EXAMINERS' ANALYSIS OF QUESTION NO. 5

Yo's Suit Against Charles

The issue is whether the damages provision in the contract between Yo and Charles is a valid liquidated damages clause or an invalid penalty.

> It is a well-settled rule in this State that the parties to a contract can agree and stipulate in advance as to the amount to be paid in compensation for loss or injury which may result in the event of a breach of the agreement. Such a stipulation is enforceable, particularly where the damages which would result from a breach are uncertain and difficult to ascertain at [the] time [the] contract is executed. If the amount stipulated is reasonable with relation to the possible injury suffered, the courts will sustain such a stipulation.

Curran v Williams, 352 Mich 278, 282 (1958); see also *Barclae v Zarb*, 300 Mich App 455, 485 (2013). However, "[c]ourts will not permit parties to stipulate unreasonable sums as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable." *Curran*, 352 Mich at 283.

Here, a court should find the clause to be an unenforceable penalty. Damages resulting from Charles' breach were not "uncertain and difficult to ascertain at time contract is executed," because Yo was able to calculate such damages based on its experience. In addition, the amount stipulated was not "reasonable with relation to the possible injury suffered." Yo calculated that Charles' breach would cause lost profits of $2,000, but the "liquidated damages" clause set damages at $6,000—three times the actual loss.

Purported damages may constitute an invalid penalty "notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages." *Id.* at 284-85. *See also Moore v St Clair County*, 120 Mich App 335, 341 (1982) (Of course, use of the terms 'liquidated' or 'stipulated' damages does not necessarily mean that the clause is valid and not a penalty. *Nichols v Seaks*, 296 Mich. 154, 161-162 (1941)). Consequently, the fact that the contract between Yo and Charles describes the $6,000 as "liquidated damages" does not make the clause enforceable.

Charles' Suit Against Jazzamatazz

"[D]amages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 414 (1980). Courts apply an "objective standard" of foreseeability, under which damages are recoverable if "the defendants reasonably knew or should have known that in the event of breach," such damages would result. *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 13, 14-15 (1994) (internal quotation marks omitted).

Here, no facts indicate that Jazzamatazz knew or should have known that Charles was relying on Jazzamatazz's provision of concert tickets in order to perform under a separate contract with another magazine, or that Jazzamatazz's failure to provide such tickets could expose Charles to a potentially costly breach of contract action by another magazine. Thus, the $1,000 for lost income from Yo was not objectively foreseeable and is not recoverable. As explained above, the $6,000 was an invalid penalty, but even if it were a valid liquidated damages stipulation, it would be even less foreseeable to Jazzamatazz and therefore also unrecoverable.

"[I]t is generally held that damages for mental distress cannot be recovered in an action for breach of a contract." *Kewin*, 409 Mich at 415. *See also Valentine v Gen American Credit, Inc*, 420 Mich 256, 261-62 (1984) (stating "the general rule" that "mental distress damages for breach of contract are not recoverable"). Breach of "almost any agreement . . . results in some annoyance and vexation. But recovery for those consequences is generally not allowed, absent evidence that they were within the contemplation of the parties at the time the contract was made." *Kewin*, 409 Mich at 417. "Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish." *Id.* at 419. Given that Jazzamattazz did not know of Charles' contract with Yo, Jazzamatazz consequently could not have contemplated Charles' mental distress resulting from breach of such contract. Under the general rule, then, Charles cannot recover mental distress damages from Jazzamatazz.

"[T[he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-26 (1996) (footnote omitted). "[A]bsent allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." *Kewin*, 409 Mich at 420-21 (citation and footnote omitted); *see also Valentine*, 420 Mich at 263 (same). Punitive

damages in the absence of a statutory authorization are not recoverable in Michigan. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400 (2006). Here, there is no evidence of tortious conduct by Jazzamatazz independent of its breach, so Charles cannot recover exemplary/punitive damages.

"Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Barclae v Zarb*, 300 Mich App 455 (2013) (quotation marks omitted); *see also UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998) (same). "[A]n integration clause nullifies all antecedent agreements . . . ." *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 413 (2002) (quotation marks omitted). *See also UAW-GM Human Resource Ctr*, 228 Mich App at 494 ("If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties . . . this declaration is conclusive as long as it has itself not been set aside by a court . . . ." (quotation marks omitted; first ellipses in original.)). Because the contract between Charles and Jazzamatazz contains an explicit integration clause indicating that the contract "constitutes the entire agreement between the parties," Jazzamatazz's purported agreement with Charles regarding the Justin Bieber concert tickets would "vary the written contract" by adding a new term. Evidence of this purported agreement is therefore inadmissible.

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl*, 450 Mich at 625 (footnote omitted). Damages for breach of a commercial contract are thus generally limited "to the monetary value of the contract had the breaching party fully performed under it." *Kewin*, 409 Mich at 414-15. Here, if Jazzamatazz had fully performed under its contract with Charles, it would have given Charles two tickets worth $100 each. Consequently, a court should award Charles $200 damages in his action against Jazzamatazz.