EXAMINERS' ANALYSIS OF QUESTION NO. 4

Betty's Argument:

Betty argues that she had a valid contract with Higgins Pool. "An essential element in a contract claim is legal consideration." *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 158 (2006). The best argument is that, while Higgins Pool furnished consideration by promising to provide a swim lesson, Betty furnished no consideration—the lesson was offered for free, so she incurred no detriment and conferred no benefit on Higgins Pool. The pool's offer of a free swim lesson "was merely a legally unenforceable, gratuitous undertaking . . . ." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 59 (2005). Consequently, a court should reject Betty's claim of a valid contract requiring that Higgins Pool provide her child with a free lesson. However, a cogent argument that Betty's agreement to the liability disclaimer constituted consideration will be given full credit.

Daisy's Argument:

Daisy should argue that Higgins Pool breached its contract with her because Audrey did not "reasonably determine" that Evan was uncooperative. It is unclear how a court should respond. On the one hand, Evan was "unhappy and complied only half-heartedly with Audrey's instructions" and complained loudly about the situation. On the other hand, Audrey arguably terminated the lesson because she was "sleep-deprived and tired of dealing with unpleasant children," not because Evan was uncooperative; moreover, Evan was complying with her instructions, if only "half-heartedly." Examinees will receive credit for using the facts presented to make cogent arguments either way.

Franny's Argument:

Franny should argue that the contract was not validly modified regarding price because the parties did not mutually agree to change the price. There is no dispute that both parties agreed to substitute Franny's daughter for her son in the lesson. However, the parties did not mutually agree to modify the contract price in light of this substitution. While

Audrey may have assumed that Franny would pay the higher price, "a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372 (2003); *see also Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 326-327 (1996) ("[I]n the same way a meeting of the minds is necessary to create a binding contract, so also is a meeting of the minds necessary to modify the contract after it has been made."). "This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Quality Products*, 469 Mich at 364-365. Here, Franny and Audrey did not discuss any change in price or make any written modification to their contract; indeed, Franny was unaware that lessons for younger children were more expensive. Because the mutuality requirement thus was not satisfied, a court should reject the pool's attempt to collect the $10. Applicants might apply the doctrine of mistake. If Franny's mistake was unilateral and Audrey knew of Franny's error but concealed it, the original contract price is not rescinded. If the mistake was mutual, equity would likely put the loss on Higgins Pool. Alternative points can be earned for this analysis.