ANSWER TO QUESTION NO. 5

The first issue is whether Ms. Grandy can testify to what Jones said after she fell. Since this raises a hearsay issue, the applicant should first set out the appropriate definitions. 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." MRE 801(c). Hearsay is not admissible unless it comes within an exception. MRE 802. All out-of-court statements offered to prove the truth of the matter asserted are not inadmissible hearsay. In particular, a statement is not hearsay if it is offered against a party and it is the party's own statement. MRE 801(d)(2)(A).

For several reasons, Ms. Grandy should be allowed to testify to what Jones stated. First, the statement is not hearsay because it is a statement made by a party opponent. Clearly Jones was the declarant, and he is a defendant in the case. Thus, it is admissible. It could also be argued that it is not hearsay because it is not being offered for the truth of the matter asserted, i.e., that Jones should have fixed the stairs, but to instead prove that as the owner, Jones was on notice that the stairs were defective. See *Clark v KMart,* 465 Mich 416, 419 (2001). (Notice of dangerous condition is relevant in premises liability cases.) Either way, it is not hearsay and is admissible.

Points should be awarded if the applicant determines that the evidence is relevant, MRE 401, and the probative value is not substantially outweighed by unfair prejudice. MRE 403. Finally, this is not a declaration against interest, as Jones is available to testify. MRE 804(b) (3); MRE 804(a) (4), *Sackett v Atyeo,* 217 Mich App 676, 684 (1996). It is also not admissible as a present sense impression, MRE 803(1), or as an excited utterance, MRE 803(2), as the facts reveal that Jones made the statement at least 30 minutes after the fall, and there is nothing to suggest that he was under any stress of excitement from seeing Ms. Grandy fall. See *Johnson v White,* 430 Mich 47, 57-58 (1988) and *Hewitt v Grand Trunk W R Co,* 123 Mich App 309, 320-322 (1983).

The second issue is whether Ms. Grandy can testify to Jones' offer to settle her potential claim. Initially, it should be noted that, for the reasons outlined above, the statement is not hearsay because it is an admission of a party opponent. MRE 801(d) (2) (A). However, under MRE 408 evidence of an offer to furnish consideration to compromise a claim that is disputed as to either

amount or validity is inadmissible. Here, although there was no pending lawsuit, and the accident just occurred, Jones was offering consideration to resolve any dispute Ms. Grandy may have had immediately after she fell. Given these facts, and Ms. Grandy's response, there was a sufficient "dispute" even though it had not yet crystallized into a lawsuit. *Affiliated Mfrs Inc v Aluminum Co of America,* 56 F3d 521, 527 (CA 3, 1995); *Commonwealth Aluminum Corp v Stanley Metal,* 186 F Supp 2d 770, 773 (WD KY, 2001). This testimony is therefore likely to be inadmissible.

The third issue is whether Ms. Grandy can testify about the replaced stairs she saw a week after the accident. MRE 407 precludes evidence of subsequent remedial measures that if made previously would have made the event less likely to have occurred. Ms. Grandy's testimony is clearly prohibited. No facts have been provided to suggest that it was offered to show ownership, control, or feasibility of the measure, and its only possible use would be to prove that Jones and the bakery were negligent.

As to the final issue, "[t]o lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal knowledge, that the photograph is an accurate representation." *Knight v Gulf & Western Properties, Inc,* 196 Mich App 119, 133 (1992). The original photograph is normally required for admission, MRE 1002, but a duplicate would be admissible in the absence of doubt as to the duplicate's authenticity. MRE 1003. Here Ms. Grandy can testify to the accuracy of the scene depicted in the photograph, as she was there when it occurred. There is also nothing to suggest that the photo was not the original. Additionally, neither the fact that she did not take the photo, *Ferguson v Delaware International Speedway,* 164 Mich App 283, 291 (1987), nor the fact the scene has partially changed since the photo was taken, *Knight, supra* at 133, precludes her from establishing its foundation for admission.