EXAMINERS' ANALYSIS OF QUESTION NO. 11

Breach of Contract for Gardening Services:

When Vicki signed the written contract provided by Rob in May 2018, she and Rob entered a valid agreement requiring her to provide services every day of the week. Vicki breached the contract by failing to provide service to Rob on Mondays.

Alternatively, the May 2018 agreement would be invalid if the facts were interpreted to indicate that Rob provided *no consideration*. In that case, the issue would be whether Vicki breached the May 2017 contract. The following analysis would be adjusted accordingly.

Parol Evidence Rule:

Vicki sought to introduce evidence of her conversation with Rob the previous summer to prove that she was not required to provide services on Mondays. Such evidence would be barred by the parol evidence rule, "which prohibits the use of extrinsic evidence to interpret unambiguous language within a document." *Shay v Aldrich*, 487 Mich 648, 667 (2010).

> The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument, where the language of the instrument itself taken alone is such that it does not clearly express the intention of the parties or the subject of the agreement. [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470 (2003) (internal quotation marks omitted).]

Here, however, the written contract "stated that Vicki agreed to provide services every day of the week," which unambiguously expresses the intention of the parties. Consequently, evidence of Vicki's conversation with Rob is inadmissible. See also *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 455 (2015) ("Absent ambiguity, interpretation of a contract clause does not require parol or extrinsic evidence to resolve.").

Implied Contract:

Vicki also argues that the understanding she and Rob reached the previous summer, had created an implied contractual provision that she did not need to provide services to Rob on Mondays. However, "parties may execute a substituted agreement which totally supersedes the terms of the original." *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 412 (2002). "[I]f the later contract covers the same subject matter as the earlier contract and contains terms that are inconsistent with the terms of the earlier contract, the later contract may supersede the earlier contract, unless it appears that this is not what the parties intended." *Id.* at 414 n 16. Here, Rob and Vicki clearly intended for the new contract to supersede the previous contract.

"An implied contract cannot be enforced where the parties have made an express contract covering the same subject matter." *Scholz v Montgomery Ward & Co*, 437 Mich 83, 93 (1991). See also *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373 n 4 (2003) ("[A]n implied-in-law contract cannot contradict an express contract on the same subject."). Consequently, any implied contractual understanding from the previous summer that Vicki would not provide services to Rob on Mondays, would be unenforceable because Vicki and Rob's subsequent written contract contained a contrary provision covering that issue.

Breach of Contract for Social Media Promotion:

The oral agreement between Vicki and Rob is unenforceable on two grounds:

1. **Lack of Consideration:**

First, the agreement lacked consideration. "An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740 (2000). Here, the sole purported consideration was "Rob's paying Vicki 10% of the restaurant's June sales." However, "[u]nder the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Id.* at 740-741. Under their earlier agreement, Rob already had a duty to pay Vicki for the previous month's restaurant sales, and no facts indicate a dispute regarding the amount owed. Thus, Rob's promise to pay Vicki an amount

already owed did not constitute valid consideration, making the contract invalid and unenforceable. See id. at 742 ("We hold that the preexisting duty rule barred the fund from requiring plaintiff to take on additional burdens, without consideration, in order to get paid that which she was owed."). See also *46th Circuit Trial Court v County of Crawford*, 476 Mich 131, 158 (2006) ("[B]ecause the county board has a preexisting duty to appropriate a serviceable level of funding to its court, a county cannot be compelled under contract law to appropriate . . . funds to enable the court to function serviceably . . . ."); *Yoches v City of Dearborn*, 320 Mich App 461, 480 (2017) ("[T]here was no new consideration for the hold-harmless agreement because the City was already contractually obligated to provide the hayrides at the time the hold-harmless agreement was signed. That is . . . the City had a preexisting duty to provide the hayrides.").

Alternatively, if Rob promised to pay Vicki an *additional* 10% of restaurant sales, the contract is supported by valid consideration and is thus enforceable.

2. Statute of Frauds:

Second, the agreement violated the Statute of Frauds, which provides that "[a]n agreement that, by its terms, is not to be performed within 1 year from the making of the agreement" must be "in writing and signed with an authorized signature by the party to be charged . . . ." MCL 566.132(1)(a). The oral agreement required Vicki to promote Rob's restaurant on her social media accounts for two years. Since the agreement by its terms could not be completed within one year of its making, it was required under the Statute of Frauds to be in writing. The oral agreement is thus unenforceable. See *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 549 (1991) ("Any promise made to members of Group B was unenforceable under the statute of frauds because the asserted agreement . . . was not capable of performance within one year."); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441 (1993) ("A contract . . . that is not capable of being performed within one year is within the statute. . . . [T]he alleged . . . contract was for a three-year term. 'By its terms,' then, the contract could not have been 'performed within one year' and so falls within the statute of frauds." (citation omitted)).