EXAMINERS' ANALYSIS OF QUESTION NO. 4

Henry v. Plumber:

Henry may maintain his suit against Plumber because he is a third-party beneficiary of the contract between Plumber and AquaCare.

Under Michigan statute, "[a]ny person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." *Id.* at 600.1405(1). "An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status." *Schmalfeldt v N Pointe Ins Co,* 469 Mich 422, 428 (2003) (citations omitted).

In the contract between Plumber and AquaCare, Plumber undertook to provide services directly for Henry's benefit. The contract specified the particular work Plumber was to perform to enhance Henry's aquarium and required Plumber to work directly with Henry in executing the contract. These facts are similar to those in *Vanerian v Charles L Pugh Co, Inc,* 279 Mich App 431 (2008), in which the contract "contained a detailed list of instructions and requirements relative to the job" and "[t]he work to be performed under the contract related entirely to repairs and improvements in plaintiff's house," id. at 433; "plaintiff [was] expressly referred to in the contract," *id.* at 436; and "plaintiff and defendant discussed the project with each other," id. The court concluded that "[d]efendant undertook to do something directly for plaintiff," *id.* at 434, making him an intended third-party beneficiary.

AquaCare v. Henry:

I. *Installation of Heater*

A court should find that the contract provision regarding the heater installation is void because it violates a statute.

"Contracts which violate a statute are contrary to public policy and cannot be enforced by the courts". *Peeples v City of Detroit*, 99 Mich App 285, 302 (1980). *See also Johnson v QFD, Inc*, 292 Mich App 359, 365 (2011) ("[C]ontracts founded on acts prohibited by a statute . . . are void." (internal quotation marks omitted)); *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 244 (2000) (holding a contract "void and unenforceable" because it violated a statute and an accompanying administrative rule); *Kukla v Perry*, 361 Mich 311, 324 (1960) ("where an illegal contract is involved, the court will not enforce it or grant relief thereunder").

However, the void heater-installation provision is severable from the fish-feeding provision. "A general rule of contract law is that a void section of an otherwise valid provision can be severed if it is not an essential part of the whole." *Peeples*, 99 Mich App at 296. *See also Stokes v Millen Roofing Co*, 466 Mich 660, 666 (2002) (if illegal provision is not "central to the parties' agreement," lawful provisions can be severed and enforced). "[I]f any part of an agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute, provided the statute does not, either expressly or by necessary implication, render the whole void, and provided the sound part can be separated from the unsound, and enforced without injustice to the defendant." *Smilansky v Mandel Bros*, 254 Mich 575, 582 (1931) (internal quotation marks omitted).

"The primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Prof'l Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174 (1998). "As a general rule, a contract is . . . severable when, in its nature and purpose, it is susceptible of division and apportionment. The singleness or apportionability of the consideration appears to be the principal test. The question is ordinarily determined by inquiring whether the contract embraces one or more subject matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537-38 (1991) (internal quotation marks omitted); *see also E Distrib Corp v Lightstone*, 257 Mich 184, 186 (1932). Here, the heater-installation provision and the fish-feeding provision address different subject matters, andeach is supported by separate consideration. No facts suggest that the statute banning installation of the heater affects, "either expressly or by

necessary implication," AquaCare's duty or ability to feed the fish.

II. *Feeding of Fish*

A court should find in favor of Henry based on the doctrine of impossibility. "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *Bissell v LW Edison Co,* 9 Mich App 276, 285 (1967) (internal quotation marks omitted). "'[W]hether a promisor's liability is extinguished in the event his contractual promise becomes objectively impossible of performance may depend upon whether the supervening event producing such impossibility was or was not reasonably foreseeable when he entered, into the contract.'" *Id.* at 284 (quoting 84 ALR 2d 12, § 6 (1962)). *See also Roberts v Farmers Ins Exch,* 275 Mich App 58, 73-74 (2007).

Here, performance of the fish-feeding provision became impossible because there were no longer any fish to feed. This circumstance was not "reasonably . . . within the contemplation of both parties when they entered into the contract" because neither Henry nor AquaCare thought the cat was capable of catching and eating the fish.