

FEBRUARY 2018 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

Price:

Buggy's argument regarding the price term will succeed because Buggy and Ellen entered a valid contract at the price of \$25 per month.

"In order for there to be an enforceable agreement between the parties, there must be 'mutual assent' to be bound—that is, the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 508 (2014) (citing *Goldman v Century Ins Co*, 354 Mich 528, 535 (1958); *Dodge v Blood*, 307 Mich 169, 176 (1943)). "[B]ecause the offeror is entitled to receive what it is it has bargained for, if any provision is added to which the offeror did not assent, the consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected . . ." *DaimlerChrysler Corp v Wesco Distrib*, 281 Mich App 240, 247 (2008) (brackets in original) (quoting 2 Williston, Contracts (4th ed, § 6.11, pp 110-117)). "[W]hen negotiating the terms, the acceptance of the final offer must be substantially as made; if the purported acceptance includes conditions or differing terms, it is not a valid acceptance—it is a counteroffer and will not bind the parties." *Huntington Nat'l Bank*, 305 Mich App at 508.

When Ellen sent Buggy a proposed contract with a price term of \$50 per month, she was making an offer. When Buggy crossed out the \$50 price and wrote "\$25," she was rejecting Ellen's offer and making a counteroffer. See *Zurcher v Herveat*, 238 Mich

App 267, 296 (1999). ("For a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered."). "[T]o change an acceptance into a counteroffer, the changes to a material term must themselves be material," *id.* at 297, and Buggy's reduction of the contract price by half constituted a material change to a material term.

The question then becomes whether Ellen accepted Buggy's counteroffer. "[A]n acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453-54 (2006) (internal quotation marks omitted) (brackets in original). "An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act . . . Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." Restatement Contracts, 2d, § 30, pp 84-85.

Buggy's counteroffer to Ellen did not "invite or require" acceptance to be made in any particular fashion. Therefore, even though Ellen's offer required Buggy to sign the document, Ellen's own failure to sign the document does not mean that no contract was formed. Instead, "assent to an offer may be indicated by acts as well as by words." *Pakideh v Franklin Commercial Mortgage Group*, 213 Mich App 636, 641 (1995) ("If an offer does not require a specific form of acceptance, acceptance may be implied by the offeree's conduct." *Id.* at 640). Consequently, Ellen's rendering of services implied acceptance of Buggy's counteroffer, which included the \$25 price term. See *Wake Plumbing & Piping, Inc v McShane Mech Contr, Inc*, Case No: 2:12-cv-12734, 2014 US Dist LEXIS 102962, at *6 (July 29, 2014) ("A meeting of the minds can be found from performance and acquiescence in that performance."); *DaimlerChrysler*, 281 Mich App at 247 (finding that defendant accepted counteroffer "by performing the contract work.").

Ellen's failure to call ahead:

Buggy will not succeed in her argument that Ellen's failure to call ahead relieves Buggy of her contractual obligation to pay for Ellen's services.

No substantial breach:

"When performance of a duty under a contract is due any non-performance is a breach. [2 Restatement Contracts, 2d, § 235, p 211.]" *Woody v Tamer*, 158 Mich App 764, 771 (1987) (brackets in original). Buggy is therefore correct that Ellen breached the contract by failing to call ahead for the first treatment. Buggy further argues, however, that because of that breach, she does not have to perform her duty under the contract by paying Ellen (at least for that month). In essence, Buggy is arguing that Ellen's breach discharged Buggy's obligations and that Ellen would have no cause of action against Buggy for failing to perform under the contract.

Under Michigan law, "[h]e who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126 (1968) (internal quotation marks omitted). See also *Alpha Capital Mgmt v Rentenbach*, 287 Mich App 589, 613 (2010) ("[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." (internal quotation marks omitted)); *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585 (2007) (same). "However, the rule only applies if the initial breach was substantial." *Id.* Consequently, Buggy's argument will succeed only if Ellen's initial breach was substantial.

"To determine whether a substantial breach occurred, a trial court considers whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Id.* (internal quotation marks omitted). "[T]he words 'substantial breach' . . . must be given close scrutiny. Such scrutiny discloses that the application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible . . ." *Baith*, 380 Mich at 126 (internal quotation marks omitted). Here, the allegedly nonbreaching party, Buggy, obtained the benefit she reasonably expected to receive under the contract: extermination services. While the contract also provided Buggy the benefit of receiving a call from Ellen prior to each treatment so that Buggy could prepare, in this instance Buggy was already prepared, so Ellen's breach caused no damages and did not interfere with Buggy's receipt of the extermination services. In

addition, Ellen's failure to call ahead did not render Buggy's performance "ineffective or impossible."

Waiver:

Buggy also appears to have waived her right to demand performance of the call-ahead requirement for that month. "A waiver may be . . . inferably established by such declarations, acts and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *Strom-Johnson Constr Co v Riverview Furniture Store*, 227 Mich 55, 67-68 (1924). See also *H J Tucker & Assocs v Allied Chucker & Eng'g Co*, 234 Mich App 550, 565 (1999) (same). "If the parties mutually adopt a mode of performing their contract differing from its strict terms, . . . or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter." *Goldblum v UAW*, 319 Mich 30, 37 (1947) (ellipses in original; internal quotation marks omitted). Although Ellen did not call ahead, Buggy did not object—in fact, she "invited Ellen inside." By allowing Ellen to perform despite her failure to call ahead, Buggy was acting in a manner "inconsistent with a purpose to exact strict performance" of the call-ahead requirement.

Guarantee:

Buggy will not succeed in invoking the guarantee because she is attempting to apply it to services that are not covered by her current contract with Ellen.

Although the parties' previous contract covered extermination services to kill wasps and other outdoor insects, the current contract covers extermination services to kill only indoor insects. Since the wasps were outdoor insects, their presence would not trigger the guarantee in the current contract. Buggy must pay for the second month's extermination services.