ANSWER TO QUESTION NO. 6

For the following reasons, I would advise Landscape Design that it may safely retain the amount it already collected for the preliminary design, but that, because it breached the contract by submitting a non-compliant revised plan, the most it can recover in addition is the amount owed under the second invoice covering the budget estimate it prepared on the preliminary design.

1. In the contract, Landscape Design agreed that it had to comply with cost limitations, if any, imposed on it by Mall Management. Because there was no cost limitation at the time Landscape Design supplied its preliminary design, Landscape Design was contractually entitled to keep the payment at the $150 hourly rate that it received for this work. *Zannoth v Booth Radio Stations,* 333 Mich 233, 242-243 (1952).

2. Landscape Design also was contractually entitled to payment at the $150 hourly rate for providing the estimated cost of the preliminary design, in light of the fact budgeting was within the scope of the contract and Mall Management's request related to the preliminary design. *Id.* Therefore, Landscape Design should recover on the second invoice in the amount of $4,800.

3. Once Mall Management imposed the cost limitation as a condition precedent, however, Landscape Design was required to present only designs that complied with the cost limitation. Any design that did not comply was a breach of contract by Landscape Design, relieving Mall Management of its duty to perform. In addition, Mall Management afforded Landscape Design with an opportunity to cure (which Mall Management was not required to do), which Landscape Design refused to do. *Id.* 333 Mich at 246; *Able Demolition v City of Pontiac,* 275 Mich App 577, 583-584 (2007).

4. An issue also may be raised as to whether Landscape Design's breach was a substantial breach, because only a substantial breach would be sufficient to relieve Mall Management of its obligation to perform. The question under these circumstances is whether, despite the breach, Mall Management obtained the benefit it reasonably expected to receive. Because in this case, Mall Management reasonably expected to receive a final design plan that could be implemented within its cost limitation, it did not receive the benefit it reasonably expected, and the breach was substantial. *Able Demolition,* 275 Mich App at 584-585; *Michaels v Amway Corp,* 206 Mich App 644, 650 (1994).

5. Nor is the amount for the revised plan available under a theory of quantum meruit, which would require that Mall Management have unfairly received and retained a benefit from Landscape Design. The revised plan was unusable, and therefore of no benefit to Mall Management, which had to hire and pay for another landscape design firm to start from scratch. *Zannoth*, 333 Mich at 243; *Morris Pumps v Centerline Piping*, 273 Mich App 187, 194 (2006).

6. This also is not a situation that is amenable to a frustration of purpose of performance or impossibility defense, although this writer recommends that a test taker who raises the issue be provided one point for recognizing it as a potential issue. To the extent the frustration of purpose defense is recognized in Michigan, it requires that the frustrating event be one that was not reasonably foreseeable at the time the contract was made and was not a risk that was assumed by the breaching party. While Landscape Design concluded that it was unable to modify its existing design to abide by the cost limitation, the parties agreed in the contract that cost limitations could be imposed and, once imposed, were a condition precedent to performance. Both parties were also aware of an unfavorable economic climate at the time the contract was entered. Under these circumstances, the imposition of a cost limitation was foreseeable and was a risk that Landscape Design assumed. *Rooyakker v Plante & Moran*, 276 Mich App 146, 159-160 (2007).