

EXAMINERS' ANALYSIS OF QUESTION NO.

An "agency" is "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 559 (2014) (internal quotation marks omitted). Here, an express agency relationship was created by the contract between Derwin (the principal) and Carolyn (the agent) for the express purpose of arranging Derwin's birthday party.

Derwin's liability to Saucy Sean's - "A principal is bound by the acts of an agent done within the scope of the agent's authority." *Hutton v Roberts*, 182 Mich App 153, 162 (1989). Therefore, an agent has a duty to comply with all lawful instructions received from the principal. *Burton v Burton*, 332 Mich 326, 337 (1952); *Cutter v Powers*, 200 Mich 375 (1918). If the agent fails to obey the principal's instructions, the agent is liable to the principal. *Cutter v Powers*, 200 Mich 375, 385-386 (1918); *Andrews v Hastings Mut Ins Co*, 40 Mich App 664 (1972). Derwin will be required to pay Saucy Sean's the contract amount, because Carolyn was acting within the scope of her agency when she contracted with Saucy Sean's.

Derwin's liability to Exclusive Edibles - Generally speaking, a principal may NOT be held liable for the acts of an agent that occurred prior to the commencement of the agency. *Polly v Charouhis*, 253 Mich 363, 366 (1931). However, if a person ratifies the unauthorized acts of another, and has received and accepted the benefits accruing from those acts, that person may be bound as a principal. *Langel v Boscaglia*, 330 Mich 655, 659 (1951); *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18 (1938). In this situation, while Carolyn was not Derwin's agent at the time she ordered his birthday cake, Derwin's acceptance of the birthday cake and its consumption by the party attendees would constitute ratification. Therefore, Derwin is liable for the cost of the birthday cake.

Writer's Note: The doctrine of "ostensible agency" (apparent authority) is inapplicable under these facts and if an applicant raises and rejects its application, she/he should receive some credit. An agency is ostensible when the principal

causes a third person to believe another to be his or her agent where no agency actually exists. Three elements "are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence." *VanStelle v Macaskill*, 255 Mich App 1, 10 (2003). Here, because Derwin did not do anything that would cause Exclusive Edibles to reasonably believe that Carolyn Cook was acting on his behalf, an ostensible agency claim would fail.

May Carolyn keep the \$1000? - An agent owes a duty of good faith to the principal "and is not permitted to act for himself at the principal's expense during the course of his agency." *Central Cartage Co v Fewless*, 232 Mich App 517, 525 (1998). Thus, "all profits made in the execution of a fiduciary's agency belong to the principal," and the agent has a duty to account to the principal. *Id.* An agent is not permitted to personally profit from the agency relationship except to the extent that the agreement permits it or the principal expressly assents. *Goldman v Cohen*, 123 Mich App 224, 230 (1983). Here, nothing in the facts indicate that the contract permitted Carolyn to keep the negotiated discount, nor do the facts indicate that Derwin expressly consented to it. Therefore, Carolyn may not keep the \$1000.