

### EXAMINERS' ANALYSIS OF QUESTION NO. 15

1. The trial court properly granted Power's motion for summary disposition.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion, and if the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [Wilson v Alpena Co Rd Comm, 474 Mich 161, 166 (2006) (citations omitted).]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). Courts are "liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5 (2008). However, the trial court may only consider substantively admissible evidence in ruling on a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 123 (1999). Thus, affidavits, depositions, admissions, and documentary evidence offered in support or opposition to a motion under MCR 2.116(C)(10) may "only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373 (2009).

Here, Donovan's CEO asserted by affidavit that she had been told by her loading-dock employees that the widgets were defective, and therefore, she refused to pay for the widgets. However, this statement is hearsay that would not be admissible as evidence to establish the proof of the truth of the matter asserted, i.e., that the widgets were defective. See MRE 801(c) ("Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). See also *In re Contempt of Henry*, 282 Mich App 656, 670-671 n 1 (2009) ("Under MRE 802, hearsay evidence is inadmissible absent an

exception."). Donovan's CEO claimed to have been told that the widgets in question were defective, but she did not establish that she had personal knowledge that this was true, nor did Donovan present affidavits from the de-clarants who purportedly had personal knowledge. Moreover, Donovan did not present other evidence to support the em-ployee's assertions that the widgets were defective, such as affidavit testimony that the employees were unable to use the widgets because they were defective, or that the widgets were tested in some fashion by experts who opined that the widgets were defective. Because Donovan relied on inadmissible evidence in opposition to Power's motion, while Power's motion was supported by documentary evidence that was undisputed, the trial court was required to grant Power's motion. In other words, Donovan did not establish a genuine issue of material fact that it failed to pay Power \$30,000 for widgets delivered to Donovan pursuant to contract.

2. The trial court properly granted Power case evaluation sanctions. As articulated in *Peterson v Fertel*, 283 Mich App 232, 236 (2009), case evaluation sanctions are governed by MCR 2.403(0), which provides in relevant part:

(1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the oppos-ing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evalu-ation.

(2) For the purpose of this rule "verdict" includes,

- (a) a jury verdict,
- (b) a judgment by the court after a nonjury trial,
- (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

Under MCR 2.403(L)(1), the failure of a party to file a written acceptance or rejection of a case evaluation award within 28 days of being notified of the evaluation panel's award constitutes a rejection of the award. *Peterson*, 283 Mich App at 234 n 1. In the question pre-sented, because Power filed its motion for summary disposition two months after the panel issued its award, the facts demonstrate that Donovan rejected the award

by failing to respond to the panel's award within 28 days. The facts also demonstrate that summary disposition was awarded in favor of Power after Donovan rejected the case evaluation award. Thus, the judgment in favor of Power constituted a verdict as provided by MCR 2.403(0)(2)(c), because it was entered as the result of the trial court's summary disposition ruling after the case evaluation award was rejected by Donovan. In addition, the verdict of \$30,000, being greater rather than 10% less than the \$25,000 case evaluation award, MCR 2.403(0)(3), was not more favorable to Donovan, and therefore, Donovan was liable to Power for its actual costs.