

**FEBRUARY 2015 MICHIGAN BAR EXAMINATION  
EXAMINERS' ANALYSES**

**EXAMINERS' ANALYSIS OF QUESTION NO. 1**

The first issue is whether Polly can establish a prima facie case of slander. The elements are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24 (2005).

Polly will have no trouble proving the elements of slander. First, Dan made a statement about Polly--that she was a prostitute, with the not so subtle accusation that her husband was her pimp. Although the second clause of Dan's statement was somewhat in the form of a question, overall the statement was about Polly working as a prostitute. The statement was therefore defamatory because it tended to harm Polly's reputation in the estimation of the community. *Rouch v Enquirer & News*, 440 Mich 238, 251 (1992). Additionally, there is nothing to suggest that this was at all true, *Wilson v Sparrow Hosp*, 290 Mich App 149, 155 (2010) (truth is an absolute defense to defamation claim), and the facts show that Dan tried to come up with the most outrageous accusation. Second, Dan's statement was not privileged, and it was communicated to many people on the sidewalk, including two of Polly's friends. Third, because Polly is a private individual, she must prove that Dan was negligent in publishing the statement. MCL 600.2911(7). She can easily do so, as the facts indicate that Dan simply created an outlandish story about Polly for the sole purpose of revenge and embarrassment. Finally, because Dan accused Polly of lack of chastity, she does not need to prove special harm, as the statement is actionable by itself. MCL 600.2911(1); *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 338-339 (1993). The fact that she may have laughed off the incident at first is therefore irrelevant. Some applicants may raise the possibility

that Dan's statement might not be defamatory because it is "rhetorical hyperbole", on the basis that it could only be seen as loose language or something not meant as an actual assertion of fact. *Ghanam v Does*, 303 Mich App 522, 545-546 (2014).

Thus, the applicant should conclude that Polly can establish a prima facie case of slander.

The second question is whether Polly can recover punitive damages. She cannot. According to several statutory provisions, in this private plaintiff slander case Polly is not entitled to an award of punitive damages. MCL 600.2911(2)(a) states that, except as described in (2)(b) (involving libel claims only), a libel or slander plaintiff is only entitled to recover actual damages. Although a private plaintiff can recover actual damages under this subsection if she proves actual malice, *Glazer v Lamkin*, 201 Mich App 432, 436-437 (1993), the subsection does not list punitive damages as being recoverable. Additionally, MCL 600.2911(7) provides that recovery for a successful private plaintiff is limited to economic damages. Consequently, despite the evidence of Dan's malice in publishing the statement, Polly is not entitled to an award of punitive damages. *Peisner v Detroit Free Press*, 421 Mich 125, 130-133 (1984).

To the extent that applicants may assert that Polly is not entitled to punitive damages because she never requested that Dan issue a retraction, Michigan law has been construed such that retractions only apply to libel committed by media defendants. See *Brantley v Zantop International Airlines*, 617 F Supp 1032, 1035-1036 (ED Mich, 1985), interpreting MCL 600.2911(2)(b).