,* 292 Mich 570 (1940).

The employer should, therefore, pay for the surgery and related medical treatment because Claire has sustained a compensable work related injury that is one "arising out of and in the course of employment." MCL 418.301 (1). Employers are responsible for reasonable and necessary medical care related to work injuries. MCL 414.315(1).

ANSWER TO QUESTION NO. 11

The transaction falls under Article 2 of the Uniform Commercial Code, which governs contracts, whether oral or written, that involve the sale of goods. See MCL 440.2102. The contract involved the purchase of labels, an item movable at the time identified in the contract for sale. MCL 440.2105(1).

Here, Organics made a written offer that memorialized terms of a contract and Sticker attempted to accept the offer through a purchase order form that added a term not in the offer. Although not the focus of the call of the question, an answer may initially question whether the purchase order form operated as an acceptance, given its additional disclaimer. In this regard, MCL 440.2207(1) controls the issues and provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Here, there is no indication that the purchase order form states that "acceptance is expressly made conditional on assent to the additional or different terms," and thus there is no real reason to dispute that the purchase order form operated as an acceptance.

The more relevant question is whether the disclaimer became part of the contract. The remainder of MCL 440.2207 provides that:

> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of

> a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writing of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

The question reflects that both parties are merchants under the UCC. MCL 440.2104. Further, there is no indication that the offer expressly limits acceptance to its terms and there was no timely objection. MCL 440.2207(2)(a) and (c).

Thus, the only remaining question whether the disclaimer was part of the contract is whether it "materially altered" the contract. "Material additional terms do not become part of the contract unless expressly agreed to by the other party." *Power Press Sales Co v MSI Battle Creek Stamping,* 238 Mich App 173, 182 (1999), quoting *American Parts Co v American Arbitration Ass'n,* 8 Mich App 156, 173-174 (1967) (internal quotation and citation omitted). Although there is no case law on point, Michigan courts have recognized that "clauses such as those listed in Code comment four, like warranty disclaimers, are routinely deemed material as a matter of law." *Id.,* at 180. Further, given the discussion between the Organics' representative and the Sticker representative in which the Sticker representative indicated that Sticker had provided such labels to other companies, Organics could reasonably be surprised that Sticker would not ensure that the labels would adhere to its product, and suffer hardship as a result of this reliance. Accordingly, a correct answer should simply conclude that the disclaimer clause materially alters the contract and will not be enforced as a matter of law.

In regard to the second question, an answer should conclude that Organics has a strong argument to refuse to order any further labels from Sticker within the one-year contract period.

MCL 440.2612 provides that:

> An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
>
> (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the

> seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Here, the contract clearly authorizes the delivery of goods in separate lots to be separately accepted. The call of the question does not relate to Organics' decision to reject the plum and apple labels, but asks whether Organics can refuse to order "further labels from Sticker within the one-year contract period." The relevant question is whether the "nonconformity . . . with respect to one or more installments substantially impairs *the value of the whole contract"* and "there is a breach of the whole." MCL 440.2612(3). Here, a strong argument can be made that the failure of the labels to adhere directly to fruit impairs the value of the entire contract. As indicated, Organics entered into the contract because "to sell produce in grocery stores its fruit had to be identified by type, size and how it was grown." Thus, the defect is not a minor nonconformity and is not insignificant to the entire contract. Also, the damages could be considered substantial, as Organics expressed concern that the labels could not be used for other "larger orders." Also very important is that Organics has a reasonable apprehension that the defect will not be cured and that the labels would not adhere to other fruits. When Organics called Sticker and complained about the problem, Sticker's representative simply indicated that sometimes the adhesive did not bond direct to "some fruits," leaving Organics to wonder which fruits could then be distributed. The representative also clearly indicated there would be no refund or any replacement labels. Organics has a strong position to cancel the entire contract under MCL 440.2612(3).

ANSWER TO QUESTION NO. 12

1. MCL 557.28 states "[a] contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place." Michigan courts have held that prenuptial agreements are enforceable in the context of divorce. *Rinvelt v Rinvelt,* 190 Mich App 372 (1991). To be enforceable, prenuptial agreements must be "fair, equitable, and reasonable under the circumstances, and must be entered into voluntarily, with full disclosure, and with the rights of each party and the extent of the waiver of such rights understood." *Id.* at 378-379. The agreement "should be free from fraud, lack of consent, mental incapacity, or undue influence." *Id.* at 379. Because of the relationship of extreme mutual confidence between the parties, a prenuptial agreement creates a special duty of disclosure that is not present in an ordinary contract. *In re Estate of Benker,* 416 Mich 681, 689 (1982).

Prenuptial agreements may be voided if certain standards of "fairness" are not satisfied. *Reed v Reed,* 265 Mich App 131, 142-143 (2005). The *Reed* court stated that, "[a] prenuptial agreement may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Id.* The party challenging the agreement bears the burden of proof and persuasion. *Rinvelt, supra* at 382.

Here, Ronaldo was not honest with Mia about the reason for the prenuptial agreement. He consciously chose not to inform Mia of the fact that his father wanted to limit her ability to claim an interest in the business, and the fact that there were plans for rapid expansion. Assuming that she discovers Ronaldo's prior knowledge, Mia will argue that the agreement was obtained through nondisclosure of a material fact. The issue will be whether the unrevealed motives were "material" facts, given that Mia has no desire to obtain an interest in the business anyway. However, she would argue that Ronaldo did not make a full and frank disclosure of his true interest in the family business, which, in the end, made his potential income substantially more than hers. *In re Estate of Benker,* 416 Mich 681, 692-693 (1982) (discussing presumption of non-disclosure). Note that the fact that Mia was not advised by an attorney works in her favor, as does the fact that the agreement made no provision for her after the divorce, and

she was potentially waiving far more than he was. *Id.*

Mia might also argue that the substantial growth in the business constituted a change in circumstances rendering the enforcement of the agreement unfair or unreasonable. To determine if a prenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the prenuptial agreement. *Reed,* 265 Mich App at 144. However, if the clear language of a prenuptial agreement envisions that the parties will obtain separate assets during the marriage, the fact that one party's assets grew significantly more than the other party's assets is not unforeseeable, and thus not a change in circumstances requiring the court to void the agreement. *Reed,* 265 Mich App at 146-147. The expansion of a business is unlikely to be considered unforeseeable by a court.

There is no clear answer to the question of what the judge would do. The key here is the test-taker's ability to recognize the issues, articulate the standards, and apply the standards to the facts.

2. MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

The factors that a court examines to determine if spousal support is warranted are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial

status, and (14) general principles of equity. *Berger v Berger,* 277 Mich App 700, 726-727 (2008).

The applicant should not be expected to list every one of these factors, but should focus on those that are relevant to the facts presented in the question. Specifically: (1) Ronaldo's conduct--engaging in sexually explicit e-mails and having affairs--obviously works against him because it is his "past conduct" and he is at fault for causing the divorce; (2) the length of the marriage (8 years) might tend to favor Ronaldo, as this was arguably more than a short-term marriage but it would not classify as a long-term marriage; (3) the fact that Mia will not receive an interest in Ronaldo's family's business suggests that she is giving up a potentially significant asset and taking little in the property settlement, and that Ronald will continue to earn substantially more than her, so the economic disparity favors Mia and Ronaldo certainly has an ability to pay; (4) Mia is also responsible for her son, which is a factor in her favor, but (5) she is earning enough to arguably make a comfortable living, even without help from Ronaldo, and there is nothing indicating that she could not continue to work and live comfortable. General principles of equity might also tend to favor Mia, in that Ronaldo failed to reveal to Mia that by signing a prenuptial agreement she was giving up any interest in a rapidly expanding business. Under the circumstances, some amount of spousal support for a limited period of time might be expected.

Again, there is no clear answer to the question of what the judge would do, and the key is the test-taker's ability to apply the spousal support factors to the facts presented in the question.

ANSWER TO QUESTION NO. 13

1. Adams is not entitled to a $40,000.00 fee. Her fee agreement with Barnes was unethical in that:

(1) it potentially allowed her to receive a fee of greater than 1/3 of the actual net recovery in a personal injury case (as she, in fact, sought to obtain), in violation of MCR 8.121, the maximum share permissible in such cases. The fee agreement and her attempt actually to obtain a fee greater than 1/3 each constituted a violation of MRPC 1.5(a), which prohibits a lawyer from entering into an agreement for, charging or collecting an illegal or clearly excessive fee;

(2) it purported to create a "present value" when the notion of a "present value" as to a pending action is illusory. *Cf., e.g., Walton v Hoover, Bax & Slovacek, LLP,* 149 SW3d 834 (Tex App 204) aff'd in part, rev'd in part, remanded by 206 SW3d 557 (2006), judgment vacated 2007 Tex App Lexis 929. Even where, as here, a specific settlement offer had been made shortly before Barnes terminated Adams' services, a client is entitled to consider factors other than money in determining whether to accept or reject an offer, each of which is an aspect of the "value" of the case. Also, a lawyer is obligated to abide by the client's decision as to accepting a settlement offer. MRPC 1.2(a). (In a personal injury action, for example, a client may wish to accept a lower offer than the lawyer thinks is appropriate in order to minimize stress and risk; in a suit between two businesses, the client may wish to settle for less than might be available in order to preserve the opportunity for future business with the opponent);

(3) it significantly interfered with the client's right to counsel of choice, since the fee-sharing formula of the fee agreement penalized Barnes for terminating the attorney-client relationship by potentially depriving successor counsel of an opportunity to receive any fee, let alone a meaningful fee based on *quantum meruit.* With exceptions not applicable here, a client has the right to terminate the services of their attorney at any time and for any reason, *cf.* Restatement The Law Governing Lawyers 3d, §32(1), and a fee agreement that penalizes the client for exercising that right is unethical, *cf.* Restatement, §40(2) (c); and,

(4) it was not in writing, in violation of MRPC 1.5(c), which requires contingent fee agreements to be in writing.

2. Adams is not entitled to any fee. Where an attorney has engaged in misconduct in the course of a representation and the attorney's services are severable, the attorney may not collect (or must refund) the portion of the attorney's fee generated by the misconduct. *Cf. e.g., Polen v Melonakos,* 222 Mich App 20 (1997). Where, however, the conduct is not severable, the attorney is not entitled to any fee. *Evans & Luptak v Lizza,* 251 Mich App 187 (2002) ; *Idalski v Crouse Cartage,* 229 F Supp 2d 730 (ED Mich 2002). In this case, the fee agreement itself violated the rules of professional conduct in multiple respects, and the agreement was void as a matter of public policy and unenforceable. *Id.* In these circumstances, Adams' misconduct would not be deemed to be severable, and she would not be entitled to any fee.

ANSWER TO QUESTION 14

1. UCC v Common Law. The primary purpose of the contract between Brawny and Speedy Service was the provision of repair services, not the sale of goods. Therefore, the dispute must be resolved under Michigan's common law of contracts rather than Article 2 of the Uniform Commercial Code.

2. Is there a contract and what are its terms? Speedy Service's quotation is an offer to Brawny to have Speedy Service perform the repair work on the terms stated in Speedy's quotation form. The quotation offers Brawny a choice of two price/urgency options; in either case the offer also includes the terms on the back of the quotation form. To create a contract, an offeree's acceptance must be unambiguous and in strict conformance with the offer. *Kloian v Domino's Pizza, LLC,* 273 Mich App 449, 452 (2006). A contract requires mutual assent (sometimes called a "meeting of the minds") on all essential terms. *Id.* at 453.

Brawny's January 4 communication to Speedy Service was not sufficient to create a contract. It did not specify which of the two price/urgency alternatives Brawny was choosing, and those alternatives differed on terms so important that there can be no contract without them: the contract price and timetable for completing the work. In addition, Speedy Service's quotation form made clear that Speedy insisted on acceptance of all terms on the back of the form in order for there to be an effective acceptance. Brawny rejected this when it stated that the parties' agreement would be subject to all terms of its own form. We know from the facts that the indemnity terms (and other provisions) of the Speedy Service and Brawny forms were quite different. This is an additional reason why Brawny's request that Speedy begin work was not effective in creating a contract. In fact, because Brawny proposed different terms, it was a counteroffer. A counteroffer operates as a rejection of the original offer unless the counterofferor indicates a different intention (for example, is simply asking whether the offeror will modify the original offer.)

Although Brawny's January 4 communication did not plainly tell Speedy Service which of the two price/urgency alternatives that Speedy had originally proposed Brawny desired, it certainly does not suggest that Brawny regarded the expedited timetable as unacceptable. The best reading is that Brawny's counteroffer allowed Speedy to choose the timetable for completion. An offeree is entitled to accept an offer either by promising to perform or by

rendering performance. *DaimlerChrysler Corp v Wesco Distribution, Inc,* 281 Mich App 240, 247 (2008). In other words, mutual assent to contract terms can be found not only through exchanges of words, but from one party's performing the contract and the other party's acquiescence in that performance. From the beginning of Speedy Service's performance, it made clear that it had selected the "expedited" approach to completing the contract and that it would be working overtime, which was consistent only with the expedited, higher-priced alternative. Brawny thus had ample reason to know that Speedy had chosen the $25,000 guaranteed completion approach to performing the contract. There was thus an eventual meeting of the parties' minds on the $25,000 alternative, and on the inclusion of Brawny's standard terms in the contract since Speedy did not propose any modifications to that portion of the contract.

Some examinees may reach the same conclusion based on a different analysis involving *quantum meruit.* These examinees will argue that performing the work on an expedited basis was not a sufficiently clear manifestation that Speedy agreed to all of the terms contained in Brawny's purchase order and hence there is no contract. If that is true, the services that Speedy provided were nevertheless valuable to Brawny, and both parties expected that Speedy would be compensated for them. Speedy is therefore entitled to recover their reasonable value. Both parties agreed that $25,000 was a reasonable value for repairs completed within 3 days --Speedy by quoting that price and Brawny by not suggesting a different price. It is also likely that some examinees will argue that Brawny always retained the right to choose whether it wanted expedited repairs or not and never specified that it did, so that the reasonable value of the repairs was only $15,000. All replies using a *quantum meruit* analysis should be evaluated individually based on their internal logic and persuasiveness.

3. <u>Contract Interpretation.</u> With respect to Speedy Service's injured employee, certainly the indemnity clause on Speedy's quotation form is not part of the contract. If a contract was formed as a result of Brawny's counter-offer, the contract was "subject to all terms of Brawny's purchase order," one term of which was that Speedy Service would be solely responsible for certain injuries or claims asserted against Brawny.

The next question, however, is whether this injury falls within the scope of Brawny's indemnity clause. It does not. It is limited to injuries or claims "arising out of [Speedy's] furnishing the services covered by this Purchase Order." The injury to Speedy's employee had nothing to do with the work being performed. It was part of the process of preparing Speedy's quotation, not of its furnishing repair services. [Some may argue that the clause is

ambiguous and that the ambiguity must be construed against Brawny as the drafter of the clause. This is a worthy suggestion, though the drafter believes the provision is unambiguous on the stated facts.] Furthermore, unless the parties agree otherwise, a contract will not be construed to operate retrospectively, and this injury occurred before the contract was made.

[An examinee who finds that no contract was made and that recovery must be under *quantum meruit* should also logically conclude that Speedy has no obligation to Brawny with respect to Speedy's injured employee since none of the printed form provisions became part of the parties' arrangement.]

ANSWER TO OUESTION 15

Hearsay "is 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." MRE 801(c). A "statement" can be a written or oral assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. The "declarant" is a person who makes a statement. MRE 801(b). Hearsay is not admissible unless it comes within an exception. MRE 802.

Not all out-of-court statements offered to prove the truth of the matter asserted are hearsay. In particular, a statement is not hearsay if it is offered against a party and is one of which the party has manifested an adoption or belief in its truth. MRE 801(d)(2) (B).

A prior statement is excepted from the hearsay rule if the declarant is unavailable to testify at trial, and the statement is "offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b) (6). One way that a declarant may be "unavailable" is if the declarant is absent from the hearing and the proponent of the testimony has been unable to procure the declarant's attendance by process or other reasonable means. MRE 804(a) (5).

Additionally, all admissible evidence must be relevant. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. And, finally, relevant evidence can always be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or because it would confuse the issues, waste time, etc. MRE 403.

The initial question is whether the content of Diane's first statement can be attributed to Mr. Smith, i.e., whether Mr. Smith manifested an adoption or belief in its truth. MRE 801(d) (2) (B). "An adoptive admission is the express adoption of another's statement as one's own. It is conduct on the part of a party which manifests circumstantially that party's assent in the truth of a statement made by another. . . . In order to find adoptive approval of the other's statement the circumstances surrounding the other's declaration must be examined." *Shemman v American Steamship Co,* 89

Mich App 656, 673 (1979), quoting *Durbin v K-K-M Corp,* 54 Mich App 38, 50 (1974). Here, Mr. Smith's conduct in nodding his head affirmatively, coupled with his simultaneously hugging her and commencing his statement with "I know about all that," is sufficient to manifest his belief in the truth of Diane's statement. Mr. Smith's gestures and statement are all affirmative acts or statements reflecting his agreement to what Diane just stated, especially considering the context of the conversation. Thus, the better conclusion is that this is an adoptive admission by Smith and can be admitted through Clark, who witnessed it. However, an applicant could also correctly recognize that Mr. Smith's conduct was somewhat ambiguous, because nodding of the head and hugging do not tell us much about what he was thinking, and it is not necessarily clear what part of Diane's statement his "I know about all that" was directed to. An applicant with that perspective could legitimately argue that the circumstances were not sufficiently clear to establish an adoptive admission.

Diane's second statement to Mr. Smith ("I can't believe you are doing this to me") would also be admissible. Although this second statement meets the definition of hearsay as it is an out-of-court statement offered to prove the truth of the matter asserted, i.e., that Diane was in love with Mr. Smith and they had been having an affair, it arguably falls within two hearsay exceptions.

The first is the exception stated in MRE 804(b)(6). To gain admission under MRE 804(b) (6), the proponent must show that (1) defendant engaged in or encouraged wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. *People v Jones,* 270 Mich App 208, 217 (2006). Clearly, the statement is being offered against Mr. Smith, and evidence suggests that Mr. Smith engaged in wrongdoing to prevent Diane from testifying. The facts suggest that Mr. Smith's threat to Diane about testifying to the truth at trial is what led to her leaving the country. The threat also led to Mrs. Smith not being able to subpoena Diane for trial, i.e., to Diane being unavailable under the rules of evidence. MRE 804(a) (5). Thus, the statement would be admissible.

Another exception under which Diane's second statement likely could be admitted is MRE 803(2), the so-called "excited utterance" exception. MRE 803(2) allows admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." According to the facts, Diane was "furious and frightened" at the time because she had just been threatened by Mr. Smith. This arguably qualifies as a "startling event or condition" (though much

of the case law involves statements made in the wake of crimes and accidents) and Diane's statement related to that startling event.

The applicant should also briefly discuss the relevancy of the evidence, and whether it is otherwise excluded because of the criteria within MRE 403. As already noted, it is relevant and not excluded under MRE 403 as Diane's statement goes to the heart of the issue at trial.