California Bar Examination

Performance Tests and Selected Answers

February 2002

FEBRUARY 2002 CALIFORNIA BAR EXAMINATION EXAMINATION PERFORMANCE TESTS AND SELECTED ANSWERS

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This document contains the Two Performance Tests from the February 2002 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by the applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here the consent of their authors and may not be reprinted.

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INSTRUCTIONS AND FILE

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Estate of Keefe

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response.

McIntyre, Yost and Amrein, LLP

MEMORANDUM

TO: Applicant
FROM: Gretchen Pronko
DATE: February 26, 2002

Our client, Mason Finch, is the former caretaker of decedent, Sandra Keefe, who promised to leave him a life estate in certain real and personal property in exchange for Mr. Finch's agreement to care for her. We recently filed a complaint on behalf of Mr. Finch, asserting a simple cause of action against the administrator of Ms. Keefe's estate for specific performance of an oral contract. Defendant has filed a motion for summary judgment.

The file contains a number of documents and some relevant cases you will need to review in order to perform the following tasks:

A. Draft declarations for all witnesses whose testimony will be useful in establishing that there are disputed issues of fact and in supporting our arguments. Don't take time to write out headings or other boilerplate language. Our client, the witnesses interviewed by our investigator, and the friend contacted by our client (see Mr. Finch's letter on this subject in the file) have all agreed to sign declarations if you think their testimony will help.

B. Draft only sections III and IV of a Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.

In performing this assignment, please comply with the Internal Memorandum regarding Oppositions to Motions for Summary Judgment.

McIntyre, Yost and Amrein, LLP
INTERNAL MEMORANDUM

TO: Associates
FROM: Myron Taylor
RE: Oppositions to Motions for Summary Judgment

DECLARATIONS

All facts asserted in opposition to motions for summary judgment must be supported by admissible evidence established in declarations or by judicial notice.

Declarations must:

- Be limited to facts relevant to the motion for summary judgment.
- Include only admissible evidence that the declarant could testify to if called as a witness.
- Be concise and direct statements of facts; a declaration should not be a summary of everything the declarant knows.
- Be drafted before the memorandum of points and authorities; then, the statements of undisputed and disputed facts and argument can cite to the declarations by paragraph number, and need not repeat all of the facts.

MEMORANDUM OF POINTS AND AUTHORITIES

The Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment consists of five different sections, as follows:

Section I. Introduction: This consists of a concise one-paragraph summary of the nature of the underlying case, the basis for the summary judgment motion, and the basis for the opposition.

Section II. Response to Moving Party's Statement of Undisputed Facts: This is in two-column format. In the first column we restate the alleged Undisputed Facts. In the

second column, we respond with “Agree” or “Disagree,” indicating whether we agree or disagree that the fact alleged to be undisputed is in fact undisputed.

Section III. Responsive Party’s Statement of Disputed Facts: This is a two-column section identical in format to the Moving Party’s Statement of Undisputed Facts (Section II of their Memorandum). In the first column, we state those facts we believe are disputed. The second column lists citations to evidence that establish these facts.

Section IV. Response to Moving Party’s Arguments: In this section, we draft arguments that respond point by point to the arguments made in the moving party’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment. In support of our arguments, we cite to our Disputed Facts by the number assigned in Section III, and to relevant cases to support our legal assertions. We also make any additional arguments that support the position that there are triable issues of fact or that there are legal issues precluding entry of judgment as a matter of law.

Section V. Conclusion: This is a brief statement asking the court to find in our favor.

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(555) 267–0001

Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

In re ESTATE OF SANDRA KEEFE, Deceased.
_____/

MASON FINCH,

Plaintiff,

vs.

GRANT KEEFE, as Administrator of the Estate of Sandra Keefe,

Defendant.

_____/

Case No. 171757

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is an action for specific performance of an oral contract to make a will. Plaintiff, Mason Finch, claims that the decedent, Sandra Keefe, promised to leave him a life estate in certain real and personal property as consideration for his agreement to provide care for her. Defendant, Grant Keefe, seeks summary judgment on three grounds: the undisputed facts establish that there was no oral contract between plaintiff

and decedent; this claim is barred by the statute of frauds; and, this claim is barred by the applicable statute of limitations.

II. DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Statement	Citation to Evidence
1. Defendant is the administrator of decedent's estate.	Declaration of Grant Keefe, ¶ 1
2. Defendant is decedent's nephew.	Declaration of Grant Keefe, ¶ 2
3. Defendant reviewed decedent's papers, documents, and personal effects, and found no writing signed by decedent promising interests in her estate to plaintiff.	Declaration of Grant Keefe, ¶ 3
4. Defendant spent significant time with decedent in the months before she died.	Declaration of Grant Keefe, ¶ 4
5. Defendant had many conversations with decedent in which she discussed defendant and plaintiff and Megan Finch.	Declaration of Grant Keefe, ¶ 5
6. Decedent indicated that she felt she had more than provided compensation to plaintiff for the services he provided.	Declaration of Grant Keefe, ¶ 6
7. Decedent indicated that she would not leave a will, as she knew and desired that defendant would inherit everything if she died intestate.	Declaration of Grant Keefe, ¶ 7
8. Decedent died on August 26, 1999.	Declaration of Grant Keefe, ¶ 8
9. This action was filed on January 11, 2002.	Request for Judicial Notice of Complaint

III. ARGUMENT

A. Plaintiff's Claim Based on an Oral Contract to Make a Will Must Fail Because There is No Evidence to Establish the Existence of an Oral Contract.

The undisputed facts in this case show that there was no oral contract to make a will. Defendant was decedent's nephew. [Defendant's Undisputed Fact (hereafter DU Fact) 2.] Toward the end of decedent's life, defendant spent substantial amounts of time with her. [DU Fact 4.] Defendant had many conversations with decedent in which she discussed defendant and plaintiff and Megan Finch. [DU Fact 5.] Decedent indicated that she felt she had more than provided compensation to plaintiff for the services he provided. [DU Fact 6.] She further indicated that she would not leave a will, as she knew and desired that defendant would inherit everything if she died intestate. [DU Fact 7.]

These undisputed facts establish that decedent never promised to make a will with provisions in favor of plaintiff. Thus, no contract, oral or written, existed.

B. Even if an Oral Contract Exists, It Cannot be Enforced Because It Is Not in Writing.

Defendant was named administrator of decedent's estate. [DU Fact 1.] In this capacity, he examined decedent's records, papers, and personal effects. [DU Fact 3.] He did not discover any will or any other writing signed by decedent indicating any promises made to plaintiff. [DU Fact 3.]

Columbia Probate Code §150 provides as follows:

> A contract to make a will . . . can be established only by one of the following:
>
> (a) Provisions of a will stating material provisions of the contract.
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
> (c) A writing signed by the decedent evidencing the contract.

Probate Code §150 is clear in requiring a writing to establish the existence of a contract to make a will. (*Riganti v. McElhinney* (Colum. Ct. App. 1967).) Because the undisputed facts in this case establish that the provisions of Probate Code section 150 have not been met, this action is barred.

C. This Action Is Barred by the Statute of Limitations Because It Was Filed More Than Two Years After Decedent's Death.

Columbia Code of Civil Procedure section 597 provides that actions to enforce the terms of an oral contract must be brought within two years. An action to enforce a contract to make a will arises upon the death of the promisor. (*Kennedy v. Bank of Columbia* (Colum. Ct. App. 1965).) Decedent died on August 26, 1999. [DU Fact 8.] This action was filed on January 11, 2002. [DU Fact 9.] Thus, plaintiff's action is untimely and therefore barred.

IV. CONCLUSION

The law and undisputed facts in this case establish that plaintiff's action must fail. Defendant respectfully requests that summary judgment in his favor be entered.

Dated: February 21, 2002

Respectfully submitted,

HIMMLER & MATZEN

By_____
PAUL PRICE

Attorneys for Defendant

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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

In re ESTATE OF SANDRA KEEFE, Deceased.
_____/

Case No. 171757

DECLARATION OF GRANT KEEFE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MASON FINCH,

Plaintiff,

vs.

GRANT KEEFE, as Administrator of the Estate of Sandra Keefe,

Defendant.

_____/

I, Grant Keefe, declare as follows:

1. I am the defendant in this action, and I am the administrator of decedent Sandra Keefe's estate.

2. I am also the nephew of decedent Sandra Keefe.

3. In my capacity as administrator, I reviewed my aunt's papers, documents and personal effects, and found no writing signed by my aunt promising any interest in her estate to plaintiff.

4. I spent on average two hours, three times per week with my aunt in each of the six months before she died.

5. During the last six months of her life, I had many conversations with my aunt in which she discussed Mason Finch, Megan Finch, and me.

6. In a number of these conversations, my aunt indicated that, while she appreciated what Mr. Finch had done for her, she also felt she had more than provided compensation to Mason Finch for the services he provided.

7. My aunt stated on several occasions that she would not leave a will, as she knew that I would inherit everything if she died without a will. She made it clear to me that this was her wish.

8. Sandra Keefe died on August 26, 1999.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct, and that this declaration was executed on February 16, 2002 in Garden City, Columbia.

_____

Grant Keefe

TRANSCRIPT OF INTERVIEW WITH MASON FINCH BY ATTORNEY GRETCHEN PRONKO

Ms. Pronko (Q): The tape recorder is on now. As I said, this will give us an accurate record of what you say for use later on.

Mr. Finch (A): That's fine with me.

Q: Good. First, let me tell you what I know about your case. An elderly woman whom you befriended some time ago promised to leave you certain property in her will, but she died without making a will.

A: Yeah, that's pretty much it in a nutshell, but of course there are lots of details

Q: Why don't you begin with a little background information about yourself?

A: Okay. I'm 38 years old. I'm a single dad raising a daughter on my own. Her name's Megan and she's 16 years old. I've been an MFCC — a Marriage, Family and Children's Counselor — for about 12 years now. I got my Master's Degree in 1988, and opened my own practice in 1990. I've lived in Columbia for the last 16 years. Let's see, what else would you like to know?

Q: Why don't you tell me how you first met — what is the elderly woman's name?

A: Actually, there were two of them, sisters, Sandra and Mabel Keefe. I had just gotten my MFCC license and was looking for office space, so this was about 12 years ago. Sandra and Mabel owned a commercial building here in Columbia with six office spaces in it. I couldn't afford the rent they were asking, so I asked if they'd be willing to work out an exchange of some sort. They were very nice. We agreed I would manage the office building for them in exchange for a 50% discount in rent. I think what really clinched the deal was their meeting Megan. She was 4 years old at the time, and quite a charmer. Neither Sandra nor Mabel had children, and they absolutely fell in love with Megan. They invited us over for dinner, and after that, we became quite close. We reciprocated with dinners, and eventually took weekend trips together. Actually, they were quite adventurous, and we did lots of hiking and traveling together to quaint towns and sites throughout the country.

Q: How was their health?

A: About four years after we met, Mabel had a stroke. It was a pretty bad one. She was in the hospital for about six weeks. She moved to a rehabilitation facility for another six weeks. After that, Mabel was able to return home, but her mobility was very limited. She could get around with a walker, but really couldn't be left alone for long periods of time. It was difficult for Sandra to provide the level of care Mabel needed, so she approached me with an idea. Sandra was still well enough to do grocery shopping,

and light housekeeping, and to provide care to Mabel in the mornings and on weekends. She asked if I would be willing to cut back my counseling practice to the mornings only. This way, I could provide care for Mabel in the afternoons. Sandra also asked me if I'd be willing to fix dinner for Mabel and Sandra in the evenings. In exchange, Sandra said that Megan and I could move in and live with them in a small in-law unit attached to their house. It was a converted garage. We'd be able to live there rent-free. Sandra also said I could use the office space rent-free. By this time in our friendship, this was a "no-brainer" decision for me. I had to do it.

Q: They must have felt very close to you to ask this of you.

A: It really was like having a wonderful second family, you know? They really felt like relatives to me, so, like I said, I had to do it.

Q: Well, you've described at least two different agreements, one involving the office rent, and a subsequent one involving taking care of Mabel. Do you have a sense of the respective market values of each of the arrangements?

A: Well, somewhat. The full rent for the office I leased was $500 per month, so half was $250. I would say that I spent an average of one-and-a-half hours per week on management tasks, such as taking calls about vacant offices, showing prospective tenants around, collecting rents, arranging for repairs, both routine and emergency, overseeing maintenance. I also know that similar positions charge a percentage of the gross rents, like five percent per month. So, either way, my management duties were worth about $250 per month. At first, I was charging $40 per hour for counseling, but I soon raised it, as my clientele built up, to $85 per hour. I'm telling you this so you may have an idea of what I feel my time was worth at the time.

Then, in terms of the second arrangement, I have no idea what my services were worth, but I was losing money, even with the free rent at both places. I'd estimate that I was losing about $1000 per month in income because of the reduction in work hours.

Q: How was your financial situation?

A: It was tough financially. I was just starting out. I had been living on student loans, and graduated with about $30,000 in loans to pay back. The first year I only made $12,000, so having a 50% reduction in rent really helped out. Four years later, though, my situation had changed pretty dramatically. I had a full-time practice, and was actually turning clients away.

Q: Were there any other consequences to your finances or otherwise as a result of the agreement?

A: Yeah, there were. First off, I spent a fair amount of time during the first four years building up my reputation in the community. I made lots of presentations, attended

professional luncheons, seminars, and conferences, and actually started being asked to make presentations myself. That tailed off pretty much down to zero once I started caring for Mabel. I simply didn't have time anymore. It's hard to measure the effects of that sort of thing, but I'd have to say that my reputation has sort of plateaued now, instead of heading upward steadily like it was before. Oh yeah, I had also been thinking about getting my Ph.D. The local university offers a night program. I had to put that on hold indefinitely.

Q: How long did this arrangement continue?

A: Well, unfortunately, after about a year, Mabel passed away. Of course I helped Sandra as much as I could, but she was pretty devastated, as you can imagine. Just after the estate got settled, Sandra's health took a real turn for the worse — I think that Mabel's death took a lot out of her. She never really regained her spunk afterwards. Anyway, I ended up providing the same type of care for Sandra that I did for Mabel, only it was harder because I had to do it all myself. I had to cut down my practice some more, only working three mornings a week, about 33% of full time.

Q: Were you able to return to a full-time practice after Mabel died?

A: No, I had just started taking more clients when Sandra's health went downhill quite quickly.

Q: Did your care for Sandra differ from your care for Mabel?

A: Sandra's wasn't nearly as intensive, but because I had to do it myself I had to spend quite a bit of time doing errands like shopping, cleaning, and taking her to the doctors. Megan and I actually moved into the main house so I could be more available.

Q: It sounds like it must have been incredibly demanding.

A: Well, yes and no. I wouldn't have traded it for the world in a lot of ways. Mabel and Sandra lived life to its fullest, so if even a little of that rubbed off on me, I'm grateful.

Q: How long did you care for Sandra?

A: Five years. She was pretty lucid the entire time, except at the very end. She died the way she wanted to — at home.

Q: You mentioned that Sandra made some promises to you?

A: Yes, Sandra was extremely grateful. She realized all of the sacrifices I was making — not that I minded, you know. Anyway, she said she wouldn't forget me. Having inherited her sister's estate, Sandra now owned a 100% interest in the office building and residence. She said that she would meet with her lawyer and set it up so I would be able to live in the residence for the rest of my life and also get the income from the office building during my lifetime. In addition, Sandra made a series of cash contributions of $10,000 for each of five years to Megan's college fund.

Q: So Sandra gave you $50,000?

A: Yes.

Q: And she died without making the will she promised, right?

A: Yes, that's why I'm here. I actually thought things were going to work out fine. It turns out that Mabel and Sandra had a nephew they'd never even mentioned. Grant, the nephew, suddenly appeared about six months before Sandra died. He was named administrator of the estate because Sandra died without a will. I had a conversation with Grant soon after Sandra's death. I told Grant about the promises Sandra had made to me. Grant was noncommittal, but made no move to evict Megan and me from the house. As for the office building, Grant took over management of the building, but continued to charge me no rent. The income from the office building would have been nice, but I didn't really need it, and I thought Sandra and Mabel were very generous as it was. About two months ago, a real estate broker came by saying that Grant was going to sell the house, and I also got a 30-day notice terminating my use of the office. I called you right away.

Q: Did Grant Keefe say or do anything that led you to believe that he would honor the agreement?

A: No. Like I said, he was noncommittal, and I didn't push him. Maybe I should have. He said that his aunt had never mentioned anything about such promises. I think I just assumed that Grant was like his aunt, and that he would honor her promises. He's now taking the position that there were no such promises.

Q: When did Sandra die?

A: About two-and-a-half years ago. I thought that time might be a problem. That's why I was in such a hurry to find an attorney.

Q: Well, hopefully we'll be able to help you. What would you like the outcome of this situation to be?

A: To be honest, I'd like to get Grant to make good on the promises of his aunt.

Q: Let me ask you this. Was anything ever put into writing?

A: No, not that I ever saw.

Q: Were there any witnesses to any of these conversations you had with Sandra?

A: Well, there is Mildred Fowler. She helped with housekeeping for years. I'm sure Sandra talked to her. Oh, there was also Tori Phillips. She was a home-healthcare worker who helped out for about the last six months.

Q: Well, this gives me a good start. I will probably have my investigator talk to Ms. Fowler and Ms. Phillips, if that's all right with you.

A: That's fine. Anything that'll help.

Q: Mr. Finch, you'll probably have to sign a complaint, so you should hear from me by the end of the week, okay?

A: That's fine. Thank you very much.

TRANSCRIPT OF INTERVIEW WITH MILDRED FOWLER BY INVESTIGATOR CHARL MALONE

Ms. Malone (Q): Thank you for agreeing to talk to me, Ms. Fowler.

Ms. Fowler (A): Sure.

Q: I've asked your permission to tape-record this conversation, and you said that it would be okay, right?

A: Yes, that's right.

Q: My name is Charl Malone, and, as you know, I work for attorney Gretchen Pronko, who is representing Mason Finch in his dispute with Grant Keefe. I'm here to ask you questions about Sandra and Mabel Keefe. How long did you know them?

A: I first met them when I came to work for them about 20 years ago. They hired me to clean their house once a week.

Q: How well would you say you got to know them?

A: I'd say we got to know each other pretty well. They were around most of the time, so we'd chat about what was going on in our lives. They always asked about my family. They were both very sweet.

Q: That's certainly the impression one gets from Mason Finch. Speaking of Mason, what can you tell me about his relationship with the Keefes?

A: Mr. Finch rented an office space from Sandra and Mabel. They mentioned that he was managing the office building for them. They always spoke very highly of him. Then Megan and Mason moved in with Sandra and Mabel after Mabel's stroke, you know. Mason came home from work just as I was leaving, usually around lunchtime. Sandra told me that he took care of Mabel in the afternoons and fixed dinner in the evenings.

Q: Then Mason continued caring for Sandra after Mabel's death, right?

A: That's right. Over time he began to provide more and more care for her. At the end she was quite dependent on him to do just about everything.

Q: Did Sandra ever talk to you about whether she was paying him for the care?

A: Well, I didn't want to pry. She did mention quite frequently that she didn't know what she would have done without Mason. She also mentioned that she would help Megan with her college expenses and that she would make sure that she left Mason in good financial shape.

Q: Do you have any idea what she meant by leaving him in good financial shape?

A: She mentioned that she would be making a will so that Mason could use the house during his lifetime. I know that. Beyond that, I really don't know.

Q: Did she say this on more than one occasion?

A: Oh yes, definitely. I just can't say how many times for certain.

Q: Do you recall when she first mentioned it?

A: The first time must have been soon after Mabel died. She took it really hard. She was feeling quite lonely and depressed, I think. She'd never admit it, but she missed Mabel terribly. She was so grateful when Mason and Megan stayed on to help her out. I'm sure it was during this time that she decided she'd take care of Mason to show him how much it meant to her.

Q: This would have been in what year?

A: Well, Mabel died in 1995, so it was within six months or so of then.

Q: Do you have any recollection of other occasions when she mentioned taking care of Mason and Megan?

A: Sorry, I really don't, but it was a number of occasions over the next number of years, I'm sure.

Q: Did Sandra mention anything about the office building?

A: No.

Q: Well, thank you so much, Ms. Fowler. This has been very helpful. Here's my card. If you think of anything else, please get in touch with me, okay?

A: Yes, I certainly will.

TRANSCRIPT OF INTERVIEW WITH TORI PHILLIPS BY INVESTIGATOR CHARL MALONE

Ms. Malone (Q): Ms. Phillips, my name is Charl Malone. I've asked your permission to tape-record this conversation, and you indicated that this would be okay with you, right?

Ms. Phillips (A): Yes, that's fine.

Q: You probably know that I work for Attorney Gretchen Pronko, who has been retained by Mason Finch to represent him in an action against the estate of Sandra Keefe?

A: Yes, I understand.

Q: Please tell me about how you came to know Sandra Keefe.

A: I was hired by Grant Keefe to provide home healthcare for his aunt, Sandra Keefe.

Q: When were you hired?

A: I worked for about six months — until two weeks before she died, so I guess that would mean I was hired in early 1999.

Q: How many hours per week did you provide care?

A: I came in Monday through Friday, from 8:00 a.m. until 1:00 p.m., so that was 25 hours a week.

Q: How much were you paid and who paid you?

A: I was paid $27 per hour, and I was paid by my agency. Mr. Keefe hired me through my agency.

Q: What duties did you perform for Ms. Keefe?

A: She was confined to her bed. I had to assist her in getting her meals, administering medication, making sure that she changed positions in bed, emptying her catheter bag and changing bedding and clothing as necessary. I also provided companionship to her — someone to see to her needs, talk to her, cheer her up, that kind of thing.

Q: Could you describe Ms. Keefe's physical and mental state during this period?

A: Physically, she was pretty weak and, as I said, bedridden. Mentally, though, she was quite sharp, I would say.

Q: Did she ever talk to you about Megan and Mason Finch?

A: Oh, yes, she was quite fond of them. She was very glad that things had worked out for all of them.

Q: What do you mean by "things had worked out"?

A: She felt that Mason and Megan had provided her with companionship and care over the years, and that she had reciprocated by allowing them to live with her. She also mentioned that Mason had gotten some sort of deal with his office space. Oh yeah, I almost forgot. She also said that she had given Megan a pretty sizable sum of money for her college expenses.

Q: Did Ms. Keefe ever mention anything about making a will or making specific provisions in a will?

A: No, in fact she said she didn't really need one because she wanted her nephew to get everything. Since he was her only heir, he would get everything whether she had a will or not.

Q: Did she ever mention anything about allowing Mason and Megan to continue living in the house after her death?

A: No, she didn't.

Q: Did she ever say anything about letting Mason get income from the office building after she died?

A: No.

Q: You just mentioned her nephew, Grant Keefe. Was he around at all?

A: Yes, he came to visit Ms. Keefe pretty frequently, I'd say at least twice a week.

Q: Can you describe the interactions between Ms. Keefe and her nephew?

A: They obviously felt very warmly toward each other. I never heard her laugh as much as when he was in the room with her.

Q: Can you compare these interactions to those between Mr. Finch and Ms. Keefe?

A: To be honest, I didn't see that much of Mr. Finch. He came home at around 1:00 p.m., just when I was getting off.

Q: Did you see any interactions between Mr. Finch and Grant Keefe?

A: No, I can't say I did. As far as I know, Mr. Keefe only came when I was there. I don't think he visited when Mr. Finch was around.

February 23, 2002

Dear Ms. Pronko:

As we discussed, I contacted a close friend of mine named Ralph Sanchez. My career would have been closely parallel to his if I hadn't taken time off to care for Mabel and Sandra Keefe. He's also an MFCC, and we did both our undergraduate and masters degrees together, with very comparable academic records. Ralph is very willing to sign a declaration if it will help.

Here's a summary of his earnings compared to mine over the last 12 years:

	My net earnings (including rent savings)	Ralph's Earnings
1990	$15,000	$12,000
1991	$20,000	$20,000
1992	$30,000	$30,000
1993	$48,000	$48,000
1994	$33,000 (Mabel has stroke at mid-year)	$24,000 (Ralph in Ph.D. program)
1995	$45,000 (Mabel dies mid-year)	$24,000 (Ralph in Ph.D. program)
1996	$33,000 (begin caring for Sandra)	$65,000
1997	$31,000	$67,500
1998	$31,000	$71,000
1999	$35,000 (Sandra dies mid-year)	$72,500
2000	$45,000	$75,000
2001	$50,000	$78,000

I hope this helps. Remember, I would have entered the Ph.D. program the same year as Ralph and could have had similar earnings to his. By the way, I looked into whether I could enter the University of Columbia's Ph.D. program this coming year, and

learned that the costs of doing so would be prohibitive at this point. In 1994 they would have waived tuition and even paid me a stipend. That program is no longer available.

Thanks,

Mason Finch

TUESDAY AFTERNOON
FEBRUARY 26, 2002

California
Bar
Examination

Performance Test A

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ESTATE OF KEEFE

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RIGANTI v. McELHINNEY

Court of Appeal of Columbia (1967)

This is an action for quasi-specific performance of an oral contract between plaintiffs and one James R. Trissel, now deceased, wherein plaintiffs agreed to look after Trissel's improved real property, collect the rents, and account to him for same, and to care for Trissel so long as he lived, and show respect and obedience toward him as children toward a father. For this service, attention, and care, Trissel agreed plaintiffs should have free rent of the living quarters on his property that they then occupied, and that on his death he would leave them a part of his property by his will. Although plaintiffs carried out their part of the agreement, decedent failed to provide for them in his will.

The court rendered judgment in favor of plaintiffs. Defendant, Muriel McElhinney, niece of Trissel and the residuary devisee and legatee under the will, has appealed.

The judgment decrees, *inter alia*, that plaintiffs have quasi-specific performance of an oral agreement with Trissel; that plaintiffs are the sole and only beneficial and equitable owners of the improved real property here in question; that defendant has no right, title, interest, or estate whatsoever in and to said real property or the rents, issues, and profits therefrom, and that she and her heirs, representatives, transferees, or assigns, and each of them, is permanently restrained and enjoined from claiming or asserting any right, title, interest, claim, or estate whatsoever in, to, or over said real property.

Defendant pled the statute of frauds as embodied in Probate Code section 150 and the statute of limitations. But even though the agreement is oral, sufficient facts may be shown to take the case out of the statute of frauds.

Where a contract is within the statute of frauds, as it is here, the mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute. If the services are of such a peculiar character, however, that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored

to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule. Equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. The plaintiff has rendered services of extraordinary and exceptional character, such service as in contemplation of the parties was not to be compensated for in money, and as in contemplation of law, cannot be compensated for in money; therefore, by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections.

Applying these principles to the facts as found by the trial court, we conclude the judgment must be affirmed.

Plaintiffs had been living in Trissel's downstairs duplex at 623 South Catalina Avenue for a little more than five years when the oral agreement here in question was entered into. They had ample time and opportunity to get well acquainted and had apparently developed confidence and respect for each other. Trissel was without immediate family except for a son with whom his relations were not friendly and with whom he seldom communicated. His health was not good and he faced surgery. He was then 62 years of age. In these circumstances Trissel no doubt felt alone in the world and in need of "a family" who would take an interest in him and look after his needs and welfare, and treat him like a father. It seems that over the next two years plaintiffs gave Trissel the care and attention he needed and wanted and served him as though they were members of his family. He recognized this by referring to plaintiffs as "his kids" and stating to a friend that they were closer to him than the members of his own family had ever been. These services and this type of devotion for the rest of Trissel's life were of such a peculiar character that it was impossible to estimate their value by any pecuniary standard. Furthermore, it is evident that the parties did not intend to measure the value of these services by any such standard, for if they had so intended they could have fixed a fee therefor just as they had agreed that free rent would compensate for plaintiffs' taking care of Trissel's rental units and the collection of the rentals.

Having special skills as a mechanic and in certain trades of the building industry, Wade Riganti could have improved his station in life by leaving Trissel's living accommodations and "walking away" from his and his wife's obligations under their agreement with Trissel. But they did not do that. They honored their commitment with Trissel. As a result, plaintiffs, after the performance of their services, could not be restored to the situation in which they were before the rendition of the services. The failure therefore of Trissel to leave his will as agreed works a fraud upon plaintiffs and serves to remove the oral agreement from the statute of frauds. Equity then steps in, as it did in this case, and decrees what we call "quasi-specific" performance to avoid the perpetration of a fraud upon plaintiffs and unjust enrichment of defendant. Of course, equitable relief should not be granted where it would work a gross injustice upon innocent third parties. No such problem is presented in the case at bench, for the trial court drew the conclusion, *inter alia*, that plaintiffs were entitled to quasi-specific performance "to avoid . . . unjust enrichment of defendant."

There is no merit in defendant's suggestion that plaintiffs failed to show that the consideration rendered by them was adequate. It sufficiently appears that there was adequate consideration for the contract, for the extent of the consideration is to be measured by the breadth of the undertaking rather than by the eventuality. Plaintiffs might have had to serve and nurse Trissel for many years. Each party to the agreement knowingly stood to lose or gain by that contingency.

We can also dispose of the statute of limitations argument. An action for quasi-specific performance accrues on the death of the person who breached the agreement. Where quasi-specific performance by declaration of a constructive trust on real property is sought on the basis of an oral agreement pursuant to which that property was to have been left by will, a four-year period applies rather than the two-year period of limitation generally applicable to contracts not in writing.

The judgment is affirmed.

KENNEDY v. BANK OF COLUMBIA

Court of Appeal of Columbia (1965)

This appeal originated in an action brought by plaintiff against the Bank of Columbia National Trust & Savings Association, as executor of the will of Thomas J. McDermott, deceased (hereinafter referred to as executor). The complaint contained a single cause of action for quasi-specific performance of an alleged oral contract between plaintiff and decedent, by which decedent agreed to devise and bequeath his property to plaintiff by his will as compensation for personal services rendered and to impose a constructive trust upon the property. Executor filed a motion for summary judgment. The motion was granted, and judgment was entered.

The allegations of the complaint upon which plaintiff's case must stand or fall are these: On or about May 1, 1941, decedent offered to employ plaintiff in his home as a domestic servant and as an assistant in his retail gasoline station business, and orally promised that, if she would perform services for him and his family and would remain at Bakersfield and assist him in building up his business, he would execute an irrevocable will leaving her his entire estate; prior to May 1, 1941, plaintiff was a healthy woman and used her time to care for her own household and to earn money working at various tasks; plaintiff accepted decedent's offer of employment and worked for him substantially all of the time from May 1, 1941 until about June 15, 1953, at which time decedent orally informed her that he was retiring from business and he would no longer need her services, but that a will theretofore made by him in her favor would remain irrevocable.

Further, plaintiff alleged that, in order to fulfill her portion of said oral agreement between the parties, she gave up most of her own social life, opportunities to move to other cities with her husband, and opportunities to work for other persons so as to assist her husband in accumulating savings and property of their own. In general, plaintiff alleged, in reliance upon the oral agreement of decedent to leave all of his property to her by will upon his death, she put aside most of her personal pleasures, comforts, and affairs, and forsook many of her friends while she was performing services as housekeeper and assistant to decedent in his business.

Plaintiff alleged that in doing all of these things she was acting in reliance upon the promise of decedent to make her beneficiary of his will, and upon his promise that he would not change said will. Had it not been for such oral promises plaintiff would not have performed said services without receiving compensation therefor, which plaintiff did not receive, and were it not for said promises plaintiff would not have altered her way of life in the manner in which she did.

Plaintiff further alleged that the nature of her services and contributions was such that compensation therefor may not be measured, nor would compensation for services rendered be fair and reasonable under the circumstances; nor was it the intent of the parties that compensation be measured except by the total value of decedent's estate. Plaintiff alleged that she has no adequate or speedy remedy at law.

Executor filed a motion for summary judgment on the ground that the alleged contract is oral and unenforceable under our statute of frauds, section 150 of the Probate Code. The principal concern on this appeal is whether plaintiff has alleged evidence sufficient to demonstrate that triable issues of fact exist in this action.

In order to enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate, the contract is founded on good morals and not against public policy, the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him, and the remedy asked for is not harsh, oppressive, or unjust to innocent third parties.

The doctrine of estoppel, which lifts an agreement to make a will out of the operation of the statute of frauds, is based on either of two grounds. It has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a detrimental change of position in reliance upon the oral agreement. It has also been applied where unjust enrichment would result if the party who has received the benefits of the performance of the other were allowed to invoke the statute.

Courts have found a detrimental change of position where there is a family relationship or close friendship, and the decedent has turned to the plaintiff for care, solace, comfort, and companionship. Oftentimes, at the decedent's supplication, the plaintiff has moved from an established home, leaving an established position or business in his or her hometown or state, to make a residence in the home of the decedent far from friends and family, and devoting himself or herself with dedicated care to the needs of the decedent, sometimes until the death of the decedent. Where the services rendered by the plaintiff consisted in nursing and caring for a person enfeebled and suffering from a horrible disease, requiring constant and unceasing watchfulness, harrowing to the mind, destructive to the peace and comfort of the one performing the services, and possibly injurious to the health, it has been held that it is impossible to estimate their value by any pecuniary standard; and where it is evident that the decedent did not intend so to measure them, it is out of the power of any court, after the performance of such services, to restore the plaintiff to the situation in which he was before the contract was made or to compensate him therefor in damages.

Plaintiff in this case has not submitted evidence sufficient to create triable issues as to either ground. The best description of the nature of the services that plaintiff can make is that she acted as a domestic servant and as an assistant in the retail gasoline station business operated by decedent. The services of both a domestic servant and a gasoline station assistant may be adequately compensated for in money. Such services are neither peculiar, nor exceptional, nor unique. They are performed for wages by thousands of employees similarly situated. It is not alleged that plaintiff made her home with decedent; or that she occupied a close or continuing familial relationship with him; or that she attended to his personal needs; or that she nursed him through any illness; or that she did anything that was "harrowing to the mind" or "destructive to her peace and comfort" or "injurious to her health" for which money cannot compensate. The allegation in the complaint that the nature of the services was such that compensation therefor may not be measured is a mere conclusion.

The allegations of the declaration that plaintiff gave up her social life, opportunities to move to other cities and to work for other persons, opportunities to

assist her husband in accumulating savings and property of their own, and that she put aside most of her personal pleasures and forsook many of her friends are not sufficient.

Nor does the declaration establish sufficient facts to show that decedent or anyone else will be unjustly enriched if the purported oral contract is not enforced. There are no allegations that services rendered to decedent, either in his household as a domestic servant or in his service station business, substantially contributed to the value of the business or to the assets that comprise the estate. No unjust enrichment results, or may be implied, from mere allegations that plaintiff performed services of an impersonal nature for decedent.

We conclude that there are no triable issues of fact as to the inapplicability of the statute of frauds. The grant of the motion for summary judgment is affirmed.

HORSTMANN v. SHELDON

Court of Appeal of Columbia (1962)

Plaintiff, Ella Horstmann, brought this action to establish a trust in real and personal property held in the estate of her deceased mother, Bertha Horstmann. The complaint alleged that "on numerous occasions during the approximately 20 years before decedent's death, decedent urged plaintiff to reside with decedent and care for decedent; that decedent offered if plaintiff would so reside with and care for decedent and not undertake to obtain regular gainful employment outside the home of decedent, decedent would provide a home for plaintiff during the lifetime of decedent and would by a will leave the home of decedent, including the real property upon which it was situated and the furniture and furnishings therein, to plaintiff." The complaint further alleged that "plaintiff accepted each of decedent's offers and proposals and did all things required to be done in compliance therewith; that in connection therewith plaintiff refrained from undertaking any general employment outside the home and resided with decedent and cared for her and for her property for many years up to the time of the death of decedent; that during all of the aforesaid period of time decedent reiterated the aforesaid promises on numerous occasions." Plaintiff further alleged that she received no compensation for her services, and that decedent breached the alleged agreement by her will naming her brother-in-law, defendant George Sheldon, sole devisee and legatee of decedent's entire estate and the executor of her will.

The answer denied the existence of the contract and affirmatively asserted that plaintiff had been entirely supported by decedent during her lifetime.

At trial, plaintiff testified consistent with her complaint. In addition, several witnesses testified to extensive personal services rendered by plaintiff to decedent, including nursing and personal care, cooking, housework, serving meals, gardening, cutting wood, house repairs, and a multitude of other duties and responsibilities relating to the premises where the parties lived.

The trial court found the existence of the contract as alleged by plaintiff, and that plaintiff had fully performed her part of the bargain but that decedent had not performed

her part of the agreement. The judgment imposed a trust upon the home property for the lifetime of plaintiff and also allowed her the life use of certain personal property.

The chief contention of defendant on appeal is that the evidence is insufficient to support the judgment. The record, however, is replete with evidence to support the making of the agreement between plaintiff and decedent and the full performance of the contract by plaintiff. Under long established rules it is not for this court to review the evidence and determine its weight and sufficiency. Where, as here, there is substantial evidence in the record to support the judgment, it will not be disturbed on appeal in the absence of some error requiring reversal on other grounds.

Defendant also urged that plaintiff filed no claim against decedent's estate and therefore the complaint does not state a cause of action. There is no merit in this contention, however. Plaintiff's suit here is not one for the recovery of damages for breach of contract, nor in quantum meruit for the value of her services. Plaintiff's suit is in equity for the purpose of enforcing her contract by having defendant declared trustee of the described property for plaintiff's benefit. She seeks no relief at law but only in equity, and under such a pleading no claim against the estate of the decedent need be filed.

Another question presented by this appeal is whether our statute of frauds, Probate Code section 150, bars the enforcement of plaintiff's contract. We conclude that it does not.

The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may contribute to the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute.

At the time of trial, plaintiff was 63 years of age. The understanding or agreement between plaintiff and decedent commenced about 1926, and from that date to the date of decedent's death plaintiff had been engaged in the performance of her part of the bargain. As the trial court found, many of the years of her youth and all of the years of her maturity were spent in the care and maintenance of decedent. The

agreement was breached at a time when plaintiff was approaching the later years of her life. It can hardly be said that to permit this would not result in unconscionable injury to plaintiff. Having made this finding, we need not address the second prong.

If plaintiff is not permitted to pursue her remedy in a court of equity, she would be relegated to an action at law for damages for the breach of her contract, or left to pursue her quasi-contractual remedy for the value of services rendered. Neither is adequate for the breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship.

The judgment is affirmed.

ANSWER 1 TO PERFORMANCE TEST A

DECLARATIONS

Declaration of Mason Finch

I, Mason Finch, declare as follows:

1. I am the Plaintiff in this action.

2. I am a Marriage, Family and Children's Counselor and received my Master's Degree in 1988. I have been in practice for 12 years.

3. I met Sandra and Mabel Keefe about 12 years ago 1990 through an agreement by which I managed an office building they owned for a 50% discount in rent so I could open my own practice. The rent before my half off was $500. I provided about an hour and half a week of my time for management duties and saved $250 in rent. At the time I was charging $40 and later $85 an hour. Therefore by the end my time was actually worth more than I was being compensated for with the rental agreement. (6 hours a month time $85=$440).

4. My daughter Megan Finch and Sandra and Mabel Keefe and I developed a close friendship that included dinners and weekend trips together. I eventually considered them to be a wonderful second family.

5. After Mabel Keefe suffered a stroke in 1994 I was approached by Sandra Keefe and asked to cut back my counseling practice to mornings only to care for Mabel in the afternoons and fix dinner for them both in the evenings. In exchange Sandra allowed my daughter and I to live with them in their converted garage

rent free and use the office space rent free.

6. The reduction in hours resulted in a loss of about $1000 a month and I was in a tough situation financially. I had to turn clients away even before I reduced my hours. Also it resulted in a plateau in my reputation. I was not able to pursue speaking engagements as I had done before.

7. I also was not able to pursue a PhD program which at the time would have paid for my tuition and provided me a stipend in a night program. This opportunity is no longer available to me at this time. I would have likely seen substantial increase in my salary comparable to the increase Ralph Sanchez saw after completing the PhD program I planned to take also.

8. After Mabel passed away, I provided much needed emotional support to Sandra. After settling Mabel's estate, Sandra's health took a turn for the worse so I stayed on providing the same type of care I had for Mable, but now without anyone's help. I had to cut down my practice to only three hours a week and provided constant care for Mabel outside of the care her nurse gave her in the mornings.

9. The type of care for Sandra included running errands, shopping, cleaning, taking her to the doctors.

10. Megan and I moved into the main house to be more available.

11. I cared for Sandra for five years this way. She was lucid until the very end, but required much physical care.

12. Because of the care I provided for her, Sandra was extremely grateful and said she would not forget the way I cared for her and her sister. She owned 100% of the house and building after her sister's death and told me I could have the house to live in for the rest of my life and to get the income from the building

during my lifetime. She also made a series of cash contributions of $10,000 for each of five years to Megan's College Fund.

13. Her nephew Grant Keefe who showed up about six months before she died was noncommital when I told him of her promises, but he made no move to evict me from the house so I assumed he would honor his aunt's promises. I received a 30- day notice two months ago from a real estate broker after staying in the house for two years as they were going to sell the house and to get out of the office.

Declaration of Mildred Fowler

1. I, Mildred Fowler, declare as follows:

2. I worked as a housekeeper for the Keefe sisters for 20 years. I cleaned their house once a week.

3. I chatted often with them about what was happening in our lives.

4. They told me they rented an office space to Mr. Finch and that he was managing the building for them.

5. They always spoke very highly of Mr. Finch.

6. Mr. Finch and Megan moved in with them after Mabel's stroke and took care of Mabel in the afternoons and fixed dinners in the evenings.

7. He continued to take care of Sandra after Mabel's death and she grew

quite dependent on him to do just about everything.

8. Sandra mentioned frequently that she did not know what she would have done without Mr. Finch. She was very grateful that Mr. Finch stayed on to help her after Mabel died as she was lonely and depressed. She said she would help Megan with her college expenses and make sure Mason was left in good financial shape.

9. She specifically stated that she would make a will so Mason could use the house during his lifetime. She said this on many occasions, including soon after Mable died. And she said she wanted to take care of Mr. Finch to show him how much it meant to her that he took care of her.

Declaration of Ralph Sanchez

1. I, Ralph Sanchez, declare the following:

2. I did my undergraduate and masters degrees with Mr. Finch and we had similar academic records.

3. We had similar earnings until Mr. Finch left his full time practice to care for the Keefe sisters.

4. I received my PhD in 1995 and saw substantial increases in my salary.

III. RESPONSIVE PARTY'S STATEMENT OF DISPUTED FACTS

	Statement	Citation to Evidence
1.	That an oral promise was made to Mr. Finch that he would receive the house for his lifetime.	Declaration of Mason Finch¶ 12 Declaration of Mildred Flower ¶ 9
2.	That an oral promise was made to Mr. Finch that he would receive the income from the office building for his lifetime.	Declaration of Mason Finch ¶ 12
3.	Defendant [did] not spend significant amounts of time with decedent before her death. Rather he spent roughly 6 hours a week with her.	Declaration of Grant Keefe ¶ 4
4.	Decedent did not feel that the compensation Mr. Finch had received was adequate. She was very grateful for his care and wanted to make sure he was left in good financial shape after her death.	Declaration of Mildred Flower ¶ 8
5.	Decedent promised to leave a will leaving the house and office building to defendant.	Declaration of Mason Finch ¶ 12 Declaration of Mildred Flower ¶ 9

IV. RESPONSE TO MOVING PARTY'S ARGUMENTS

A Plaintiff's Claim Based on an Oral Contract to Make a Will is Sufficient as there is Evidence from the Declarations of the Oral Agreement.

Defendant asserts that the non-existence of a writing proves that decedent never promised to make a will with provisions in favor of plaintiff and therefore no oral or written contract ever existed. Although plaintiff cannot attest to the existence of a written provision, Mr. Finch has repeatedly and consistently maintained that he received oral promises from decedent for a life estate in the house and office building. [Finch DU Fact 12.] Ms. Fowler is able to support Mr. Finch's assertions of an oral promise as to the life estate in the house. [Flower DU Fact 9.]

Further the extensive nature of the services rendered, the lack of monetary compensation besides free rent for such services and the detrimental reliance by Mr. Finch that is the loss in revenue, clients, reputation, and opportunity to obtain a PhD, creates the reasonable assumption that an alternative means of compensation was intended. [Finch DU Fact 5-9, 12.]

Therefore there are triable issues of fact as to whether any such oral promises were made and the motion for summary judgment should be denied.

B. The Oral Contract Does Not Fail for Lack of a Writing Because of the exceptions to the Statute of Frauds of Part Performance/Estoppel and Unjust Enrichment Which Apply.

Although the Statute of Frauds does apply to such an oral contract there are two defenses available. First is the doctrine of estoppel and second unjust enrichment.

Doctrine of Estoppel

Where a contract is within the statute of frauds as it is here, the mere rendition of services is not usually adequate part performance of a verbal agreement as to relieve the contract from the operation of the statute. However, if the services are of such a peculiar character, that it is:

(1) impossible to estimate their value by any pecuniary standard, and

(2) it is evident that the parties did not intend to measure them by any such standard, and

(3) if the plaintiff after performance of the services could not be restored to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule of law. Riganti (Ct Appeal Col. 1967)

The policy behind this is equity as the plaintiff has rendered services of extraordinary and exceptional character, services as in contemplation of the parties was not to be compensated for in money and as in contemplation of law, cannot be compensated for in money. Id. Therefore, by no action of law could a plaintiff be restored to his original position. Id. It would be the nature of a fraud upon him to deny him relief and so equity in order to promote justice makes good the law's imperfections. Id. It would be inequitable to not enforce a contract after one party has been induced by the other to seriously change his position in reliance on the contract. Horstmann (Ct Appeal Col. 1962).

In addition to the above requirements the contract must be definite and certain, the consideration adequate, the contract founded on good morals and not

against public policy and the remedy is not harsh, oppressive or unjust to innocent third persons. Kennedy (Ct Appeal Col. 1965).

As to the requirement for definite and certain terms, Mr. Finch's oral agreement with Ms. Keefe was definite and certain. He was to have use of the house and income from the building for life. [Finch DU Fact 12.]

The requisite consideration for an agreement is found in measuring the breadth of the undertaking rather than the eventuality as the plaintiff may have had to serve and nurse the decedent for many years. Id. Here, Finch gave up over five years to care for Sandra alone and would have continued to perform such services as long as needed to his own professional and financial detriment therefore adequate consideration would be found. [Finch DU Fact 10.]

The contract was founded on good morals and not against public policy as it was a way to allow Ms. Keefe to provide for Mr. Finch in return for all the care he had provided her.

Finally, it would arguably not be harsh or unjust to a third person, here Mr. Keefe. This is arguable as he is a legal heir and appears to have had a relationship with Ms. Keefe. This is an issue to be further addressed and argued in court and requires the summary judgment motion to be denied.

We now turn to the first three requirements regarding service and pecuniary payments.

Exceptional Service - Impossible to Measure Value

The court in Riganti in finding performance of such services of extraordinary and exceptional character, looked to facts such as ample time to get acquainted and

develop confidence and respect for each other. The court has also looked to such things as family relationship or close friendship that the decedent turned to for care, solace, comfort and companionship that is outside the normal realm of domestic or nursing services. Id. Further, relocating, devoting care until death such that the services rendered by the plaintiff consisted of nursing and caring for a person enfeebled and suffering from a horrible disease, requiring constant and unceasing watchfulness, harrowing to the mind, destructive to the peace and comfort of the one performing services, and possibly injurious to health, such services are impossible to have an estimated value by any pecuniary standard, especially where decedent did not intend to so measure them. Kennedy. Providing extensive personal services as the plaintiff did in Horstmann for her mother was also sufficient performance of exceptional and extraordinary character. Horstmann. [Note: Where the services provided by the plaintiff were purely as a domestic servant or a business assistant which could be adequately compensated for in money, services being neither exceptional or peculiar nor unique, quasi-specific performance is not available. Kennedy.]

Similarly here, such services of an extraordinary and exceptional character were performed by Mr. Finch. Mr. Finch reduced his office hours and took a substantial loss financially and professionally to spend all but three mornings a week caring for Ms. Keefe. He took care of all her shopping needs, cooked her meals in the evenings and provided her with her only company in the afternoons and evenings. Although she had a nurse, the nurse left by 1:00 [p.m.] and Mr. Finch took care of all her needs for the remainder and majority of the day. They had a close and personal relationship and she relied on him not only physically but for emotional support as well. Clearly, Mr. Finch provided much more than a domestic servant would and his services would be of an exceptional and extraordinary character, destructive to his peace and comfort to watch his dear

friend deteriorate as he provided her main and substantial care. This was extraordinary care and service. [Finch DU Fact 5-12.]

Not Intend to Measure by Pecuniary Standard

The lack of a fixed fee for personal services where the parties entered an agreement for free rent as compensation for taking care of rental units and the collection of rentals was evidence the parties had not placed a monetary value on the personal services. Riganti. The courts look not only at a lack of an agreement to pay monetarily but also the inability to place a monetary standard on the services rendered.

Here, the Mr. Finch (sic) agreed to take care of Sandra for the majority of his time and with no monetary compensation. Mr. Finch was provided with free rent, but this was out of a necessity to be available to Sandra and care for her better. There was no benefit at any time monetarily to Mr. Finch; rather he suffered substantial monetary loss. Their agreement as to the management of the office building and the determination of his services and the reduction in rent evidenced Sandra's ability to enter contractual agreements for his services as a manager. The lack of such an agreement when we turn to his services caring for her shows they did not intend to place a pecuniary standard on his services. Further, the type services he provided her would not be conducive to placing a monetary standard on them. Therefore they were not intended and it would be impossible now to place a monetary value on his services.

Not be Restored

The court has also placed emphasis on the plaintiff's special skills, such as in Riganti where plaintiff was a mechanic and his choice to honor the commitment of taking care of the decedent and thereby denying himself the opportunity to

improve his station in life. Id. This resulted in the plaintiffs' inability to be restored to the position they were in before rendition of the services. Id.

Could not restore him for his services and the loss he had in the reputation and PhD program. He forewent many opportunities and this could not be adequately compensated for in monetary standard.

Unjust Enrichment

An alternate basis is to limit unjust enrichment where a party would receive the benefits of the performance of the other if allowed to invoke the statute. Kennedy.

Unclear of unjust enrichment here as Mr. Grant entered late in the picture and did not care for her, only visited irregularly. This would be a triable issue for the court.

Therefore there are triable issues of fact as to whether the parties intended to place a monetary value on Mr. Finch's services, if this is possible and the amount of loss he suffered in his business and the loss of a PhD. Also legal issues as to whether Mr. Keefe would be unjustly enriched. Therefore the motion for summary judgment should be denied.

C. This Action is Not Barred by the Statute of Limitations Because It was Filed Within the Four Year Requirement Given to Requests for Quasi-Specific Performance by Declaration of a Constructive Trust on Real Property on the Basis of an Oral Agreement.

An action for quasi-specific performance accrues on the death of the person who breached the agreement. Riganti. Where quasi-specific performance by declaration of a constructive trust on real property is sought on the basis of an oral agreement pursuant to which that property was to have been left by will, a four-year period applies rather than the two-year period of limitation generally applicable to contracts not in writing. Id.

Here, the action is for quasi-specific performance by declaration of a constructive trust and therefore the relevant statute of limitations should be four years and not the two years claimed by defendant. [Moving Party's Motion for Summary Judgment.]

Here the breaching party was Ms. Sandra Keefe as she never created a written will and she died on August 26, 1999. [Moving Party's Motion for Summary Judgment.] Therefore the action started to accrue in August of 1999 and the statute of limitations will not toll until August 26, 2003. Plaintiff instituted his action on January 11, 2002, roughly two and a half years after decedent's death and well within the four year statue of limitations.

Further, Mr. Finch relied on Mr. Keefe not kicking him out of the house for two years, waiting until after the statute of limitations was up to kick him out. Even if the two year statute of limitation applies and Mr. Finch should have been alert as to his remedies, out of equity the court should not allow Mr. Keefe to use the statute of limitations as a way to cajole Mr. Finch into believing he would honor his aunt's promises until the statue of limitations expired. This is not the purpose of the statute of limitation provisions.

Therefore there are legal issues precluding entry of judgment as a matter of law as the statute of limitations has not tolled or alternately a trial issue of law/fact as

to the proper form of relief and the applicable statue of limitations period and Mr. Keefe's bad faith in waiting till the statue of limitations tolled to try to evict Mr. Finch.

ANSWER 2 TO PERFORMANCE TEST A

A. Draft declarations for all witnesses whose testimony will be useful in establishing that there are disputed issues of act and in supporting our arguments.

DECLARATION OF MASON FINCH

I, Mason Finch, declare as follows:

1. I am the plaintiff in this action.

2. I am the former caretaker of decedent Sandra Keefe, and decedent Mable Keefe (her sister).

3. I've been a Marriage, Family and Children's Counsel for about 12 years.

4. I got my Master's degree in 1988 and opened my own practice in 1990.

5. It was also in 1990 that I met the decedent, Sandra Keefe.

6. Sandra (and Mabel) owned a commercial building and asked that I manage the building for them in exchange for a 50% discount in rent.

7. The full rent for my office was $500, so half was $250.

8. During this period I spent about 1½ hours per week on management tasks (taking calls, showing units, collecting rents, repairs, etc).

9. Similar positions at other commercial buildings charge a percentage of gross rents -- about 5% per month.

10. At the same time I was earning between $45 - $85 dollars per hour ($85 towards 1994) for services in my MFCC business.

11. In about 1994, Mabel had a stroke.

12. Sandra asked me to cut back my counseling practice to mornings only so that I could provide care for Mable in the afternoon, and fix dinner for Sandra and Mabel,

13. Sandra asked Megan (my daughter) and I to move into their in-law unit attached to their house (rent-free).

14. Sandra also said I could use the office rent-free.

15. Sandra, Megan and I were like a family so I agreed.

16. This arrangement, albeit with rent-free living and rent-free office, cost me about $1000 per month in lost income because of the reduction in office MFCC work hours.

17. This arrangement caused me to forgo a fair amount of reputation building and networking time in my professional community. Prior to the arrangement I had

attended and been asked to make professional presentations to the community. That ceased.

18. The arrangement also prevented me from entering a PhD program at the local university.

19. That university, Columbia, is now cost prohibitive for me to enter. Had I gone in 1994, I would have received a tuition waiver and a graduate stipend. This program is no longer available.

20. After Mabel died, Sandra had us move into the main house to care for her.

21. I cared for Sandra entirely by myself for the most part – doing shopping, cleaning and intervening with the doctors.

21b. This care of Sandra, which I lovingly undertook, lasted about 5 years until her death.

22. Sandra constantly thanked me for all the sacrifices I made, and told me that she would instruct her lawyer to give me a life estate in the residence for what I'd done.

23. She said she would also instruct the lawyer to give me the income from the office building during my lifetime for what I'd done.

24. Because Sandra loved Megan, almost as the daughter she never had, she also provided a cash gift for Megan's college fund of 50K.

25. Upon Sandra's death, Megan and I continued to live in the house as agreed to with Sandra for 2½ years.

26. I informed Grant Keefe of Sandra's oral contract with me.

27. Last month I got an eviction notice from the house and the office.

28. Mildred Fowler witnessed several conversations in which Sandra promised me the house and the office life estates.

29. Toni Phillips witnessed the good work and peculiar services I rendered for Sandra.

30. My earnings from the MFCC profession began around 15K in my first year, and built steadily towards 48K, the year Sandra first asked me to reduce my work in half at the MFCC.

31. During the time I cared for Mildred and Sandra, my income dropped dramatically to 33K and below.

32. After Sandra died, my income increased slightly to pre-Mabel/Sandra days, but has not increased as appropriate to a professional with my years in the business.

33. At 2001, my income remained at 50K.

34. I am the sole support of my daughter, Megan, who relies on me to provide her the necessities of life.

DECLARATION OF MILDRED FOWLER

I, Mildred Fowler, declare as follows:

1) I have been cleaning the Keefe house for Sandra and Mabel for 20 years.

2) I clean regularly once a week.

3) In my capacity as housekeeper I came to know Sandra as a friend.

4) I knew her quite well by the time of her death.

5) Mason and Megan moved in with Sandra and Mabel at Sandra's request to care for Mabel after her stroke.

6) I witnessed Mason coming home right around lunch every time I was there.

7) Sandra told me that Mason cared for her and Mabel, and she didn't know what she'd do without him.

8) I personally came to see that Sandra had become quite dependent on Mason and relied upon him to do most everything.

9) Sandra said she'd help Megan with college.

10) Sandra said she'd make sure Mason was in good financial shape by making a will so that Mason could use the house during his lifetime to compensate him.

11) She told me about her intent to make this provision on many occasions starting in 1995 and repeating it many times after that.

DECLARATION OF TORI PHILLIPS

I, Tori Phillips, declare as follows:

1. I am a home healthcare worker.

2. I was hired by Grant Keefe in early 1999 to provide care for Sandra.

3 I worked about 6 months until her death.

4. I came Monday through Friday 8:00 a.m. to 1:00 p.m. and was paid $27 per hour.

5. I assisted her with meals, medications, certain personal hygiene issues, and provided companionship.

6. Sandra told me Megan and Mason were ones she was quite fond of.

7. Sandra told me that she wanted Mason and Megan to live with her.

8. I personally witnessed Grant Keefe coming to visit about twice a week during my duty shift.

9. To my knowledge, that was the only time Grant Keefe visited.

10. Mason Finch came every day at 1:00 p.m. to care for Sandra.

DECLARATION OF RALPH SANCHEZ

I, Ralph Sanchez, declare as follows:

1. I am a colleague of Mason Finch.

2. Mason and I did our undergrad and masters work together, with very comparable academic records.

3. I entered the PhD program the same year as Mason should have, but didn't in order to care for Ms. Keefe.

4. My net earnings paralleled Mason's during the first four years of our professional career – starting at about 12K – and rising to 48K.

5. During the two years I attended the PhD program my earnings dropped to 24K.

6. Immediately upon graduation my earnings skyrocketed to 65K and have steadily increased each year.

7. They are now 78K.

B. Draft Section III and IV of a Memorandum of Points and Authorities in Opposition to a Motion for Summary Judgement.

III. RESPONSIVE PARTY'S STATEMENT OF DISPUTED FACTS:

	Facts that are Disputed	The Citation to Evidence
1.	Defendant did not spend significant time with the decedent in the months before she died.	Declaration of Tori Phillips at ¶ 8-9.
2.	Decedent did not indicate she she had more than provided compensation to plaintiff for the services he provided.	Declarations of Mason Finch at ¶ 22, 23 Mildred Fowler at ¶10.
3.	Decedent promised plaintiff she'd leave him a life estate in her house in her will.	Declarations of Mason Finch at ¶22 and Mildred Fowler at ¶10 and 11.
4.	Decedent promised plaintiff she'd leave him a life estate in the rental income from the office building in her will.	Declaration of Mason Finch at ¶23.
5.	Plaintiff rendered extraordinary and exceptional services to the decedent.	Declaration of Mason Finch at ¶12 and 21
6	Plaintiff's devotion to the decedent were (sic) of such a character as it was impossible to estimate by any primary standard.	Declaration of Mason Finch at ¶12 and 21.

7.	Plaintiff put aside his primary MFCC career in order to care for decedent.	Declarations of Mason Finch at ¶12.
8.	Plaintiff's MFCC career will not recover from the time he spent not tending to it.	Declaration of Mason Finch at ¶30 - 33 and Ralph Sanchez at ¶4 - 7.
9.	Plaintiff passed by other opportunities, such as a tuition free PhD to take care of decedent.	Declaration of Mason Finch at ¶18 and 19 and Ralph Sanchez at ¶3.
10.	Plaintiff's expected MFCC earnings are irreversibly hurt for life.	Declaration of Mason Finch at ¶17 and 30 - 33.
11.	Plaintiff and Decedent have enjoyed a long, familia – like relationship in which Plaintiff has gone the extra mile for Decedent in every way, albeit to his personal and professional detriment.	Declaration of Mason Finch at ¶24, 28, 16, 17.
12.	Decedent did not indicate she would not leave a will. In fact, she told Plaintiff she would instruct her attorney to draft one.	Declaration of Mason Finch at ¶22 and 23.

Section IV of the Memorandum of Points and Authorities in Opposition to Motion for Summary Judgement.

IV Argument

A. Defendant's claim that there is no Oral Contact to Make a Will fails because there is substantial evidence to establish the existence of the Oral Contract.

The disputed facts in this case show that there was an oral contract to make a will. [Disputed Fact, hereafter DF, at ¶3 and 4.]

Toward the end of Decedent's life, Defendant did not spend substantial amounts of time with decedent [DF at 1]. Rather, plaintiff spent most of the time with decedent. [DF at 6.]

During this time, decedent mentioned to Plaintiff her intention to leave him a life estate in the house and in the income from the office building [DF at 3 and 4]. Decedent also indicated to housekeeper that same intention [DF at 3].

These disputed facts establish that decedent intended that her attorney make the will with provisions in favor of the plaintiff.

B. The Oral Contract cannot be defeated because it isn't in writing – rather it is removed from the Statute of Frauds.

The doctrine of estoppel, which lifts an agreement to make a will out of the question of the statute of frauds, is satisfied if one of two grounds are met [Kennedy v. Bank of Columbia.] or if the result would be unconscionable, [Horstsmann].

1) it has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a detrimental change in position in reliance upon the oral agreement.

Here, in reliance on the promise, the plaintiff gave up advancing his profitable MFCC business [DF at 7] and put aside his goals of professional academic advancement [DF at 9]. As a result, plaintiff's career and long-term earning potential are irrevocably harmed. [DF at 8 and 10.] Failure to enforce the contract would be unconscionable.

2) It has also been applied where unjust enrichment would result if the party who has received the help would be allowed to invoke the Statute of Frauds.

Here, the decedent's estate (Grant O'Keefe) would be unjustly enriched. Grant didn't spend time with his aunt until she was on her deathbed – and even then only minimal [DF at 1]. To allow him to recover would be unjust. Even if this is not held unjust, the plaintiff meets the first prong of the test solidly.

Therefore, the oral contract can not be barred because of the statute of frauds.

C. This action is not barred by the statute of limitations because a four-year period applies rather than a two-year period [is] generally applicable.

Where quasi-spec. performance by declaration of a constructive trust on real property is sought on the basis of an oral agreement pursuant to which that

property was to have been left by will, a four-year period applies rather than the 2-year statute of limitations (Riganti v. McElhinney).

Here, since Plaintiff is seeking a constructive trust on real property, the four-year statute has been abided by. Sandra died on August 26, 1999 and the action was filed January 11, 2002, well under four years after the death of Sandra.

Hence, the plaintiff's action is timely and not barred.

D. Moreover, even if the court finds that the 2-year statute applies (and it doesn't) the defendant is barred from asserting it because of the doctrine of laches.

The defendant was aware of Plaintiff's assertion that Sandra left the life estate in the house to Plaintiff [DF at 2]. He left Mason in possession of the house for the next 2½ years before evicting him. Hence, under the doctrine of laches, the action to assert the statute of frauds is barred.

THURSDAY AFTERNOON
FEBRUARY 28, 2002

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

ADAIR v. OLDFIELD

ADAIR v. OLDFIELD

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: A **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if each were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page numbers.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your answer. Grading of the two tasks will be weighted as follows:

Task A — 50%

Task B — 50%

Law Office of Lawrence Craig

MEMORANDUM

TO: **Applicant**

FROM: **Larry Craig**

DATE: **February 28, 2002**

SUBJECT: **Adair v. Oldfield**

Greg Adair was seriously injured in a rock climbing fall at a weekly climbing session that was loosely operated by our client, William Oldfield. Adair has sued Oldfield for damages based on negligence. Discovery has been completed. As I prepare for settlement or trial, I must decide whether a defense of express and/or implied assumption of risk is likely to prove successful.

These are my questions:

A. The issue of express assumption of risk turns on the enforceability of the Release of Liability signed by Adair. Please write a memorandum that evaluates the likelihood of Adair prevailing based on the law and the facts in the materials.

B. Implied assumption of risk turns on whether the risks that Adair faced were inherent in the activity of rock climbing and therefore whether Oldfield was subject to any duty to protect Adair against them. Please write a memorandum that evaluates the likelihood of Adair prevailing based on the law and the facts in the materials. Jed Williams, our expert, has given a deposition. Focusing on his statements in his deposition, your memorandum should also identify what he could, and could not, testify to at trial, and why.

EXCERPTS FROM THE DEPOSITION OF WILLIAM OLDFIELD

EXAMINATION BY MS. SALISBURY, COUNSEL FOR PLAINTIFF:

* * *

Q. Let's turn to the Wednesday climbing at Handley Rock. How did you organize those sessions?

A. I didn't. When I started climbing, a group of friends would meet at Handley Rock. On summer nights and some weekends we'd get together to climb, practice, and teach ourselves how to climb. Eventually, we got into the habit of meeting on Wednesday nights, and many climbers just showed up. Since I lived nearby, I'd bring over half a dozen ropes and other gear and kind of rig the ropes for the others. That kind of explains what developed over 20 years. No one ever sat down and said, "Let's meet one night a week and put Bill in charge."

Q. But you were responsible for equipment and setting things up?

A. But I didn't direct what went on. I didn't say who could or couldn't climb or what they could do. If someone showed up who wanted to learn, someone would help him. You know, show him how to tie into the rope, probably direct him to the easiest climbs, and talk him up the rock. I wouldn't call it formal instruction.

Q. You did that as well, helping beginners, correct?

A. Yes, that includes me as well. Sometimes a person would see us climbing and ask to try it, but most beginners would show up with a friend who was a climber or had done some climbing. So I'd say it was more common for folks to show up with someone who was responsible for them.

Q. But if a beginner was there, then you or someone would take care of him?

A. Someone would usually help him get started, yes.

Q. Was there anyone else who would always show up on Wednesday nights?

A. The people changed over the years.

Q. Over all the years, you've been the one who's been there consistently?

A. I've been the most consistent, yes. That's one way to put it.

Q. You were there when Greg Adair first showed up, correct?

A. Probably. I remember he started coming out the summer before the accident. He usually came with two friends, his girlfriend and another guy. Greg seemed to be the leader of their little group. He was the one really hooked on climbing, pushing the other two to try harder climbs, and asking for help on climbs, always interested in where to go to climb. He was there often and was eager to learn.

Q. Mr. Oldfield, would you please explain how the ropes were set up at Handley Rock?

A. Most of what we do at Handley Rock is what climbers call "top roping," climbing with a rope holding you from above, so that if you fall, the rope will hold you and prevent a long fall. You do that by placing an anchor above the rock you want to climb, at the top of the "route." That anchor might be a sling, that's a piece of nylon rope, around a tree or a boulder. At Handley Rock, since we've been climbing there a long time, we've placed permanent anchors at the top of most of the routes that we climb. We drill a hole into the rock, then hammer in a bolt, usually a 3/8 to 5/8 inch piece of metal driven into the hole with a metal hanger to which you can connect the rope. Some anchors have 2 or 3 bolts. We usually don't trust just one. But more recently we've drilled and placed big construction eyebolts, 3/4 inch by 6 inches. You could haul a tank up with one of those.

Q. Then you run the rope through the bolts or eyebolt?

A. That's not done. A rope should always run through a carabiner, usually 2 of them, if it's an anchor.

Q. What's a carabiner?

A. Metal, usually aluminum, snaplinks. They're oval with a spring-loaded gate that snaps open and shut. Think of a solid safety pin, around three inches in length but without a sharp point. You open the gate, and clip the carabiner to the bolt. Release the gate, and it snaps shut. Then you take the rope, open the carabiner gate again, place the rope in the same carabiner and let it snap shut. The carabiner in effect acts as a pulley. You have the rope connected to the anchor bolt through the carabiner, but the rope can run free, since it's not actually tied to a bolt. Now, a climber can tie into one end of the rope, the rope goes up

to the anchor, through the carabiners, and down again to where another climber is holding or securing the rope; we call it “belaying.” As the climber ascends the rock, the climber who’s belaying--we usually say the “belayer”--takes in the rope so there’s never any slack in the rope. If the climber falls, the belayer holds the rope fast, and the climber shouldn’t fall more than a foot or two, depending on how much slack is out, how quickly the belayer reacts, and the stretch of the rope. It shouldn’t be much. That way climbers can safely practice or learn.

Q. What happens when the climber reaches the top?

A. Depends. If there’s a walkoff, meaning an easy way to descend, a climber could untie and walk down, or the climber could be lowered by his belayer. You just lean back, putting all your weight on the rope, and the belayer slowly lets the rope out and the climber literally backs down the route he went up, but under the control of the belayer.

Q. Is that difficult?

A. No. You are trusting the anchor and your belayer because you’re not holding on to the rock with your hands and feet as when you were climbing up. But I guess because it’s easier, and we’re all basically lazy, lowering is the most common way to descend. You can walk off every route at Handley Rock, but almost everybody just gets lowered. You top-out, look down to be sure your belayer’s paying attention, shout “Lower me,” lean back, and you’re back on the ground in 10 seconds.

Q. What do you remember of the night of Greg Adair’s accident, July 22nd?

A. Not much, at least before the accident. I came home from work, grabbed the ropes, and set up some on the Left Face and Main Wall. Then a group of climbers wanted to try a hard variation on another rock we call The Diagonal. It’s about 50 yards south of the main climbing area, and I was there with them, when we heard the shouts from the Left Face area. We ran up there, and found Greg. It was immediately clear that he was seriously injured.

Q. What did you do?

A. Someone had already gone for help, and the rest of us did what we could to relieve the pressure on the obvious fracture of, I guess it was, his right leg, until the paramedics arrived.

Q. Where was Greg?

A. At the base of the Left Overhang route.

Q. Had you set up the rope on Left Overhang that day?

A. Yes.

Q. What do you remember about how you did that?

A. Nothing in particular.

Q. Do you remember clipping the rope to the anchor at the top of Left Overhang on July 22nd?

A. I can't say that I have a specific recollection. It's something I've done a hundred times. I can't recall anything different that night.

Q. Then you can't say that you connected the rope to the anchor on Left Overhang that night?

A. Not specifically. You develop habits or I should say practices. The Left Overhang anchor is one of those big eyebolts I told you about, 3/4 inch by 6 inches; it's never coming out. I'd clip a couple of carabiners to the eyebolt. Find the mid-rope mark on the rope, open one carabiner at a time, and clip the rope to the carabiner. Coil each end of the rope and toss them over the overhang. I can't say I remember doing exactly that on July 22nd, but that's exactly how I've done it for 20 years on each route there. And of course, if I hadn't anchored the rope, the whole rope would have gone down when I tossed the ends.

Q. Mr. Oldfield, if you anchored the rope, then how did it become unclipped when Greg was climbing?

A. I don't know. I set it up correctly, I'm sure of that, but what happened after that I don't know. I know others climbed the route before Greg's fall, and were lowered without any problem. The rope must have been anchored. Someone, somehow, unclipped it.

Q. Who unclipped the rope?

A. I don't know.

Q. Just to make clear what we may be assuming is understood: The rope and carabiners on Left Overhang on July 22nd were yours?
A. Yes.
Q. You set up the rope and carabiners?
A. Yes.
Q. When you found Greg at the foot of Left Overhang, the rope and carabiners that were there were the same ones that you had set up?
A. Yes.
Q. Do you claim that anyone else was in charge at Handley Rock on July 22nd?
A. No.
Q. And despite your role as the owner of the equipment and the one who set it up, you don't have an explanation for what happened?
A. I'm at a loss. I just don't know.
Q. Mr. Oldfield, at some time you started to ask climbers at Handley Rock to sign a form called a Release of Liability?
A. Yes.
Q. Why did you do it?
A. Well, one of the climbers was a lawyer, and he kept telling me that I should do it. Then he brought me a form he prepared and said I should make copies and ask climbers to sign.
Q. Why did he say you needed to do it?
A. We'd heard of climbing accidents involving mountain clubs, like the Sierrans, that ruined the mountain clubs financially and caused them to cease all climbing instruction.
Q. And you then made people sign the Release of Liability?
A. Asked them, that's all. When new people came out, I'd give them the form and ask them if they didn't mind signing. I couldn't make people sign. It was a favor to me.
Q. What did you say was the purpose or intent of the form?
A. That it was to prevent our climbing sessions from getting involved in litigation.
Q. Did you explain what the form said?

A. Only as I did just now.
Q. How did you get them to sign?
A. I'd usually give it to newcomers. Ask them to please read it over and sign. Then I'd come back when I remembered it, and pick them up.
Q. What happened if someone refused?
A. It never happened. But a lot of people just didn't sign. I didn't ask friends or old timers, just newcomers. If someone was climbing when I brought the forms, I couldn't ask. And many times I'd forget to pick up signed forms. Sometimes people would come to find me afterwards to give me their forms. Frankly it was pretty hit-or-miss.
Q. Did Greg Adair sign one?
A. Yes.
Q. Do you remember if he read it first?
A. Actually I don't remember. I spent some time going through the box where I kept the signed forms to find Greg's. That's the only reason that I know he signed one.
Q. So you can't say that he read it first?
A. Well, as I said, I'd give people the form, so they could read it, and pick them up afterwards. I don't remember anyone just grabbing one and signing. I think I'd remember that.
Q. Nothing further. Thank you, Mr. Oldfield. Any questions, Mr. Craig?

BY MR. CRAIG: No questions.

EXCERPTS FROM THE DEPOSITION OF GREG ADAIR

EXAMINATION BY MR. CRAIG, COUNSEL FOR DEFENDANT:

* * *

Q. Mr. Adair, would you provide your best recollection of what happened on July 22, 1998, the night of the accident?

A. I'll try. It was a Wednesday night, and I decided to go to Handley Rock to climb. I usually went with my girlfriend, Andrea, but she couldn't make it that night. I couldn't get my friend Russ to go. I hadn't been climbing in almost a month, and we were going climbing that weekend. I wanted a climbing session before the weekend. We were going to a new area called Jailhouse Rock, and I wanted to get some route information from some of the others who'd been there. Anyway, I decided to go to Handley Rock without a partner. I guess I got there around 7 o'clock, and, after putting on my harness and shoes, walked down to the base of the Left Face area. It has some good moderate warmup routes. I started climbing with a couple of guys who were there, trading off climbing and belaying with them. After doing those routes we moved over to do Left Overhang, since there was a rope on that route as well, and Left Overhang is one of the test pieces at Handley Rock. I hadn't been able to do it until that year, and it was one of the climbs I wanted to do in preparation for the weekend. Some of the others had already climbed Left Overhang, and we were talking. Well, I was asking them about Jailhouse Rock, and I guess I wasn't hurrying. I wanted to be rested for Left Overhang. Finally I roped up and started up. And that is all I remember. My next recollection is of intense pain, almost all over my body, but really excruciating in my right leg and left ankle. It turned out both were broken, and I was lying on the ground. I didn't know how I'd gotten there, and all I was conscious of was pain like I'd never known. I guess I wasn't thinking of what had happened.

Q. So between starting up and then lying on the ground you have no recollection at all of what had happened?

A. None. Some kind of traumatic amnesia, I guess. But the pain…I'll never forget that.

Q. Well, how far up the route do you remember going?
A. I don't remember going up at all. I just remember saying to Joel, who was the one belaying me, "Got me?" and starting up. That's it. Then I was writhing and screaming on the ground. I remember people being around me asking, "What happened, what happened?"
Q. What did you respond?
A. You mean while I was lying there screaming? I don't know. I don't think I could have said anything. I didn't know, and I couldn't think of anything except how much I hurt. I'd never felt anything like that.
Q. OK. Did you learn subsequently what happened?
A. I was told that the rope had not been anchored by Bill Oldfield, and when Joel went to lower me, I fell from the top of the Left Overhang to the base, the full length of the route.
Q. Who told you that?
BY MS. SALISBURY, COUNSEL FOR PLAINTIFF:
You can answer as to what anyone else told you, since it may lead to discoverable information. However, you shouldn't mention anything that you learned from me; that would be covered by the attorney-client privilege.
A. That's what I was told by the other climbers who were at the scene. They came to see me at the hospital.
BY MR. CRAIG:
Q. That was Joel and the others you were climbing with? What did they tell you?
A. Joel Samuels and Mike Griffith. They said that I cruised the climb and pulled over the overhang. I shouted or said something, probably jazzed or pumped that I'd been able to do it without falling or hanging on the rope. Then, the moment that I leaned back to be lowered, I fell straight down next to them on the ground. The carabiners that should have been clipped to the anchor were still attached to the rope, and lying there on the ground. Obviously they hadn't been attached to the anchor as we'd assumed. We'd been climbing Left Overhang without any real top rope anchor. They were as angry as I was. We were all hugely upset.

We'd trusted that Bill had set up the anchor, and he hadn't. One of us could have been killed, and my life will never be the same--crippled, fused ankle, and all.

Q. Did they say that Bill Oldfield had not set the anchor properly?

A. It was obvious to all of us. None of us would have climbed a route as stout as Left Overhang without a top rope properly anchored. At Handley Rock we trusted that there was a top-rope anchor. What if one of us had just flamed out on the climb, and just wanted to rest and hang on the rope, counting on the anchor and the rope to hold him there? None of us bargained on putting our lives on the line by climbing without an anchor on a practice climb.

Q. But if, as you say, you would not have attempted the climb if you'd known the risk, then why didn't you check the anchor? It'd have been easy to go around to the top of Left Overhang and check before you climbed it, correct?

A. That wasn't my responsibility. Bill Oldfield was the one responsible for the anchors. He and others, I guess, drilled and placed the bolts. I started going to Handley Rock because it was supervised. You could go there to learn from experienced climbers like Bill. You didn't even need to own a rope or gear. Well, just your own harness and shoes. Bill provided everything else, and they'd teach you how to tie in, belay other climbers, do basic climbing movements, like how to climb a crack or a chimney or get over an overhang. And you'd learn about all the other techniques and equipment you'd eventually need to climb real mountains, but mostly you got to practice and improve by attempting and repeating progressively harder and harder climbs with the help of better climbers and with the safety of a top rope.

Q. By the time of the accident weren't you one of the better climbers, since you were doing harder climbs like Left Overhang?

A. I wasn't a beginner and was just starting to get on the tougher climbs, but I still went to Handley Rock to learn from Bill and the other good climbers. I'd only done a couple of trips to do real climbs in the mountains. No one at Handley Rock would have considered me one of the experienced climbers. No way. Not with the others there.

Q. What had you done, doing real climbs as you say?
A. Well, the first year I was learning to climb, after going to Handley Rock for most of the summer, Andrea, Russ, and I went to a climbing area near Lake Tahoe called Lover's Leap. We went there twice that fall, and did most of the easy and a few moderate climbs. Then, the next year, about a month before the accident, we went to Yosemite for the Memorial Day weekend.
Q. What did you climb there?
A. Let's see. First we did one called the Nutcracker. Then the next day we tried one of the classics, Royal Arches, but didn't top out till after dark, got lost trying to find the descent route, and spent the night out. Not a very good start to our climbing, but others have said that it also happened to them on their first attempt of Royal Arches. So we didn't feel too bad about it.
Q. Andrea and Russ, they had started climbing with you?
A. Yes.
Q. Had they climbed more than you?
A. Probably less.
Q. On your trips to the mountains for real climbs, there were no instructors or supervision, correct?
A. No one else but us three.
Q. You wouldn't have been doing those real climbs on your own if you hadn't thought it was safe, correct?
A. I guess so. Yeah.
Q. You believed you were qualified to climb without instructors or supervisors, correct?
A. The climbs we were doing, pretty moderate ones, yes.
Q. Mr. Adair, may I show you a document entitled "Release of Liability," and ask you whether you recognize the signature?
A. It's mine.
Q. (DIRECTED TO COURT REPORTER): Will you please mark this as Defendant's 1?
Q. Do you recall signing the document?
A. Kind of.

Q. Under what circumstances did you sign the document?
A. It was at Handley Rock. Bill would come around sometimes with the forms, and ask each of us to sign.
Q. What was your understanding of what you were signing?
A. That it was necessary to protect Bill, so he wouldn't have to get insurance or something like that.
Q. Didn’t you read it?
A. Bill just came up to a group of us, and asked us to sign. Since I was going to sign it anyway, I didn’t really read it. It didn’t make any difference to me what it said.
Q. You had a chance to read the Release of Liability, but didn’t because you didn’t think it made any difference?
A. Right.
Q. Did Bill say that if you didn’t sign you couldn’t climb at Handley Rock?
A. No. All I remember is that Bill asked us to sign.
Q. What was your understanding of what would happen if you didn’t sign?
A. I don’t know. It didn’t come up.
Q. Did anyone say, “Sign or you can’t climb,” or “We won’t help you,” or “You can’t use the ropes, unless you sign?”
A. I never heard that.

* * *

RELEASE OF LIABILITY

I understand that rock climbing is an inherently dangerous activity and can result in injury or death. I waive and release all participants in rock climbing at Handley Rock from all liability and claims of damages for my injury or death which is the result of rock climbing at Handley Rock. I intend this release of liability to include Bill Oldfield and all other participants in rock climbing activities at Handley Rock.

By this release of liability, I understand that I am giving up the right ever to sue Bill Oldfield or any other participants in rock climbing activities at Handley Rock. I intend this release of liability to include all liability for my injury or death, **EVEN IF CAUSED BY THE NEGLIGENCE OF BILL OLDFIELD OR ANY OTHER PARTICIPANT.** I understand that this means that I cannot sue for injury or death resulting from falls or falling rock or resulting from defective equipment, ropes, or bolts, or resulting from improper or careless instruction, advice, or supervision.

I further understand that the risks from climbing are varied and difficult to anticipate. I intend this release of liability to include **ALL RISKS AND CAUSES OF INJURY OR DEATH**, even if the risk or cause of injury or death is not specifically identified in this release or anticipated by me at the time I sign this release.

I ACCEPT AND TAKE FULL RESPONSIBILITY FOR ALL RISKS ASSOCIATED WITH ROCK CLIMBING AT HANDLEY ROCK. I give this release of liability freely in exchange for the benefits that I may receive from my participation in rock climbing at Handley Rock.

Dated:July 9, 1997 /s/ Greg Adair

EXCERPTS FROM THE DEPOSITION OF JED WILLIAMS

EXAMINATION BY MS. SALISBURY, COUNSEL FOR PLAINTIFF:

* * *

Q. Let's turn to what you've done in this case, Mr. Williams.

A. Well, coming out here, I read the two depositions that were sent to me, Bill Oldfield's and Greg Adair's, and then today I met with Bill and the two witnesses at Handley Rock. I got each of them to tell me what happened, and then I recreated the events, including repeating the Left Overhang climb.

Q. So, what do you think happened?

A. Let's start with what we know. A group of experienced and novice climbers got together at Handley Rock, as they did most Wednesday nights in the summer. Bill went up to a small alcove where there is a fixed anchor at the top of the Left Overhang route, tossed down the rope ends, and folks started to climb.

Q. Can you easily see the anchor for Left Overhang?

A. No. In fact, to see the Left Overhang anchor, you have to get into the alcove itself, either by scrambling down from the top of Handley Rock, as Bill did to set up the anchor, or by climbing up the Left Overhang route.

Q. Not being able to see that anchor, didn't that make the Left Overhang route unsafe, at least for novices?

A. No, not at all. It's very common not to be able to see the top anchors from the base of climbs. As a climber, you have to trust that the rope has been properly anchored by whoever set it up — your climbing partner or even some other climber. When the anchors are bolts drilled into the rock, as they are at Handley Rock, almost any climber should be able to set up the anchor. So even if you can't see the anchor, you expect it to be all right. And we know that two other climbers did Left Overhang, and then were lowered down from the anchor. When Adair fell, the rope came down with him. Attached to the rope were the two carabiners that should have connected the rope to the anchor. Obviously, they were connected to the anchor when the other two climbed, and were not connected when Adair climbed.

Q. But if the rope wasn't connected when Adair was climbing, wouldn't it have fallen down immediately, or at least as the rope was being pulled in as he went up?

A. It would seem so. There are two possibilities. One is that the rope was anchored, and Adair unclipped it himself when he got to the top. That's almost incredible, but I have to concede it's possible. Second, and this is what I think happened, between the time when the others climbed and when Adair climbed Left Overhang, the carabiners and rope were unclipped from the anchor, but the rope was laid or dropped back over the anchor. It's an eye-ring bolt that sits up about one inch. The rope ends then would have gone down to the base of the climb. Adair tied into one end, and the other end was held by the belayer. Since the forces on each end were downward, the rope could have stayed looped over the anchor, even though it wasn't really connected to the anchor.

Q. You think so?

A. Yes. I tried it myself. Twice. I laid the rope over the anchor. Then climbed Left Overhang from the ground, while Bill took in the rope. The rope stayed up as I climbed.

Q. If that theory is correct, then why did it fall after Adair got up?

A. When Adair got over the overhang at the top and stood up, he was standing above the anchor. The rope would go from his waist, where it was attached to his harness, down to the anchor at his feet. Since one end of the rope was then above the anchor, the rope would have slipped over the anchor. So, when Adair said to lower him, the rope was unattached or held in any way, and he fell completely unsecured.

Q. That's quite a theory; what makes you think that is possible?

A. Not just possible. I'm sure that standing at the anchor will lift an unclipped rope off the eyebolt. I stood there tied in to the end of the rope, tried it six times, and six times the rope slipped off.

Q. Well, Mr. Williams, have you also got a theory for how the rope got unclipped before Adair climbed?

A. Unlike what I've already explained, how the rope was unclipped is conjecture. We know the rope was attached when the two others climbed; thus I can say that Bill must have properly set up the anchor initially. The rope was not attached when Adair was ready to be lowered. After the accident, the others inspected the rope and carabiners that came down with Adair and landed on the ground. They found two carabiners attached to the rope. Two carabiners placed with opposing gates is standard practice for top rope anchors. They found two carabiners with opposing gates attached to the rope. In that position, it would be impossible for the rope to come out on its own. Someone unclipped it.

Q. Yes, but whom?

A. There are several possibilities. As I said, Adair could have done it. I doubt that, but even he doesn't know what he did. Second, someone else in the group could have started to take the anchor down, been interrupted, put the rope down or dropped it down, and it looped on the eyebolt anchor. We know that there was some time between when the others climbed Left Overhang and Adair did. And as I said, the climbers below would not have seen anyone in the alcove. Then again, someone else may have done it. It's a public area. The others say that there are usually adolescents around. Maybe someone did it as a prank.

Q. So, you cannot say how the rope got unclipped?

A. No.

Q. Since there were several ways that the rope could have become unclipped, then, as an expert on safety and as an instructor, you would agree that Bill Oldfield should have checked the anchors before each person climbed, since he was in charge?

A. No. Not even in an instructional setting. I'd say that once an anchor is properly set up, I would not expect an instructor to go back up to check the anchor each time someone climbs.

Q. Are you claiming that it was Mr. Adair's responsibility to check the anchor set up by Bill Oldfield, the experienced person in charge?

A. No. It's common for climbers to trust that a top rope has been properly set up. I'd have to say that Adair could assume that the anchor was properly set up. I'd have done the same thing he did.

Q. You would agree that the top rope that had already been used by other climbers becoming unclipped would be unexpected?

A. Yes.

Q. And it would not be an inherent risk of climbing?

A. I wouldn't put it that way. I'd say that human error in an unpredictable natural environment is an inherent risk. It could have been from the anchor being unclipped or from Adair's failure to check his anchor before lowering.

Q. If Adair's conduct was reasonable, how could what he did be an inherent risk of climbing?

A. When Adair got to the anchor, he should have checked the anchor. Once at the anchor, he should have checked to see that the rig was properly set up, and decided whether he was willing to entrust his life on it. Properly done, climbing can be relatively safe, but we're all human, and mistakes cause most climbing accidents. Human mistakes are a part, not a necessary part, but a common and understood part of climbing.

Q. But isn't top-roping expected to be safe, or at least safer?

A. Sure, but you can't have climbing without risks. Basically what you're trying to do is to manage a large number of variables. But you can't eliminate them, not in a vertical environment, where any mistake, no matter how minor, can mean a brush with death. After all, what climbing—or probably any adventure sport--is all about, is putting yourself in a situation where your survival depends on your wits, skills, and probably a little luck. That's the essence of what it means to be alive in an unpredictable world.

Q. Let me make sure I've got your qualifications.

A. Well, I've climbed for 30 years, almost all of that full time. Done everything from big walls like El Capitan in Yosemite to expeditionary climbing in the Himalayas. For the last 20 years, I've been a professional climbing guide with Grand Teton Mountain Guides, the largest and oldest guiding company in

America; I'm now the Chief Guide. I guide clients on mountains around the world.

Q. Including Mt. Everest?

A. Yes, that's become almost obligatory.

Q. Ever had a client or student seriously injured?

A. Of course.

Q. Any get killed?

A. Yes. It comes with the territory.

Q. Have you ever been sued as a result of a climbing accident?

A. No.

Q. Would it be good for your business for instructors to be sued for climbing accidents?

A. Probably not.

Q. What's this other position you hold, as editor of the annual report that analyzes climbing accidents?

A. Yes. For 15 years I've put together the Journal of Mountaineering Accidents in North America, sort of our bible of accident analysis.

Q. Mr. Williams, what is your rate of compensation, that is, for testifying in this case?

A. I'm to receive $500 a day.

Q. Thank you, Mr. Williams. I have no further questions. Any questions, Mr. Craig?

BY MR. CRAIG: No questions.

THURSDAY AFTERNOON
FEBRUARY 28, 2002

California Bar Examination

Performance Test B

LIBRARY

ADAIR v. OLDFIELD

LIBRARY

BUCHAN v. UNITED STATES CYCLING FEDERATION

Columbia Court of Appeal, 1991

This is an appeal by defendant United States Cycling Federation (the Federation) from the judgment of the Superior Court in favor of plaintiff Barbara Buchan.

As will appear, the dispositive issue involves express assumption of risk.

Buchan had been a top-level athlete all her life. Her goals, at the time of her injury, were to represent the United States in the Cycling World Championship in 1982 and in the Summer Olympics in 1984. The Federation is the governing body in the United States for the Olympic sport of cycling and is the sanctioning body of the races.

Buchan was injured in one of the trial races to select the team for the 1982 World Championship, over which the Federation had total control. In races prior to the trials, the Federation segregated races according to ability, because of the substantially higher risk of mixing novices with elite racers. At the trials, however, it admitted some novices, at first not even disclosing to the racers that it was doing so. In an initial trial, as a tight pack of racers sped downhill reaching a speed of 30 miles per hour, a novice named Pieper, not accustomed to and scared of large packs of riders, lost control, hit the rider in front of her, and caused a chain reaction of fallen riders. The elite riders, including Buchan, unsuccessfully but repeatedly protested the inclusion of novices. At the next trial, when once again a pack of riders descended downhill, reaching 50 miles per hour, Pieper lost control, struck another racer's back wheel, and caused an immediate chain reaction, spilling numerous riders, this time with tragic consequences. Buchan landed squarely on her head and sustained a catastrophic injury to her brain.

The Federation required every applicant for a license to race to sign an application form containing a "Release of Liability," which provided in relevant part: "I acknowledge that cycling is an inherently dangerous sport in which I participate at my own risk. In consideration of the agreement of the United

States Cycling Federation to issue an amateur license to me, I hereby waive, release, and forever discharge the United States Cycling Federation, its employees, agents, members, sponsors, promoters, and affiliates whosoever from any and all liability, claim, loss, cost or expense arising from or attributable in any legal way to any action or omission to act, negligent or otherwise, of any such person or organization in connection with sponsorship, organization, or execution of any bicycle racing or sporting event, including travel to and from such event, in which I may participate as a rider, team member, or spectator. To the best of my knowledge I have no physical condition that would interfere with my ability to participate in or attend any such event or would endanger my health hereby."

Buchan signed the agreement. She testified she was given no opportunity to negotiate the terms of the release. The evidence at trial showed the Federation had no procedure whereby a racer could, for an additional fee, purchase insurance against the Federation's negligence.

The trial court denied the Federation's motion for summary judgment and the case proceeded to trial. At trial, several racers and coaches testified that crashes and falls are common; that ninety percent of the riders get broken collarbones; that riders shouldn't race unless they are willing to accept the risks; and that good bicycle riders are involved in crashes, which are a part of the sport. Buchan herself acknowledged that in 75 percent of bicycle races there are crashes involving the falling down of multiple riders. Buchan had two prior racing falls.

The Federation appeals the jury verdict awarding Buchan $1,152,000. We find it unnecessary to address all of the contentions raised by the Federation since we believe that the trial court erred in denying the Federation's motion for summary judgment and its motion for directed verdict in that the release signed by Buchan, under which she expressly assumed all risks inherent in bicycle racing, effectively barred her action.

In *Tunkl v. Regents* (Colum. Supreme Ct. 1963), the Columbia Supreme Court held that a release of liability may be effective only if it does not involve the

"public interest." The court said that those factors that bear on the public interest focus on whether the party seeking exculpation is engaged in performing service of great importance and practical necessity to the public, and whether such party possesses a decisive advantage of bargaining strength against any member thereof.

Applying the "public interest" test, the Courts of Appeal have enforced releases of liability signed by racecar drivers, participants in whitewater rafting, dirt bike racers, and skydivers.

Nevertheless, the trial court concluded that the present case represents a situation in which the public interest and publicly conferred power provide the Federation an insurmountable advantage in bargaining strength against any athlete seeking to participate in amateur bicycle racing at the world-class level, and that a cyclist who wants to participate in Olympic or other international competition can only do so through the Federation. Once a racer like Buchan entered the World Trials she came under the control of the Federation, subject to the risk of its negligence, and that she had no choice over whom she would race against, and the decision as to who would be allowed to race was at the complete discretion of the Federation.

Despite the trial court's impressive analysis of Olympic and world-class racing, we conclude on this appeal that there is no public interest in bicycle racing. This is so regardless of the level of competition or the motive of the participants. We conclude that the concept of "public interest" has no applicability to sports and recreational activities. No public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk that the law would otherwise have placed upon the other party.

Measured against the public interest in situations where releases of liability have been rejected, such as hospitalization, escrow transactions, banking, and the operation of common carriers, bicycle racing is not one of great importance to the public. There is no compelling public interest in facilitating sponsorship and organization of the leisure activity of bicycle racing for public participation. The number of participants is relatively small. Also, the risks

involved in running such an event certainly do not have the same potential substantial impact on the public as the risks involved in hospitalization, escrow transactions, banking, and the operation of common carriers. The service certainly cannot be termed one that is a matter of practical necessity to the public.

Buchan argues that, at least as to her, this race was of great importance, a practical necessity, and was part of her overall goal to eventually participate in the 1984 Olympics. She uses this fact to distinguish herself from what she describes as the "Sunday cyclist." However, we know of no case that has ever intimated, much less held, that great importance and practical necessity to the public are to be measured from the perspective of a single member.

To be effective, a release of liability need not achieve perfection but suffices if it clearly expresses an intent on the part of the releasor not to hold the released party liable for the consequences of its own negligence. We have no difficulty in concluding that the release here passes muster.

In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases of liability are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.

Reversed.

STATEN v. SUPERIOR COURT

Columbia Court of Appeal, 1996

Plaintiff Sylvia Granata is an experienced and accomplished amateur figure skater. She began skating when she was three or four years old and has skated competitively since the age of eleven. At the time of the accident giving rise to this litigation, she was 16 years of age and aspired to Olympic competition or a career with the Ice Capades. She was a member of defendant Ice World Skating Club (Ice World), which rented a rink at specified times for use by club members only. During an ice skating practice session, at which there were about 10 skaters skating freestyle around the ice, defendant Dorothy Staten, also a club member and aspiring figure skater, was practicing an "outward backward spiral." This maneuver required Staten to skate backwards on the ice with one leg extended and roughly parallel to the ice. While skating backward Staten collided with Granata, who was in a fixed location position practicing 360 degree spins. Granata was cut on the arm by the blade of Staten's elevated skate. She knew that skate blades were sharp, that falls and collisions with other skaters were among the risks of skating, and that skating carried with it a risk of personal injury.

Granata sued Staten and Ice World for damages based on negligence. Staten and Ice World moved for summary judgment on the ground of implied assumption of risk. The Superior Court denied the motion, specifically ruling there was a triable issue of material fact on the question whether such an injury as suffered by Granata was an inherent risk of skating. In doing so, it relied, over defense objection, on the declaration of an expert skater, who stated his opinion that being cut by the blade of a skater performing a backward spiral is not an inherent risk of the sport: "A backward spiral requires the use of care to look in the direction that one is going to travel, before the travel begins, to make sure that the ice is free of objects, including people. The failure to do so is negligent on the part of the skater."

Motivated by a desire to clarify the law of implied assumption of risk, the Columbia Supreme Court decided *Knight v. Jewett* (Colum. Supreme Ct. 1992). *Knight* holds that, in cases of implied assumption of risk, a defendant owes no duty to protect the plaintiff from a particular risk of harm, and the lack of a duty of care operates as a complete bar to recovery, without regard to whether the plaintiff's conduct was negligent, and without regard to the plaintiff's subjective awareness or understanding of the potential risk.

Generally, the participation in an active sport is governed by implied assumption of risk, and a defendant owes no duty of care to protect a plaintiff against risks inherent in the sport. Given a sport setting, the question whether the defendant owes a duty to the plaintiff is, in *Knight*'s words, "a legal question that depends on the nature of the sport in question and on the parties' general relationship thereto, and is an issue to be decided by the court, rather than the jury." Thus, under *Knight*, a trial court is to determine the question of duty by determining a given sport's inherent risks.

In the present case, we must determine whether being cut by the blade of a fellow skater during a group skating session is a risk inherent in the sport of skating. Granata argues that *Knight* does not apply because she was merely practicing and not actually competing at the time of her injury. The distinction eludes logic. Like rehearsals in drama, practice is essential to competitive athletic activity. One assumes the risks inherent in a sport by participating in it, regardless of whether the participation is practice or competition. To accept Granata's distinction would make implied assumption of risk hinge upon the formality of the activity, not the activity itself. Needless to say, the distinction is unsupported by any authority.

Granata also sees a distinction in that skating is neither a contact nor a team sport. However, skating may be analogized to snow skiing, another sport in which one acts alone and 'teamless" but in the proximity of others also so engaged. Cases dealing with skiing uniformly hold that one skier assumes the risk of collision with another.

Granata insists, however, that being cut by the blade of a backward-moving skater is not an inherent risk of the sport, relying on the declaration of her expert witness, quoted above.

In our view, the declaration is of little relevance or help. It seems only to say that negligent conduct is unexpected and thus not inherent. Thus, the expert begged the question: He assumed a duty to reach an opinion on duty. Staten and Ice World, however, contend the declaration was inadmissible on the question of duty. We agree.

This case illustrates a problem that can arise in implied assumption of risk cases, which may not have been fully appreciated by the *Knight* court. As we see it, *Knight* may require a court to determine a question of duty in sports settings while factually uninformed of how the sport is played and the precise nature of its inherent risks. Under *Knight*, "inherent risk" defines duty. The question of duty is, as *Knight* reminds us, a legal question to be determined by the court. However, it is thoroughly established that experts may not give opinions on matters that are essentially within the province of the court to decide. It seems, then, that the *Knight* court has determined that the legal question of duty in an implied assumption of risk case is to be resolved by the trial court without factual input by experts. The determinant of duty, "inherent risk," is to be decided solely as a question of law and based on the general characteristics of the sport and the parties' relationship to it. This determination is necessarily reached from the common knowledge of judges, and not the opinions of experts.

It seems to us that *Knight* has crammed a square peg of fact into the round hole of legal duty: whether there is a duty in an implied assumption of risk case turns on the question whether a given injury is within the "inherent risk" of the sport, which in turn can only be determined on a set of factual conceptions of the particular sport and how it is played. This works fine with regard to sports that are themselves a matter of common knowledge. A majority of Americans grew up with baseball and football. But what of sports such as, say, synchronized swimming or parasailing? If a given trial judge has no general knowledge of the sport in question, he or she necessarily has to get a factual

grasp of the nature of the sport from somewhere other than general knowledge, and that seems to open the door to the court's reliance on expert opinion.

We are still faced, however, with the rule against expert opinion on the question of duty. This has been overlooked in several post-*Knight* decisions, where, without discussion, expert opinion was admitted on the question of duty to conclude that being hit by a swinging boom was an inherent risk of sailing; that consumption of alcohol by other skiers was not an inherent risk of skiing; that a certain whitewater raft design did not increase risk to passengers beyond that inherent in the sport; and that a bicycle jump was unsafely designed in such a way as to increase the inherent risk of bicycle racing.

The *Knight* court has fashioned a rule and propelled sports injury cases onto the playing fields of litigation, which, as we all know, are hardly Elysian. The Supreme Court would do well to provide further guidance by clarifying the rulebook. Until it does, trial courts deciding these questions should not be faced with determining the inherent risks of an unfamiliar sport without the helpful factual input of experts. A trial judge could receive expert opinion on the factual nature of an unknown or esoteric sports activity, but not expert opinion on the ultimate legal question of duty or the penultimate legal question of inherent risk.

Let a peremptory writ of mandate issue commanding the Superior Court to enter an order granting summary judgment.

LEON v. FAMILY FITNESS CENTER

Columbia Court of Appeal, 1998

Carlos Leon appeals a summary judgment entered in favor of Family Fitness Center (Family Fitness) in his negligence action for personal injuries sustained when a bench collapsed beneath him while using a sauna in its facilities. The trial court concluded that there was no triable issue of material fact regarding whether a purported release of liability he signed was legally adequate to exculpate Family Fitness from the consequences of its own negligence. We conclude otherwise.

Leon signed a Family Fitness "Club Membership Agreement (Retail Installment Contract)" in June 1993. The document is a legal-length single sheet of paper covered with writing front and back. The front page is divided into two columns, with the right-hand column containing blanks for insertion of financial and "Federal Truth in Lending" data plus approximately 76 lines of text of varying sizes, some highlighted with bold print. The left-hand column contains approximately 90 lines of text undifferentiated as to size, with no highlighting and no paragraph headings or any other indication of its contents. The back contains approximately 90 lines of text. The purported release of liability is located at the bottom of the left-hand column of the front page, and states the following:

> Member is aware that participation in a sport or physical exercise may result in accidents or injury, and assumes the risk connected with the participation in a sport or exercise and represents that he is in good health and suffers from no physical impairment that would limit his use of Family Fitness facilities. Member acknowledges that Family Fitness has not and will not render any medical services including medical diagnosis of his physical condition. Member specifically agrees that Family Fitness, its officers, employees, and agents shall not be liable for any claim, demand, or cause of action of

> any kind whatsoever for, or on account of injury or death resulting from or related to his use of the facilities or participation in any sport, exercise or activity within or without the premises, and agrees to hold Family Fitness harmless from same.

Summary judgment is proper only where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law.

A release of liability is not enforceable if it is not easily readable. Furthermore, the important operative language should be placed in a position that compels notice and must be distinguished from other sections of the document. A layperson should not be required to muddle through complex language to know that he is relinquishing valuable legal rights. A release is unenforceable if not distinguished from other sections, if printed in the same typeface as the remainder of the document, and if not likely to attract attention because it is placed in the middle of a document. In other words, a release must not be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find.

To be effective, a release of liability by a releasor purporting to exculpate a released party from the consequences of its own negligence must clearly express such intent. At the very threshold, it must clearly notify the releasor of its effect.

Here, the purported release of liability, although a separate paragraph, is in undifferentiated type located in the middle of a document. Although some other portions are printed in bold and in enlarged print, the purported release itself is not prefaced by a heading to alert the reader that it is exculpatory, contains no bold lettering, and is in the same smaller font size as is most of the document. No physical characteristic distinguishes the purported release from the remainder of the document. The document itself is titled “Club Membership Agreement (Retail Installment Contract),” giving no notice to the reader that it includes a release of liability. Of particular relevance is the fact there is no language to alert a releasor that he was thereby exculpating Family Fitness from

the consequences of its own negligence. Where such exculpation is involved, the release must contain words clearly to that effect.

The purported release of liability begins with language that participation in a sport or physical exercise may result in accidents or injury, and that the purported releasor assumes the risk connected with the participation in such. The purported release is followed by a statement in bold, capital letters: **"MODERATION IS THE KEY TO A SUCCESSFUL FITNESS PROGRAM AND ALSO THE KEY TO PREVENTING INJURIES."** Family Fitness placed the purported release between these statements, which deal strictly with the risks inherent in an exercise or sports program without any mention that it insulated itself from the consequences of its own negligence.

Where a participant in an activity has released another from liability for the consequences of the other's own negligence, the law imposes no requirement for the participant to have a specific knowledge of the particular risk that resulted in the damages. Not every possible specific act of negligence must be spelled out or discussed. Where a release of liability for the consequences of negligence is given, it applies to any such negligent act, whatever it may have been. It is only necessary that the act of negligence that results in consequences to the releasor be reasonably related to the object or purpose for which the release is given.

Here, Family Fitness's negligence was not reasonably related to the object or purpose for which the purported release of liability was given, that is, injuries resulting from participating in sports or exercise rather than from merely reclining on its furniture. The object and purpose of the purported release that Leon signed was to allow him to engage in fitness activities within the Family Fitness facilities. However, it was not this type of activity that led to his injury. Leon allegedly was lying on a fixed, non-movable, permanent bench in the sauna room. Injuries resulting during the proper use of the bench would no more be expected to be covered by the purported release than those caused by the ceiling falling on his head or from a pratfall caused by a collapsing office chair. These incidents have no relation to an individual's participation in a health club's fitness regimen.

Reading the entire document leads to the inescapable conclusion that the purported release of liability does not clearly set forth to an ordinary layperson, such as Leon, that the intent and effect of the document is to exculpate Family Fitness from any and all of the consequences of its own negligence.

The judgment is reversed.

HANDELMAN v. MAMMOTH MOUNTAIN SKI AREA
Columbia Court of Appeal, 1999

Plaintiff Mark Handelman appeals from a judgment of dismissal entered after the Superior Court granted a motion for summary judgment by defendant Mammoth Mountain Ski Area ("Mammoth"). His claim stems from injuries sustained in a skiing accident at Mammoth.

In its motion for summary judgment, Mammoth showed the following: Handelman was injured when he fell near the top of a ski run called "Drop Out 3," and slid 817 feet down the slope before striking a rock outcrop near the bottom; Drop Out 3 is a steep chute beginning at the top of the mountain; it was in a "state of nature" at the time of the accident; and it had several exposed rock outcrops and was one of Mammoth's most difficult expert runs.

In *Knight v. Jewett* (Colum. Supreme Ct. 1992), the Columbia Supreme Court held that implied assumption of risk focuses on the legal question of duty. The ultimate question is whether, in light of the nature of the activity and the parties' relationship to the activity, the defendant had a duty to protect the plaintiff from the particular harm that caused the injury. The risks inherent in a sport may include the negligence of others. Imposition of legal liability for negligence could chill vigorous participation in and fundamentally alter the nature of the sport itself. Accordingly, a participant does not have a legal duty to protect another participant from the risks that are inherent in the sport. The fact that the participants in a sport do not anticipate the particular type of injury suffered is not determinative as to whether the risk of that injury is inherent in the sport. Neither the knowledge of the danger involved nor appreciation of the magnitude of the risk requires the clairvoyance to foresee the exact accident and injury that in fact occurs. The threat of injury need not be so great that it is probable. It is sufficient if it is known to be "within the range of possibilities," neither certain nor necessarily apt to happen.

The doctrine of implied assumption of risk can apply even if the defendant was in some manner in control of the situation and thus in a better position than

the plaintiff to prevent the plaintiff's injury. In *Ford v. Gouin* (Colum. Supreme Ct. 1992), a companion case to *Knight*, a water-skier was injured when he was pulled under an overhanging branch while water-skiing barefoot and backwards. The defendant controlled the plaintiff's speed and direction. It did not follow, however, that the defendant owed a duty to the plaintiff to protect the plaintiff from injury, even if the injury might be attributed to the defendant's negligence. The *Ford* court held that the issue, as in *Knight*, was simply whether vigorous participation in the sport might be chilled if liability attached for negligence.

Mammoth asserted that the risk of falling, sliding out-of-control, and striking rocks is an inherent risk of skiing, especially on difficult expert runs.

In opposition, Handelman presented the declaration of an expert, a veteran ski instructor, who testified that, in his opinion, conditions in Drop Out 3 were icy, dangerous, and unsafe; that he examined Drop Out 3, an accident report, ski patrol reports, and the depositions of Handelman and various witnesses, "in order to determine how the accident occurred and the causes."

Mammoth objected to the expert's opinion as "totally speculative, conjectural and assuming facts not in evidence."

The superior court overruled the objection. Rightly so.

On the basis of his professional credentials, the investigation he conducted, and statements he received about the circumstances of the accident, the expert was clearly qualified to express his opinion on the cause of the accident. His opinion was admissible even though it went to the accident's cause. A witness experienced in technical matters, and qualified to do so, may give his opinion as to the cause of a matter.

However, in our view, even the expert's opinion does not rebut the conclusion that the risk to a fallen skier, in the grip of gravitational force posed by the combination of the funnel configuration of the slope feeding into the rock outcrop below, is an inherent risk of the sport of skiing.

Perhaps hidden hazards that create inordinately dangerous conditions are not an inherent part of skiing. However, only Handelman's bare allegations and unfortunate injuries establish the hazard he confronted was either hidden or

posed an inordinate danger. The configuration of the run and the rock outcrop were clearly visible. The attributes of gravity acting in concert with an extremely steep slope and hard-packed snow are no great mystery. There are a multitude of locations on steep, skiable terrain where a fall will almost certainly have painful if not tragic consequences. Ski areas cannot be compelled to eliminate all of them.

Handelman sought the exhilaration that accompanies risks that are out of the ordinary but within the range of hazards encountered by participants in a dangerous sport. He cannot complain that he obtained something else in addition.

Affirmed.

ANSWER 1 TO PERFORMANCE TEST B

PART A

MEMORANDUM

To: Larry Craig

From: Applicant

Re: Express Assumption of Risk - Adair v. Oldfield

Whether our defense of express assumption of risk will prevail against Adair's claim of negligence will turn upon the enforceability of the Release of Liability form signed by Adair. If the release is effective, then Adair will have been deemed to assume the risks set forth in the release. In order to be effective, a release must meet several requirements, which I have outlined below. I believe that the release given to Adair by Oldfield satisfies these requirements, and therefore our defense of express assumption of risk will be successful, and Adair will not prevail.

A. THE RELEASE DID NOT INVOLVE THE PUBLIC INTEREST

A release is only effective if it does not involve the public interest. Buchan v. U.S. Cycling Foundation. This assessment turns on two factors. First, whether the activity involves the public interest when the party seeking exculpation is engaged in performing service of great importance and practical necessity to the public. Second, whether the party seeking exculpation has a decisive advantage of bargaining strength against the members.

As to the first factor, Oldfield was not engaged in performing a service of great public importance. He was simply the leader of a loosely organized rock climbing

association. Generally, the sports and recreational events are not matters of great public importance. Buchan. Releases of liability for injury have been upheld in activities such as driving racecars, white water rafting, bicycle racing, and skydiving. Rockclimbing is a recreational activity analogous to these activities, and therefore also would not be considered to be a service of great public importance.

As to the second factor, Oldfield did not have a decisive advantage in bargaining strength over Adair. According to Adair's deposition, Oldfield did not force Adair to sign the release of liability. He admitted that nobody told him that if he did not sign the release, then he would not be allowed to participate in the rock climbing activities of the group. The deposition of Oldfield confirms that he did not force participants in the group to sign the releases, but merely requested that they do so. Therefore, Adair's signing of the release form was totally voluntary. He was not pressured to do so, and his signing the release was not the result of any disparity in bargaining power.

In conclusion, the release signed by Adair did not involve the public interest, and therefore is not unenforceable on this ground.

B. THE TECHNICAL REQUIREMENT FOR A WRITTEN RELEASE WERE MET

To be effective, the release need not be perfect. Instead, it need only clearly express an intent on the part of the releasor not to hold the released party liable for the consequences of his own negligence. Buchan. To allow claims arising from hazardous recreational pursuits when valid releases have been signed would defeat the very purpose of having participants sign the releases, and therefore courts are willing to enforce them, as previously mentioned.

To be effective, the release must meet several technical requirements. The court in Leon v. Family Fitness Center provided a thorough analysis of the requirements

a release must meet. First, a release will not be enforceable unless it is easily readable. The release given to Adair satisfied this requirement. It was written in normal font and contained on a single sheet of paper. It was not excessive in length, and was clearly identified as a release of liability. Adair had ample time to review the release. Although Adair said he did not actually read the release, this should not matter. The release was clear as to its terms, and Adair signed it.

Second, operative language of the release should be prominently distinguished from other language. The release signed by Adair satisfies this requirement. The particularly important provisions of the release are written in bold, capital letters. These provisions include the ones stating that Adair releases Oldfield from liability caused by the negligence of Oldfield or another participant, that the release applies to all risks and causes of injury or death, and that the signer of the release accepts full responsibility for all risks associated with rock climbing.

Third, a release that alleges to release a party from the consequences of his own negligence must clearly express such an intent. Here, the release does allege to release Oldfield from any injuries his own negligence may cause to the participants who sign the release. However, ths provision is clearly presented in bold, capital letters. Therefore, this requirements is satisfied.

In Leon, the court found that the release of liability signed by the plaintiff was not valid. However, that release is readily distinguishable from the one signed by Adair. First, the release in Leon was only one part of a larger contract. Here, the release was afree standing document. Second, the release in Leon was written in text undifferentiated as to size, with no paragraphs or highlighting. In contrast, the release signed by Adair contained distinct paragraphs and contained bolded portions.

In conclusion, the release signed by Adair met all of the technical requirements required in order for a release of liability to be considered valid.

C. THE RELEASE WAS EFFECTIVE

To be effective, the release is not required to spell out every possible act of negligence that it purports to cover. Instead, it need only contain a general release from all negligence. The release signed by Adair did that. Finally, the injury caused must be reasonably related to the type of injury the release was intended to guard against. Here, Adair was injured when a clip came undone, likely due to negligence on the part of somebody. This is exactly the type of injury the release was intended to guard against.

D. CONCLUSION

In conclusion, based on the applicable case law and the facts of the present case, the release of liability signed by Adair will be enforceable. It is therefore unlikely that Adair will prevail.

PART B

MEMORANDUM

To Larry Craig

From: Applicant

Re: Implied Assumption of Risk - Adair v. Oldfield

The defense of implied assumption of risk will turn on whether the risks faced by Adair were inherent in the activity of rock climbing, and as a result Oldfield had a duty to protect Adair. For the reasons provided below, I believe Adair will be unlikely to prevail on his claim. Additionally, while our expert, Jed Williams, will be allowed to testify regarding his opinions, his testimony will be limited to certain issues.

A. IMPLIED ASSUMPTION OF RISK

When there is an implied assumption of risk, the defendant owes no duty to protect the plaintiff from a particular risk of harm. Staten v. Superior Court. This lack of a duty of care operates as a complete bar to any recovery by the plaintiff. Recovery is barred regardless of whether the plaintiff was negligent or whether the plaintiff knew or understood the potential risk.

The issue of implied assumption of risk turns on the question of duty, and in particular, whether the defendant had a duty to guard the plaintiff against the type of harm that was suffered by the plaintiff. Generally, participation in an active sport is governed by implied assumption of risk, and a defendant has no duty of care to protect a plaintiff against risks inherent in the sport. Staten. Whether a defendant owes the plaintiff a duty in a sports setting is a question of law, to be decided by the judge. This aspect is discussed in more detail in the following portion of the memo regarding the testimony of Jed Williams. In particular, the question on whether a duty was owed by Oldfield to Adair depends on two factors: 1) the nature of sport in question, and 2) the general relationship of the parties. Handelman v. Mammoth Mountain Ski Area.

1. The Nature of the Activity in Question

As discussed below, Jed Williams will be allowed to testify regarding the nature of rock climbing. Based on this testimony, it will be established that accidents do happen in rock climbing, and when they do, they are often severe. Furthermore, in his deposition, Adair states that he had been rock climbing for a year. Therefore, he was familiar with the aspects of rock climbing, and cannot be said to have been ignorant of the risks involved. The inherent risks of a sports include the negligence of other participants. Therefore, the nature of rock climbing, wherein participants frequently rely upon each other to secure ropes, etc., inherently includes the risk that others may be negligent in performing.

The fact that participants did not anticipate the particular type of injury is not relevant to whether the risk of injury is inherent in the sport. It is sufficient that the risk merely be within the range of possibilities. Handelman. The nature of rock climbing requires that climbers place a certain amount of trust that other climbers have performed their jobs correctly. Adair admitted that he did not check that the rope was secured to the anchor before he began to climb. It was within the range of possibilities that another participant would have been negligent in failing to secure the rope to the anchor. Therefore, the injury suffered by Adair would have been inherent in the risks of rock climbing.

2. The General Relationship of the Parties

Furthermore, consideration of the second factor, the relationship of the parties, also supports a finding of implied assumption of risk. Oldfield was not the formal head of the group, but the group was an informal one that met each week. Oldfield did not expressly agree to care for Adair. Furthermore, the mere fact that Oldfield may have exercised some control over the situation, and therefore may have been in a better position to prohibit Adair's injury that Adair was himself, is not determinative. Handelman.

For instance, in Ford v. Gouin, an accident that occurred while defendant was driving a boat while plaintiff was water-skiing behind it. The Columbia Supreme Court held that simply because defendant was in control of the boat did not mean that the defendant owed a duty to protect the plaintiff from injury. The critical inquiry was whether rigorous participation in the sport might be chilled by the imposition of liability on the defendant. Here, participation in rock climbing would be chilled if group members were held liable for the injuries of other group members.

In summary, based on the applicable law and the facts of this case, Adair is unlikely to prevail in his claim.

B. EXPERT TESTIMONY OF JED WILLIAMS

In Knight v. Jewett the Columbia Supreme Court suggested that the legal question of the duty owed in an implied assumption of risk case is to be resolved by the trial court without factual input by experts. Instead, the judge should only rely on his own common knowledge. However, in cases involving less popular sports, it is unclear whether expert testimony is admissible. In Staten a case subsequent to Knight, the court of appeals suggested that a trial judge should be able to obtain factual information on the nature of an uncommon sporting activity, but not expert opinion on the ultimate legal question of duty or the ultimate legal question of inherent risk. Furthermore, it is permissible for an expert to his opinion on the cause of the accident suffered by the plaintiff. Handelman.

Given that rock climbing is not a common sport, Jed likely will be allowed to testify on the basics of rock climbing. As previously stated, Knight may be read to prohibit any expert testimony regarding the facts of rock climbing. However, a court will probably find the reasoning of Staten persuasive in this case, as a judge probably would

be unable to make any determination in the present case without first learning the basics of rock climbing. Therefore, he will be able to testify regarding the mechanics of rock climbing. He will be able to describe the typical decisions and actions a typical rock climber would undertake and make.

Pursuant to Handelman, Jed would also be allowed to testify regarding his opinion of why the accident happened. He will be able to testify regarding the possibilities of why the rope did not fall when Adair initially began to climb. He will be able to opine that the rope was swung over the bolt, but not attached to it, and came undone when Adair reached the top of the cliff and then started to descend. He will be able to testify about the various simulations he ran, and the results.

However, under Knight, he will not be able to testify about what risks are inherent in rock climbing. The judge will have to decide this based on the general background description of rock climbing provided by Jed or the witnesses. He will also not be allowed to testify as to any duties owed to the climbers by Oldfield. He will not be able to testify about whether Oldfield should have checked the anchor before Adair began to climb, or whether Oldfield had a duty to supervise Adair. The judge will also have to decide these matters.

C. CONCLUSION

In conclusion, based on the facts, the law, and the portions of the testimony of Jed that will be admissible, Adair is unlikely to prevail in his claim.

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM A

To: Larry Craig

From: Applicant

Date: February 28, 2002

Subject: Adair v. Oldfield

Question Presented: Is the release signed by Greg Adair ("Adair") enforceable by our client, William Oldfield ("Oldfield")?

Answer: Yes.

Releases have been invalidated for activities involving the public interest, but there is no public interest involved here. Moreover, the release signed by Adair easily conforms to the standards required by a court.

Brief Statement of Facts: Oldfield is our client. Adair, a climber, signed a release form supplied by Oldfield before a climbing session. Adair suffered injuries during the climb and is suing Oldfield for damages.

Legal Analysis:

A) A Release Signed Before an Activity Involving the "Public Interest" is Ineffective

A release of liability may only be effective if it does not involve the public interest. Buchan v. U.S.C.F., P.2. The factors that bear on the public interest focus on whether the party seeking exculpation is engaged in performing service of great importance and practical necessity to the public, and whether any party possesses a great advantage in bargaining strength. Buchan, P.3. Examples of situations where releases of liability have been rejected include hospitalization, escrow transactions, banking, and the operation of common carriers.

B) Because Climbing is a Recreational Activity Not Involving the Public Interest, the Release Signed by Adair is not barred

The concept of "Public Interest" has no applicability to sports and recreational activities. Buchan, P.3. Courts have enforced releases of liability signed by racecar drivers, participants in whitewater rafting, dirt bike racers, and skydivers. Buchan, P.3.

Climbing is a leisure activity, and does not involve any public interest. Climbing is of no great importance to the public, and is not a matter of practical necessity.

Therefore, the release signed by Adair will not be barred from consideration by a court. Adair entered into a private, voluntary transaction, and must shoulder the risk of his leisure activity, if the release is found to satisfy the standards required by courts in this jurisdiction.

C) To be valid, a Release must be easily Readable, Highlight important Operative Language, and clearly express its intent and effect

A release must be easily readable. Leon v. Family Fitness Center, P.10. Furthermore, important operative language should be placed in a position that compels notice and must be distinguished from other sections of the document. Leon, P. 10. In other words, a release must not be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find.

Additionally, to be effective, a release of liability must clearly express such intent. Leon, P.10. At the very threshold, it must clearly notify the releasor of its effect. Leon, P.10.

D) The Release Signed by Adair Satisfies the Standards of a Valid Release

The release signed by Adair should be recognized as valid and legally enforceable in a court of this jurisdiction.

First, the release is easily readable. It is a short form, with only four paragraphs. There are no extraneous provisions involved, as all of the paragraphs deal with the release of Oldfield from liability.

Second, the release highlights important operative language. The phrases "even if caused by the negligence of Bill Oldfield or any other participant," "all risks and causes of injury or death," and "I accept and take full responsibility for all risks associated with rock climbing at Handley Rock," are emphasized in bold-

faced type. These phrases stand out from the rest of the release and are instantly recognizable.

Also, the release is clear about its intent and effect. The release responsibly uses the phrase, “I understand,” followed by simple, clear language, such as, “I cannot sue,” or “I waive and release all liability and claims of damages.”

There should be no problem, given the case precedent before us, the nature of the activity engaged in by Adair, and the quality of the release in question, of enforcing the release against Adair.

E) Enforcement of a valid Release in this case means that Adair cannot prevail

The effect of a valid release is to exculpate Oldfield from any and all risks and consequences associated with Adair and climbing.

All courts in this jurisdiction should follow this reasoning because of the clear precedent involving similar recreational activities.

As the Buchan court stated, unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.

Conclusion: We should be able to prevail on a summary judgment before trial.

MEMORANDUM B

To: Larry Craig

From: Applicant

Date: February 28, 2002

Subject: Adair v. Oldfield

Question Presented: Was Oldfield under any duty to protect Adair from the inherent risks of rock climbing?

What can and cannot Jed Williams, our expert, testify to at trial, and why?

Short Answers: Oldfield was under no duty to protect Adair; ultimately, however, that question is to be resolved by the judge.

While our expert cannot testify as to risk or duty, he can testify about the nature of the sport of climbing and express an opinion as to the cause of the accident. There is presently an ambiguity in our jurisdiction as to this issue.

Legal Analysis:

A) A Defendant owes no duty to protect a Plaintiff from the inherent risks of a sport

Participation in an active sport is governed by implied assumption of the risk. Staten v. Superior Court, P. 6. In cases of implied assumption of the risk, a

defendant owes no duty to protect the plaintiff from a particular risk of harm, and the lack of a duty of care operates as a complete bar to recovery. Staten, P. 6.

B) Falling is a Risk inherent to the sport of climbing, as human mistakes should be

Courts have held that the risk of falling is an inherent risk of the sport of skiing. Handelman v. Mammoth Mountain Ski Area, P. 14. The grip of gravity, when combined with the scope of a rock outcrop, makes falling an equally inherent risk in the sport of climbing.

Adair will likely argue that human error is not an inherent risk of skiing. However, we can rebut this with the testimony of our expert witness, who can and will testify as to the cause of the accident, and the nature of climbing itself. Our argument should be that climbing is a complex and intricate sport that involves a detailed interplay between ropes, instruments, and humans. As such, human error and mistake should be an inherent risk of climbing.

C) Ultimately a Trial Judge will decide whether the risk was inherent and whether a legal duty was owed

There is no case on point in this jurisdiction, concerning rock climbing. The closest analogous case is a skiing case.

It will be up to the judge to determine the inherent risks of climbing, and accordingly, whether Oldfield owes a legal duty or not, by analyzing the nature of the sport in question.

Given the similarities between climbing and skiing, the risk of falling should be found by a judge to be a risk inherent to the sport of climbing.

D) An Expert cannot testify as to the ultimate issues of risk and duty – there is a present ambiguity of law in this jurisdiction

In Knight v. Jewett, the court held that the determination of duty and risk is a determination to be made from the common knowledge of judges, not the opinions of experts.

As of Staten v. Superior Court, several cases were allowed expert opinion on the question of duty.

The Staten Court, after requesting supreme court clarification on the matter, went on to find that a "trial judge can receive expert opinion on the factual nature of an unknown or esoteric sports activity, but not expert opinion on the ultimate legal question of duty or the penultimate question of inherent risk."

E) Therefore, our expert can testify as to the factual nature of climbing, and express an opinion as to the cause of the accident, but not about the risks and duty issue.

Jed Williams may testify as to whether or not Oldfield was negligent. This would include testimony about who unclipped the carabiners from the anchor.

Williams could also testify as to what carabiners are, and how the anchor operates, and the function of a climbing instructor. This relates to the nature of the sport.

However, Williams could not testify as to whether human mistakes are an inherent risk of climbing, nor could Williams testify about falling being an inherent risk of climbing. Williams would be unable to testify as to the legal duty owed by Oldfield.

F) If Falling and Human Error is an Inherent risk of the sport of climbing, Adair will not prevail

If falling and human error is an inherent risk of climbing, Oldfield owed no duty of care to Adair, and therefore cannot be held liable for his injuries.

Since this determination will ultimately be made by the judge, and no case law is on point, there remains a possibility that human error can be found not to be an inherent risk with climbing.

Given the intricate and complex machinery and instrumentation involved in the sport of climbing, however, and the vital role humans play in operating that machinery, a judge should find in our favor. It will work to our advantage to have an expert testify extensively as to the detailed requirements of a mountain climb.

Conclusion: Law to be decided by judge. No case on point as to whether falling/human error is an inherent risk of climbing. Expert testimony should be limited by court in scope, but still can be helpful. Facts and law favor our position.

California
Bar
Examination

Performance Tests
and
Selected Answers

July 2002

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2002 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Contents

TUESDAY AFTERNOON
JULY 30, 2002

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE THOMAS OUTDOOR ADVERTISING

IN RE THOMAS OUTDOOR ADVERTISING

INSTRUCTIONS

1. You will have three hours to complete this performance test. This session of the examination is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States. Columbia is located within the jurisdiction of the fictional United States Court of Appeals for the Fifteenth Circuit.
3. You will have two sets of materials with which to work: A **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page numbers.
5. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

SCHELLY & KATZ, LLP
2800 BLAKE STREET
FAIRVIEW, COLUMBIA 55515

MEMORANDUM

To: **Applicant**
From: **Judith M. Schelly**
Date: **July 30, 2002**
Subject: **In re Thomas Outdoor Advertising**

The Benton City Council today placed on the agenda for its August 6, 2002 meeting a proposed ordinance relating to outdoor advertising in the form of billboards. The proposed ordinance is quite controversial. It would effect a change from the currently unregulated state of affairs, and impose, for the first time, various restrictions and even outright prohibitions.

We represent Stephen Thomas, the sole proprietor of Thomas Outdoor Advertising, a relatively new but fast growing business. Thomas objects to the proposed ordinance because he believes that, if enacted, it would threaten the general well-being of Benton and his profitability as well.

I have an appointment with the City Attorney to discuss the proposed ordinance. To help me prepare for that meeting, please draft a memorandum for me that:

1. Analyzes the constitutionality of the proposed ordinance, being sure to identify and evaluate the arguments that I can make to the City Attorney in support of the position that it is in fact unconstitutional; and

2. Identifies and discusses specific modifications that can be made to the proposed ordinance that will meet both Thomas's stated goals and the city's expressed concerns and still be constitutional. Do not redraft the proposed ordinance.

BENTON *EXPRESS*
July 15, 2002

* * * * *

Billboards? In Benton?
By Elizabeth D'Orazio, *Express* Staff Writer

You wouldn't think that billboards could have raised such a ruckus — unless, that is, you live in Avalon County and, especially, the City of Benton.

For just about as long a time as most folks can remember, Patrick Curtan has been the "King of Billboards" in this rural county and its oldest city.

Most of Curtan's billboards are like others you see throughout the state, and, indeed, throughout the country, advertising major brands of gasoline, familiar soft drinks, and ubiquitous fast food restaurants.

But some of Curtan's billboards are altogether unique, advertising nothing more or less than his own idiosyncratic views on matters that the public is concerned about — or matters that he thinks the public *should* be concerned about.

Crusty, but somehow endearing in an odd sort of way, Curtan has found it hard to alienate anyone, even though practically no one has ever agreed with him. That's probably because his views have never been either liberal or conservative, progressive or reactionary, left or right. As one long-time friend, Al Waters, puts it, "Pat's a contrarian. He licks his finger, puts it up to see which way the wind is blowing — and then sets himself right into its blast." For example, at the height of the oil embargo in the early 1970's, he waged a campaign on his billboards urging county officials to buy only the most gas-guzzling of cars, ostensibly to put pressure on the federal government to allow wide-scale oil exploration throughout Alaska. But in the late 1990's, appearing on his billboards in a neon purple and pink costume as "SUVerman," he incited teenagers to "liberate" sports utility vehicles from their parents and turn them over to him for transformation into roadside planters.

Although Curtan has found it hard to alienate anyone, he has succeeded so far as one person is concerned — Benton City Council Member Sonia Hemphill. Hemphill is the architect of Benton's remarkable renaissance. About five years ago, with little support, she persuaded the City Council to establish Benton's Historical District. What was formerly a dilapidated collection of ramshackle shops with hardly any merchandise

to speak of, and even fewer buyers, is now becoming a trendy mecca for the upscale visitor who has lots of money to spend on such essentials of the good life as free-range ostrich, heirloom fruits and vegetables, and boutique wines. “Curtan’s billboards,” says Hemphill, “might put off the very people we want to attract. At the very least, they cast an unflattering light on the community, presenting the residents as unsophisticated bumpkins.” She told Benton City Attorney Theodore J. Stroll, “Do whatever you can to deal with the problem.”

This leaves Curtan, one might suspect, exactly where he wants to be — in the middle of the biggest ruckus his billboards have ever raised.

CITY OF BENTON
PROPOSED ORDINANCE RELATING TO OUTDOOR ADVERTISING

Section 1. Legislative Findings.

A. Aside from this ordinance, outdoor advertising in the form of billboards, as herein defined, is not regulated by any ordinance.

B. The lack of regulation of billboards has led in the past, and may lead in the future, to aesthetic blight because of visual clutter.

C. The lack of regulation of billboards has created in the past, and may create in the future, traffic safety hazards because of visual distraction.

D. The regulation of billboards specified herein is necessary to prevent aesthetic blight and traffic safety hazards.

Section 2. Definitions.

A. "Billboard" is any structure, object, device, or part thereof, situated outdoors that advertises, identifies, displays, or otherwise relates to a person, thing, institution, organization, activity, condition, business, good, service, event, or location by any means, including words, letters, numerals, figures, designs, symbols, fixtures, colors, motion, illumination, or projected images.

B. "On-site/commercial" billboard is any billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any business conducted on the parcel on which it is located and/or any good or service produced by such business or made available by such business for purchase thereon.

C. "Off-site/commercial-or-noncommercial" billboard is any billboard, as defined herein, other than an on-site/commercial billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any person, thing, institution, organization, activity, condition, business, good, service, event, or location.

D. "Historical District" is that area of the city so established by the City of Benton Historical District Ordinance enacted on July 14, 1997.

Section 3. Regulation.

A. Any person may erect and maintain an on-site/commercial billboard in the Historical District.

B. No person shall erect or maintain any off-site/commercial-or-noncommercial billboard in the Historical District, with the exception of off-site/commercial-or-noncommercial billboards with commemorative historical signs, service club signs, or signs depicting time, temperature, and news.

Section 4. Declaration of Public Nuisance and Removal.

A. Any billboard erected or maintained in violation of any of the provisions herein is declared a public nuisance.

B. Any billboard declared a public nuisance hereunder may immediately be removed by the Director of Public Works.

Section 5. Expenses and Fine.

A. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is jointly and severally liable for any and all expenses incurred by the Director of Public Works in its removal.

B. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is subject to a fine not exceeding $10,000.

OFFICE OF THE CITY ATTORNEY

July 19, 2002

COLUMBIA OUTDOOR ADVERTISING ASSOCIATION
FACT SHEET

In 2001, individuals and entities in the United States spent about 2% of their advertising budget on outdoor advertising by means of billboards.

Over the years, individuals and entities have increasingly spent more money on billboards, and have increasingly made greater use of this medium.

Billboards have been shown to possess various strengths. For example, they quickly build awareness; create continuity of a brand or message; are adaptable, applying national or regional strategies within a local context; and provide geographic and demographic flexibility.

Judged by the cost of reaching their audience, billboards are more affordable than other media.

The appearance of billboards has changed in recent times, largely through the use of computer-painted vinyl, which provides high quality and consistent images; three-dimensional and moving displays; and innovative lighting.

Billboards provide significant direct economic contributions in wages and benefits to employees, in payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies, especially in rural areas and small cities.

Billboards also play a substantial role for businesses and other activities that are small, local, or tourist-related, especially, again, in rural areas and small cities.

TRANSCRIPT OF STEPHEN THOMAS INTERVIEW
July 25, 2002

Judith M. Schelly: Mr. Thomas, thank you for coming in. We're recording this session on audiotape with your permission, right?
Stephen Thomas: Yes.
Schelly: Could you tell me a bit about the outdoor advertising business in the County of Avalon and the City of Benton?
Thomas: Sure. For years, the business has been dominated by Patrick Curtan. Still is. The county is rural, and there's lots of space for billboards. He's tied up most of the best sites outside of the city and just within its fringes, with generous payments to the property owners. Over the years, he's made a great deal of money. Even when times were tough, he devoted space to his personal agenda. Now, when he's made more money than he could spend in three lifetimes, there's no stopping him. He's quite a character, that's for sure. But beneath all his flamboyance, he's a solid businessperson and a solid citizen. In any event, when the Benton Historical District Ordinance was under consideration about five years ago, I decided to get into outdoor advertising, not like Curtan with his national advertisers and his conventional billboards, but in a niche that would anticipate where I thought Benton would go.
Schelly: What do you mean?
Thomas: Benton's Historical District had a number of sites that could be used for billboards. All of them were available for lease. No one had tried to secure any of them.
Schelly: Why not?
Thomas: Benton was a city that time had passed by. There was hardly anyone there. And those who were there had little to sell and little to buy. But I thought that would change. It did. Well, I leased many of the best sites in the Historical District that could be used for billboards. The leases were generally for 25 years. I guaranteed the lessors a fixed minimum payment and provided for increased payments as my revenues increased. I manufactured the billboard structures myself to last at least 25 years — two and one-half times as long as the best billboards in the state. That kind of manufacturing makes my costs two or three times higher than those for conventional structures.
Schelly: You mentioned a niche?

Thomas: Yes. I figured that conventional billboards would look out of place in an historical district, even, and especially, the computer-painted vinyl ones with their sharp images. So I came up with a notion for something different. The displays on structures would conform to their surroundings — bricks and wood and stucco, as the case may be, and not paper or plastic. They would not change monthly, as is typical. Rather, they would vary with the seasons, and with local festivities within each season. Thus, there would be autumn displays, with appropriate adjustments for Harvest Time, Halloween, and Thanksgiving. Most important, to my mind, would be their character. They would not advertise only the goods or services on sale at the location in question.

Schelly: You mean that a billboard at my antique store — let's say I owned an antique store — would advertise other antique stores?

Thomas: In a way. The billboard would advertise a group of antique stores. No, better, it would actually help create an antiques district.

Schelly: Doesn't that cut against the interests of the owner of the individual antique store?

Thomas: Not at all. You're acquainted with the "Diamond District" in midtown Manhattan in New York City?

Schelly: Of course.

Thomas: Well, it's a fact of economic life that when a vibrant area like the Diamond District is created, each business gets more customers, in spite of the competition it faces from other businesses, than it would have gotten otherwise — indeed, it gets more customers because of the competition.

Schelly: We see that phenomenon closer to home in the various "Auto Rows" throughout Columbia, don't we?

Thomas: Right.

Schelly: Have you put any displays up?

Thomas: Not yet, but we're not far off.

Schelly: Now, turning to the proposed ordinance —

Thomas: It's simply bad news all the way around. The Historical District as a whole depends on its various subdistricts — antiques, as we mentioned, gourmet, arts, etc. It needs ambience. Without ambience, you're not going to get enough people to come to buy the upscale commodities that it specializes in, certainly not enough people with the money to buy them. To be frank, the ordinance would be devastating to my business. I've invested about $2.5 million. Under the ordinance, I would lose most of it. I would probably have to shut down and let my employees go.

Schelly: How many employees do you have?

Thomas: I have a permanent staff of 10, plus 15 others who will stay with me until we finish manufacturing the structures.

Schelly: Why does the city want the proposed ordinance?

Thomas: It claims that it wants to avoid aesthetic and traffic problems. But billboards have never been regulated in the city. I've never heard any complaints about unsightliness. Then again, there haven't been many billboards. As for traffic, what traffic? The Historical District is basically a pedestrian mall. Everybody knows what's driving this — Hemphill's fight with Curtan. But Curtan's billboards are nowhere near the Historical District. I recognize that cities commonly regulate the appearance of billboards. I wouldn't have a problem with that. How could I? That's what I'm selling. But what the city's proposing? No.

Schelly: So, what would you like to see happen?

Thomas: I just want to be able to run my business as planned.

Schelly: So, no ordinance would be best?

Thomas: No, some kind of design review and approval would be appropriate. Conventional billboards like Curtan's would be out of place in the Historical District. But they might prove tempting to some merchants because they would probably be much less expensive than mine.

Schelly: I think you've given me enough information to proceed. I'll keep you informed as things develop. Thanks for coming by.

Thomas: You're welcome.

OFFICE OF THE CITY ATTORNEY
CITY OF BENTON
1000 GROVE STREET
BENTON, COLUMBIA 55155

July 26, 2002

Judith M. Schelly
Schelly & Katz, LLP
2800 Blake Street
Fairview, Columbia 55515

Re: Proposed Ordinance Relating to Outdoor Advertising

Dear Ms. Schelly:

I am writing to memorialize our telephone conversation concerning the City of Benton's proposed ordinance relating to outdoor advertising in the form of billboards.

You stated that your client, Stephen Thomas of Thomas Outdoor Advertising, objects to the proposed ordinance on the ground that, if enacted, it would threaten the general well-being of Benton.

I responded that outdoor advertising ordinances are now as common as outside advertising itself, and that the proposed ordinance is hardly out of the mainstream.

I noted the background to the proposed ordinance, which was well known to you: Together with its residents and businesses, the city, as a small municipality in a rural county, had long been affected by the general decline that has plagued this area of the state; residents and businesses were quite poor, and city government was all but bankrupt. In 1997, the City of Benton Historical District Ordinance established the Historical District. In the years that have followed, the city has experienced a remarkable turnaround, attracting many visitors, including many quite affluent, to its crafts shops, antique stores, art galleries, artisanal bakeries and creameries, and inns and restaurants.

I further noted that outdoor advertising of even the common variety might negatively affect aesthetic values and traffic flow in the Historical District. Moreover, outdoor advertising of a controversial character might offend some visitors or at least cause some discomfort. To avoid any such problems, City Council Member Sonia Hemphill asked us to

draft a proposed ordinance. We have done so. Although we are of the view that an ordinance may lawfully prohibit all outdoor advertising in the Historical District, we have not taken that approach. Rather, the proposed ordinance would allow on-site/commercial billboards, which promote the goods or services on sale at the location in question, and certain off-site/commercial-or-noncommercial billboards. We think that this approach is a reasonable one, permitting steady economic growth for our residents and businesses and, consequently, financial stability for city government itself.

Let me observe, in conclusion, that the City Council will soon schedule a hearing on the proposed ordinance. You and your client are, of course, welcome to participate.

Should you wish to communicate with me in advance of the hearing, I remain available, as always, to consider any and all constructive suggestions.

Very truly yours,

Theodore J. Stroll
City Attorney

TUESDAY AFTERNOON
JULY 30, 2002

California
Bar
Examination

Performance Test A
LIBRARY

LIBRARY

City of Benton

HISTORICAL DISTRICT ORDINANCE

Section 1. Legislative Findings.

A. The area of the city bounded by Lincoln Avenue, Bliss Street, Flushing Avenue, and Lowery Street, hereinafter the "Historical District," has in recent years been so adversely affected by blight as to diminish the economic base of the city.

B. A master plan for the rehabilitation of the Historical District was recently adopted.

C. It is essential to the preservation of the aesthetic integrity of all buildings in the Historical District, and to the preservation of the ambience of the Historical District itself, that all such buildings be regulated to ensure consistency with surroundings in size, shape, color, and placement.

Section 2. Regulation.

* * * * *

C. Before erecting, modifying, or removing any building in the Historical District of whatever sort, all owners of real property, tenants, contractors, and others shall submit plans to the Director of Public Works for design review and approval for consistency with surroundings in size, shape, color, and placement.

* * * * *

F. Only pedestrian traffic shall be allowed in the Historical District, except as indicated in subsection G, below.

G. With the exception of police, fire, and similar governmental services, vehicular traffic shall be allowed in the Historical District only between the hours of 2:00 a.m. and 7:00 a.m., and then only as necessary for mercantile pick-ups and deliveries. Vehicular traffic for police, fire, and similar governmental services shall be allowed in the Historical District at all times.

* * * * *

ENACTED JULY 14, 1997

Metromedia, Inc. v. City of San Diego

United States Supreme Court (1981)

The City of San Diego enacted an ordinance that imposes substantial prohibitions on the erection of outdoor advertising displays in the form of billboards. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting displays" and "to preserve and improve" the city's "appearance." The ordinance permits on-site commercial billboards, which generally advertise goods or services available on the property on which they are located, but forbids off-site billboards, which generally advertise or otherwise relate to goods or services or activities available or conducted elsewhere, unless permitted by one of several exceptions specified, such as for commemorative historical signs, service club signs, for-sale and for-lease signs, signs depicting time, temperature, and news, and temporary political campaign signs.

Metromedia, a company that was engaged in the outdoor advertising business in San Diego when the ordinance was passed, obtained an injunction in a state trial court, which concluded that the ordinance was facially invalid under the First Amendment's free speech clause as applied to the states and their cities through the Fourteenth Amendment's due process clause.

The state Supreme Court, however, set aside the injunction, holding that the ordinance was not facially invalid.

Holding to the contrary, we shall reverse and remand.

As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First Amendment forecloses similar interests in controlling their communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression.

Insofar as it regulates commercial speech — that is, speech that does no more than propose a commercial transaction, or at least relates solely to the economic interests of the speaker and his audience — the ordinance is not facially unconstitutional. It meets the requirements articulated in our cases, which consider whether the regulation of such speech (1) serves a substantial governmental interest, (2) directly advances such interest, and (3) is no more extensive than necessary.

First, the ordinance's stated purpose to improve traffic safety and the beauty of the surroundings comprises substantial governmental interests. It is far too late to contend otherwise with respect to either objective.

Second, the ordinance directly serves the substantial governmental interests in traffic safety and beauty. We hesitate to disagree with the accumulated, common sense judgments of local lawmakers that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. Nor do we find it speculative to recognize that billboards by their very nature, wherever located, can be perceived as an aesthetic harm. San Diego, like many other cities, has chosen to minimize the presence of such signs. Aesthetic judgments of this sort are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive of the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Metromedia nevertheless argues that San Diego denigrates its interests in traffic safety and beauty and defeats its own case by permitting on-site commercial billboards. The ordinance permits the occupant of property to use billboards located thereon, even if distracting and unattractive, to advertise goods and services there offered; similar billboards, even if attractive and not distracting, that advertise goods or services available elsewhere are prohibited. But, whether on-site commercial billboards are permitted or not, the prohibition of off-site billboards is directly related to the stated objectives of traffic safety and beauty. This is not altered by the fact that the ordinance is underinclusive because it permits on-site commercial billboards. In addition, the city has obviously chosen to value one kind of commercial speech — that one on-site billboards — more highly than another kind of commercial speech — that on off-site billboards. It has evidently decided that the private interest in on-site commercial speech, but not the private interest in off-site commercial speech, is stronger than its own interests in traffic safety and beauty. Hence, it has effectively decided that in a limited instance — on-site commercial billboards — its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its interests in this context

that it must give similar weight to all other commercial interests. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.

Third, the ordinance is no broader than necessary to accomplish the substantial governmental interests in traffic safety and beauty. Since San Diego has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously its most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of full accomplishment: It has not prohibited all billboards, but allows on-site commercial billboards and some others specifically excepted.

But, insofar as it bans noncommercial speech — including political speech, which deals with governmental affairs, and ideological speech, which concerns itself with philosophical, social, artistic, economic, literary, ethical, and similar matters — the ordinance is indeed facially unconstitutional.

The fact that San Diego may value commercial speech relating to on-site goods and services more highly than it values such speech relating to off-site goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. The First Amendment affords noncommercial speech a greater degree of protection than commercial speech. San Diego would effectively invert this state of affairs. The ordinance allows on-site commercial speech, but not noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why billboards with noncommercial messages would be more threatening to safe driving or would detract more from the beauty of the surroundings than billboards with commercial messages. Insofar as it tolerates billboards at all, it cannot choose to limit their content to commercial messages; it may not conclude that the communication of commercial messages concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Furthermore, because under the ordinance's specified exceptions San Diego allows some noncommercial messages on billboards, it must allow others. Although it may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech. With respect to noncommercial speech, it simply may not choose the appropriate subjects for public discourse. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for truth.

San Diego argues that the ordinance can be characterized as a time, place, and manner restriction that is reasonable and hence does not run afoul of the First Amendment. We disagree. The ordinance does not generally ban the use of billboards as an unacceptable "manner" of communicating information; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. Time, place, and manner restrictions are reasonable if they (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. Here, it cannot be assumed that alternative channels are available. Although, in theory, advertisers remain free to employ various alternatives, in practice they might find each such alternative either too costly or too ineffective or both.

Government restrictions on noncommercial speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all such speech carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since San Diego has concluded that its own interests are not as strong as private interests in the use of on-site commercial billboards, it may not claim that those same interests outweigh private interests in the use of noncommercial billboards.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

City Council v. Taxpayers for Vincent

United States Supreme Court (1984)

An ordinance of the City of Los Angeles prohibits the posting of signs on public property. Taxpayers for Vincent (Taxpayers), a group of supporters of Roland Vincent, a candidate for election to the Los Angeles City Council, entered into a contract with Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs bearing Vincent's name. COGS produced such signs and attached them to utility poles at various locations. Acting under the ordinance, city employees routinely removed all signs, including COGS' for Vincent, attached to utility poles and similar objects covered by the ordinance.

Taxpayers and COGS then filed suit in Federal District Court against the City of Los Angeles, alleging that the ordinance abridged their freedom of speech within the meaning of the First Amendment, and seeking damages and injunctive relief.

The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted a motion for summary judgment submitted by Los Angeles.

The Court of Appeals reversed, reasoning that the ordinance was presumptively unconstitutional on its face because significant First Amendment interests were involved, and that Los Angeles had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.

After careful consideration, we are of the opinion that the ordinance is not unconstitutional on its face. We are likewise of the opinion that it is not unconstitutional as applied to Taxpayers and COGS.

The First Amendment forbids the government to regulate speech in order to punish the speaker. This principle, however, is not applicable here, for there is not even a hint of punitiveness.

In sum and substance, the ordinance is a time, place, and manner restriction. A time, place, and manner restriction is reasonable under the First Amendment if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication.

It is plain to us that the ordinance is indeed reasonable.

First, the ordinance is justified without reference to the content of the regulated speech. It has nothing to do with the content of any speech on any sign. It has everything

to do with an attempt by Los Angeles to improve its appearance. Taxpayers and COGS concede as much.

Second, the ordinance is narrowly tailored to serve a significant governmental interest. Los Angeles has a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression. Its interest, as Taxpayers and COGS again concede, is basically unrelated to the suppression of ideas. The problem addressed by the ordinance — the visual assault on residents presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the city's power to prohibit. Indeed, we so held in *Metromedia, Inc. v. City of San Diego* with respect to billboards on private property. The validity of Los Angeles' aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. There is no basis for any conclusion that the prohibition against the posting of the signs of Taxpayers and COGS fails to advance the city's aesthetic interest. The ordinance curtails no more expressive activity than is necessary to accomplish its purpose of eliminating visual clutter. By banning posted signs, the city did no more than eliminate the exact source of the evil it sought to remedy.

Third, the ordinance leaves open ample alternative channels for communication. Indeed, the District Court so found, with substantial evidence in support. While a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate, the ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.

Although plausible policy arguments might well be made in support of the suggestion by Taxpayers and COGS that Los Angeles could have enacted an ordinance that would have had a less severe effect on expressive activity like theirs — such as by providing an exception for political campaign signs — it does not follow that such an exception is constitutionally mandated. Nor is it clear that such an exception would even be constitutionally permissible. To except political speech like that of Taxpayers and COGS and not other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. The city may properly decide that the aesthetic interest in avoiding visual clutter justifies a removal of all signs creating or increasing that clutter.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

National Advertising Company v. City of Orange

United States Court of Appeals for the Ninth Circuit (1988)

Aiming at traffic safety and aesthetics, an ordinance of the City of Orange, California, bars off-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises upon which such sign is located*." (Italics added.) It excepts certain governmental signs, memorial signs, recreational signs, and temporary political, real estate, construction, and advertising signs. By contrast, it permits on-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *on the premises upon which such sign is located*." (Italics added.)

National Advertising ("National") applied for a permit to erect off-site billboards in Orange. Under compulsion of the ordinance, the city denied its application.

National filed suit in district court against Orange alleging that the ordinance was unconstitutional on its face and seeking declaratory and injunctive relief. It moved for summary judgment. The district court granted its motion. It declared the ordinance unconstitutional, and ordered the city to process National's application without regard thereto. The city appeals.

Orange interprets the ordinance to prohibit only off-site billboards relating to commercial activity. The plain language of the ordinance precludes this interpretation. The ordinance bans off-site billboards relating to a "business, commodity, industry *or other activity* which is sold, offered or conducted elsewhere than on the premises . . . ." The city interprets "activity" to mean only *commercial* activity. It is settled, however, that, in ordinances of this sort, "activity" is not so limited. The exceptions to the ban allowed in the ordinance reveal the lack of such a limitation. Indeed, many involve noncommercial activity. They would be rendered meaningless by the city's interpretation. We construe the ordinance as prohibiting *all* off-site billboards relating to activity not on the premises on which the sign is located, with the exceptions specified, and permitting *all* on-site billboards relating to activity on the premises. Whether the message on the billboards is commercial or noncommercial is irrelevant: both commercial and noncommercial messages are permitted if they relate to activity on the premises and prohibited if they do not.

Standards for assessing the constitutionality of billboard restrictions are found in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego* and *City Council v. Taxpayers for Vincent*.

Under these standards, Orange's ordinance is valid as applied to billboards with commercial messages. The city may prohibit such billboards entirely in the interest of traffic safety and aesthetics, *Metromedia, Inc. v. City of San Diego*; *City Council v. Taxpayers for Vincent*; and may also prohibit them except where they relate to activity on the premises on which they are located, *Metromedia, Inc. v. City of San Diego*.

Stricter standards apply to the restriction of billboards with noncommercial messages. Under *Metromedia, Inc. v. City of San Diego*, an ordinance is invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages, or if it regulates billboards with noncommercial messages based on their content. We need not decide whether the ordinance passes the first test, because it clearly fails the second.

Merely treating billboards with noncommercial messages and billboards with commercial messages equally is not constitutionally sufficient. The First Amendment affords greater protection to noncommercial speech than to commercial, *Metromedia, Inc. v. City of San Diego*. Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Ibid*.

Thus, under *Metromedia, Inc. v. City of San Diego*, although Orange may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. The ordinance breaches this basic principle.

The exceptions to the ordinance's restrictions, like those before the *Metromedia* Court, require examination of the content of noncommercial messages. In most instances, whether off-site billboards with noncommercial messages are allowed turns on whether they convey messages approved by the ordinance.

The First Amendment forbids the regulation of noncommercial speech based on its content. Because the exceptions to the ordinance's restriction on noncommercial speech are based on content, the restriction itself is based on content.

The First Amendment might tolerate the regulation of noncommercial speech based on its content if the government were to establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. Orange cannot do so. Its allowance of some off-site billboards with noncommercial messages is evidence that its interests in traffic safety and aesthetics, while substantial, fall shy of compelling.

Orange is not powerless to regulate off-site billboards with noncommercial messages. It remains free to redraft its ordinance to conform to the First Amendment by avoiding content-based distinctions in its treatment thereof.

The judgment is affirmed.

Desert Outdoor Advertising, Inc. v. City of Moreno Valley

United States Court of Appeals for the Ninth Circuit (1996)

The City of Moreno Valley has enacted an ordinance regulating billboards. The ordinance regulates both "off-site" and "on-site" billboards. Off-site billboards may include commercial or noncommercial messages. On-site billboards may contain only commercial messages. The ordinance imposes different restrictions on off-site and on-site billboards. As a general matter, an off-site billboard may be erected and maintained only if the Director of Public Works issues a permit after finding that the billboard will not have a harmful effect upon the health or welfare of the general public, will not be detrimental to the welfare of the general public, and will not be detrimental to the aesthetic quality of the community or the surrounding land uses. By way of exception, an off-site billboard may be erected and maintained without such a permit for official notices, directions, and signs for civic or fraternal organizations. An on-site billboard can always be erected and maintained without such a permit.

Threatened with administrative proceedings to compel the removal of off-site billboards that they erected and maintained without permits, Desert Outdoor Advertising, Inc. ("Desert") and Outdoor Media Group, Inc. ("OMG") filed this action against Moreno Valley in United States District Court, challenging the constitutionality of the ordinance under the First Amendment. The city moved for summary judgment. The district court granted the motion, and rendered judgment accordingly. Desert and OMG now appeal.

Desert and OMG contend that the ordinance violates the First Amendment in its permit requirement because it gives unbridled discretion to Moreno Valley's Director of Public Works.

Under the ordinance, a person must generally obtain a permit from the Director of Public Works before erecting an off-site billboard. The Director has discretion to deny a permit on the basis of ambiguous and subjective reasons — for example, that the billboard will have a harmful effect upon the health or welfare of the general public *or* will be

detrimental to the welfare of the general public *or* will be detrimental to the aesthetic quality of the community or the surrounding land uses.

But any law — including the ordinance here challenged — that subjects the exercise of First Amendment freedoms to the prior restraint of a permit, without narrow, objective, and definite standards to guide the permitting authority, is violative of that amendment.

The ordinance contains no limits on the authority of Moreno Valley's Director of Public Works to deny a permit for an off-site billboard. The Director has unbridled discretion in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Moreover, the Director can deny a permit without offering any evidence to support the conclusion that a particular billboard is detrimental to the community. Moreno Valley claims that the Director's discretion in this regard is no more problematic than that of all such officials who must review and approve a billboard's design in order to determine whether it is consistent with its surroundings in size, shape, color, and placement. We disagree. Over the years, design review and approval has given rise, in practice, to standards that have become known to both regulating and regulated parties, and that have generally been applied without substantial controversy. The fact is proved by the presence in many ordinances of provisions simply subjecting billboards to design review and approval for "consistency with their surroundings in size, shape, color, and placement," without more — and by the absence of any significant litigation challenging the lawfulness of such review and approval. There are no such standards, however, to guide the Director in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Thus, we conclude that the ordinance violates the First Amendment in its permit requirement.

Desert and OMG next contend that the ordinance violates the First Amendment as an undue regulation of commercial speech.

To be valid under the First Amendment, as *Metromedia, Inc. v. City of San Diego* holds, an ordinance that regulates commercial speech must (1) serve a substantial

governmental interest, (2) directly advance such interest, and (3) be no more extensive than necessary.

As the party seeking to regulate commercial speech, Moreno Valley has the burden of establishing that the ordinance meets each of these three elements.

Desert and OMG argue that Moreno Valley has failed to carry its burden as to the existence of a substantial governmental interest. We agree.

Although aesthetics and safety represent substantial governmental interests, as the court in *Metromedia, Inc. v. City of San Diego* made plain, in this case, Moreno Valley has not established that it enacted the ordinance to further any such interests. It did not incorporate any statement of purpose concerning either interest in the ordinance. Furthermore, it did not provide any evidence that the ordinance actually promotes either one.

Desert and OMG also contend that the ordinance violates the First Amendment because it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages.

Under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages. We find the ordinance wanting in this respect.

Under the ordinance, off-site billboards, which alone may include noncommercial messages, generally need a permit by the Director of Public Works, whereas on-site billboards, which may include only commercial messages, do not.

Desert and OMG then contend that the ordinance violates the First Amendment because it regulates billboards with noncommercial messages based on their content.

Here too, under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it regulates billboards with noncommercial messages based on their content. We find the ordinance wanting in this respect as well.

Under the ordinance, an off-site billboard, which alone may include noncommercial messages, cannot be erected and maintained without a permit by the Director of Public Works — except for official notices, directions, and signs for civic or fraternal organizations. Because the ordinance effectively requires the Director to examine the content of the billboard to determine whether or not it is excepted, its regulation of any noncommercial speech is content-based.

The ordinance might be saved in spite of its content-based regulation if Moreno Valley could establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. The city cannot do so. It failed to present any evidence that the ordinance promoted a substantial governmental interest, much less a compelling one.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

ANSWER 1 TO PERFORMANCE TEST - A

MEMO

TO: Judith M. Schelly
FROM: Applicant
DATE: July 30, 2002
RE: In re Thomas Outdoor Advertising

You have asked me to prepare a memorandum analyzing the constitutionality of the proposed ordinance and identifying some specific modifications that can be made. I hope the following helps in your meeting with the City Attorney. We should talk after the meeting about what further steps to take in this matter.

The Constitutionality of the Proposed Ordinance

You have asked me to identify and evaluate the arguments that can be made in support of the position that the ordinance is unconstitutional. The following are the strongest arguments against the constitutionality of the proposed ordinance, although I also note places in which the ordinance appears to conform with constitutional requirements.

A. The Proposed Ordinance Constitutes an Unconstitutional Regulation of Commercial Speech.

The Supreme Court in Metromedia confronted the unconstitutionality of an ordinance much like this one and provided the operative framework for analysis. The ordinance in Metromedia, like the proposed ordinance in Benton, permitted on-site commercial

billboards, while it forbade off-site billboards of both a commercial and non-commercial nature (with specified exceptions).

The Court first noted that the ordinance, although directed at non-communicative aspects of the billboards, also impinged upon communicative aspects. Therefore, it had to comply with First Amendment restrictions on the regulation of commercial speech. The same is true here.

With respect to the regulation of commercial speech, the Metromedia Court followed a 3-part test to determine whether the regulation was unconstitutional. The 3-part analysis will form the decision here as well.

1). The Regulation Must Serve a Substantial Governmental Interest:

The first principle that applies is the "substantial governmental interest test." The Court has generally found that traffic safety and aesthetics constitute substantial government interests. See Metromedia, Vincent. However, courts have required that the government do more than mer[e]ly state such interests – the government should include a statement of propose to that effect and provide evidence that the ordinance actually promotes these interests. See Desert.

In this case, no such substantial government interest can be shown – at least with regard to traffic safety. The Historical District Ordinance clearly provides that there is to be no vehicular or motorized traffic in the Historical District, except during specified hours and for governmental servic[e]s. In these limited cases, it is unlikely that the presence of these billboards would pose a serious traffic hazard.

Although the Court has been fairly deferential with respect to the government's interest in traffic safety and aesthetics, you should point out to the City Attorney that hazards to pedestrian traffic are unlikely. Moreover, you could take some wind out of their "unsightliness" sail by pointing out that our client's billboards will blend in with the exterior of the buildings – all of which have been approved under the Historic[al] District Ordinance.

2). The Ordinance Must Directly Advance Such Legitimate Government Interest.

The Metromedia Court easily found that a prohibition on certain commercial billboards served an interest to traffic safety and aesthetics. It noted, however, that in that case there was no claim of any ulterior motive of the suppression of speech. You should point out to the City Attorney "that [t]he First Amendment forbids the government to regulate speech in order to punish the speaker." Vincent. In this case, unlike both Metromedia and Vincent, there is plenty of evidence to suggest that Council Member Hemphill is merely trying to suppress the speech of Patrick Curtan.

Thus, a court might well find that the ordinance is actually directed at an ulterior motive – suppressing Curtan – which would take this case outside the protection of Metromedia and Vincent. The City Attorney is likely well-aware of the public impression, as expressed in D'Orazio's artide, that Hemphill is just waging a very public feud with Curtan.

3). The Ordinance Must Not Be Moe Extensive Then Necessary.

The City will likely be able to argue that because it presumptively could ban all commercial messages, it is able to ban some "off-site" commercial messages, and that it is no more extensive then necessary.

You should again remind the City Attorney that this traffic safety rationale may not get them very far – pedestrians are unlikely to be harmed by the presence of the billboards and, if so, perhaps minimum light restrictions would do the job.

Moreover, there has been no showing of unsightliness or aesthetic need. Although this is not our strongest point of the argument, the earlier précis should convince the City Attorney that they have some major problems.

B. The Proposed Ordinance Constitutes an Unconditional Regulation of Noncommercial Speech.

This ordinance falls squarely within Metromedia and its progeny to the extent that it bans noncommercial speech, including political and ideological speech. The City may try to argue, as did the proponents in National Advertising, that the ordinance applies only to off-site commercial billboards, but this argument is clearly rebutted by the plain language of the statute (Sections 2 (C) and 3 (B)).

It is a well-settled principle that the First Amendment affords non-commercial speech a greater degree of protection than commercial speech. Metromedia . When a statute attempts to regulate non-commercial speech, as here, it is subject to challenge or invalidation on 2 bases. Thus, an ordinance is invalid if it imposes greater restrictions on billboards with non-commercial messages than on billboards with commercial messages or if it regulates billboards with non-commercial messages based on their content. The Benton ordinance does both and is invalid on either ground.

1). The Ordinance Imposes Greater Restitution On Non-Commercial Speech.

The ordinance allows for certain commercial speech – on-site commercial billboards – while restricting almost all non-commercial speech. This was precisely the fact submitted in Metromedia and the Court declared such content-restriction impermissible. Indeed, if the on-site commercial billboards are not a threat to either aesthetics or traffic safety, why would non-commercial on-site billboards pose such a threat? Because the ordinance only allows for on-site commercial messages, without allowing for on-site non-commercial messages, it runs afoul of Metromedia.

2). The Ordinance Regulates Billboards with Non-Commercial Messages Based On Their Content.

Content-based restriction of non-commercial speech is subject to the strictest of scrutiny and stands little chance of survival. Indeed, the government simply "may not choose the appropriate subjects for public discourse." See Metromedia; Orange.

The Benton ordinance allows exceptions from the ban for certain non-commercial speech-billboards with commemorative historical signs, etc. However, such choice among the appropriate subjects for public speech is impossible. The exceptions allowed in the ordinance are similar to those that were allowed – the ordinance that the Court struck down – Metromedia. The City Attorney should be made aware of such a glaring precedent that is directly opposed to the constitutionality of this ordinance.

C. The Ordinance Is Not a Valid Time, Place and Manner Regulation.

The City Attorney is likely to argue, as he did in your phone conversation, that this is merely a regulation of the time, place and manner of speech in the Historical District. You will be armed with a lot of case law to suggest the contrary.

A 3-part test applies in order to determine whether an ordinance can be qualified as a time, place and manner restriction, which are [sic] generally upheld under the First Amendment. Again, this 3-part framework will guide my analysis.

1). The Ordinance Must be Justified Without Reference to the Content of the Regulated Speech

The City Attorney will try to argue that this case falls within Vincent, perhaps the most famous time, place and manner case. In Vincent, however, the ordinance at issue banned the posting of any and all signs on public property. No signs were excepted – not for political speech or any other reason. The Court in that case easily [found] that the ordinance had nothing to do with the content of the speech in the sign.

Without being too redundant, the ordinance clearly chooses to allow some billboards – i.e., on-site commercial billboards – but not others, based upon the content of the billboard. This case, therefore, is more like Metromedia, in which the Court rejected a time, place and manner regulation. Because it chooses to allow some speech and not others, based on content, the ordinance fills the first privy.

2). The Ordinance Must Be Manually Tailored to Give A Significant Governmental Interest.

As discussed above, it is questionable as to whether the City's given reasons will qualify as "substantial" general interests. However, Vincent does stand as good precedent for the City's argument that aesthetics and traffic safety are substantial governmental interests. However, Vincent again noted that the ordinance at issue there was not related to suppress[ion] ideas and clearly served to reduce visual clutter by prohibiting all signage.

You should point out to the City Attorney that the connection in this case is more tenuous. Some billboards clearly will remain – although the Court has rejected arguments based on "underinclusiveness". You should still argue to him that the government's interest may not be found to be "substantial." Moreover, we can show a pretty clear interest on their part – suppressing ideas, so the link may be fairly weak. They might satisfy this privy, but it's a risk on their part.

3). The Ordinance Leaves Open Alternative Channels for Communication.

Here the City Attorney will point out hat there currently are not many billboards in Historic District and so people do have other means of communication. However, the Court has held that a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. Vincent. Indeed, the Court in Metromedia, faced with a very similar statute, found that other alternatives might be too costly or too ineffective (or both), so there were not adequate alternative modes of communication.

You should take with you the Columbia Outdoor Advertising Fact Sheet to show the substantial benefits and effectiveness of billboard advertising. Moreover, as the Historical District begins to grow and renew itself, business arriving need a cheap and effective way of attracting business – thereby serving both the City's and the businessmen's interests. A Court could well find that there not other adequate means of communication – given that

walking pedestrian traffic is the primary means of exposure to Historic District businesses. Thomas is doing his part to rejuvenate the District – in an aesthetically pleasing manner, and should be portrayed as a benefit to the City.

1). Strict Scrutiny Has Not Been Met Because The Ordinance is Not Necessary to Serve A Compelling Government Interest and is Not Narrowly Drawn.

The ordinance would be subjected to strict scrutiny as a content-based regulation of non-commercial speech and without the protection of a time, place and manner characterization.

Here you should simply stress to the City Attorney – as I'm sure he is aware – how difficult it is to meet strict scrutiny test in the area of the First Amendment Freedom of speech. For all the reasons given above, strict scrutiny clearly is not met in this case.

E. .... The Ordinance Gives Unbridled Discretion to the Director of Public Works.

Any law that subjects the exercise of First Amended freedoms to a prior restraint without narrow, objective and definite standards is violative of the 1st Amendment. Desert. This ordinance does not require that one gain a permit in order to post a billboard; however, compliance with the ordinance is determined by the Director of Public Works, who can declare a billboard to be a public nuisance and have it removed. This, the ordinance falls within the Desert standard.

There does not appear to be any restriction in the Director's decision, except that he must determine whether the billboard falls with the bounds of the ordinance. The City Attorney will likely be able to argue that the ordinance itself provides the narrow, objective and definite standards required under Desert. Nonetheless, you should point out that vesting

such authority in one public official, without allowing for a hearing or prudent review or other determination of the validity of his assessment may run afoul of the Constitution.

Conclusion

I have tried to outline our strongest arguments against the constitutionality of the ordinance -- and they are strong indeed. While the City will be able to gain some "points" in some minor areas, the analysis suggests that the ordinance does not pass muster as currently written. You should press this point hard in arguing for some of the modifications I suggest, which will serve Thomas' goals as well.

II. Specific Modifications That Can Be Made to the Ordinance

You have asked me to identify and discuss some modifications that will both serve Thomas' and the City's goals, while passing Constitutional muster. I will first identify those goals as I see them and then some ways to serve these goals.

A. Thomas' Goals

Our client has invested a substantial sum of money into his billboard business and wants to get the maximum return possible in that investment. He has leased a substantial amount of space in the Historical District, which he'd like to be able to use for some revenue – generating purpose and he has manufactured the long-lasting billboard structures at substantial cost. Thomas' goal is to get the most use out of the leased space and the manufactured billboard structure as possible, while still providing jobs for his employees and, of course, trying to make some profit for himself.

I think Thomas also has a more general goal of rejuvenating business in the Historic District, which should coincide with the City's goals to some degree. His emphasis on having a local "niche," along with his aesthetically–pleasing plans suggest that he wants to keep the Historical District clean and pleasing to the eye as much as the City does. This should help his business, as well as the businesses he promotes.

B. The City's Goals

The City's stated goals are to reduce or eliminate aesthetic blight in the Historical District caused by visual clutter, while also reducing traffic safety hazards because of visual destruction clutter, while also reducing traffic safety hazards because of visual distraction. I think it is safe to surmise that the City also has some interest in reducing the number of Curtan-owned and operated billboards in the Historical District. He seems to be quite a controversial and flamboyant character, which the City feels will be off-putting to the shoppers and visitors they hope to attract. Thus, we can also suppose that the City has a goal – along with Thomas – of rejuvenating the Business District, attracting revenue, tourism and commercial business to this area. All of this must be done tastefully, while meeting the aesthetic integrity established in the earlier Historical District Ordinance.

C. Proposed Modifications

1). Design and Review Board

Perhaps the most obvious, affective and acceptable modification for all parties would be to establish a "design & review procedure for the issuance of billboard permits. Because this would raise the issue of prior restraints of speech, it would have to comply with strict requirements as set forth in Desert Outdoor Advertising.

Something like the design and review procedure that applies for buildings in the Historical District should work. The ordinance provides for regulation according to such measures as size, shape and color. The same could constitutionally be done with respect to billboards. As the Court in Desert noted, many ordinances contain provisions subjecting billboards to design and review approval – and such provisions have gone unchallenged. That would provide the required narrow, objective and definite standard so as to guide the decision maker's process – there would be no need of "unbridled discretion."

Although Mr. Curtan might not pass such a design & review inspection, that is his problem – not ours. Thomas' billboards have been specifically manufactured so as to pass any such review. His goals would be met and the City would have little room to complain – they would be aesthically pleasing, pose little risk to passers-by, and would attract business and help establish business districts.

2). A less acceptable proposal would be to have the ordinance simply eliminate all commercial speech, but allow all non-commercial speech. As discussed above, the government has greater freedom to regulate commercial speech and likely could prohibit all such billboards. The government runs into problems, however, when it places greater restrictions on non-commercial speech than on commercial speech, as well as when it allows some but not all non-commercial speech.

Although constitutionally permissible, this modification doesn't serve anyone's goals as fully as the first proposal. The City would like to attract businesses and would not want to

increase the Curtan-type expression. Although Thomas is likely neutral as to who buys his billboard space, he might lose out to the wealthy and freewheeling Curtan in the area of non-commercial billboards. Thus, this is not a happy solution.

3). Another proposal would be to limit the number of billboards owned by any one individual. It's a bit tough to see how this would work, but there is a chance. First, as part of a general "design and review" scheme, The City could limit the total number of billboards on any one building, or within any certain square–feet distance. This could generally be constitutional either as a valid time, place or manner restriction or as a design and review qualification.

Thus, the City could impose a restriction and how many billboards any one individual could own. Thomas would "sell" the space to others, such as concerned business owners, so they would be the owners. Most would likely own only one or two spaces. However, Curtan would be limited to his personal advertising space – thereby serving a significant goal of the City. His type of obnoxious advertising as personal propaganda would be held to a minimum.

4). The final proposal, that the City prohibit all outdoor advertising, is the worst of all and should not even be discussed. It would devastate our client, who has valid constructional obligations and business interests at stake, and it is simply not an acceptable solution. Nor would or should the City endorse such an idea, given their interest in attracting business activity and shoppers to the District.

ANSWER 2 TO PERFORMANCE TEST - A

TASK ONE

INTRODUCTION

You have asked me to prepare a memo discussing the constitutionality of the proposed ordinance relating to outdoor advertising drafted by the City of Benton. The proposed ordinance regulates the use of billboards in the Benton historical district. Section 3 of the proposed ordinance allows any person to erect or maintain an on-site commercial billboard but prohibits any off-site commercial or non-commercial billboard with several exceptions including historical signs, service club signs or time, temperature, and news signs. On-site billboards are those whose message relates to business conducted on the parcel on which the billboard is located. Off-site billboards are those which have messages relating to business or any other activity that is not conducted on the property where the billboard is located.

CONSTITUTIONAL REGULATION OF COMMERICAL SPEECH

The proposed ordinance attempts to regulate commercial speech in the historical district. According to the Supreme Court in *Metromedia v. City of San Diego* commercial speech may be regulated if it (1) serves a substantial government interest, (2) directly advances such interest and (3) is no more extensive than necessary. In *Metromedia* the Court considered an ordinance that sought to eliminate hazards to pedestrians and motorists brought about by distracting displays and to preserve and improve the City's appearance. The ordinance permitted on-site commercial billboards advertising goods or services available on the property but prohibited off-site billboards unless they fell into one of several exceptions such as time, temperature and historical signs, among others. The Court noted

that the City had a substantial interest in traffic safety and the aesthetics of the City. Also the Court recognized that the ordinance directly served the interests of safety and beauty because there was no evidence that the City had a motive to suppress speech. The Court stated that it would defer to interests of local lawmakers as to what constitutes a traffic hazard or aesthetic harm. Finally, the Court ruled that the law was no broader than necessary to achieve the government interest in safety and beauty. Thus, the Supreme Court held the ordinance to be a valid restriction on commercial speech in *Metromedia.*

In the instant case, the ordinance is very similar to the one before the Supreme Court in *Metromedia.* On-site commercial billboards are allowed while off-site billboards are prohibited, with a few exceptions such as historical signs or time and temperature signs. Although the *Metromedia* court recognized traffic safety and aesthetics are substantial government interests there is some question as to whether those interests apply. The proposed ordinance states in Section 1 that lack or regulation of billboards poses traffic safety hazards and is necessary to prevent those hazards. However, the City of Benton passed a[n] historical district ordinance and in Section 1 its legislative findings did not mention that traffic safety was a concern. In Section 2 of that ordinance subsections F and G limit traffic to pedestrians and emergency vehicles except between 2:00 a.m. and 7:00 a.m. for deliveries. It doesn't appear that traffic is at all a concern in the historical district so it is not likely that billboards would create any safety hazards. The proposed ordinance also mentions that aesthetics are a big concern of the City Council. In the legislative findings of the historical district ordinance there is a statement that preservation [of] the aesthetic integrity is essential for the historical district.

Most likely the Court would hold that the proposed ordinance is a valid commercial speech regulation because there is at least one substantial State interest implicated. Even though traffic safety is not a legitimate concern here the aesthetic standards are still a substantial interest for purposes of commercial speech.

REGULATION OF NON-COMMERCIAL SPEECH

In *Metromedia* the Court held that even though the ordinance was a valid commercial speech regulation that it was facially unconstitutional insofar as it banned non-commercial speech. The Court was quick to point out that the First Amendment affords non-commercial speech a greater degree of protection than commercial speech. In *Metromedia* the ordinance at issue allowed on-site commercial speech but not non-commercial speech. The Court declared that the ordinance was unconstitutional because the City failed to explain how or why billboards with non-commerical messages would be a bigger threat to safe driving or aesthetics. Another reason that the Court struck down the ordinance was that it allowed specific exceptions for some off-site non-commercial speech. The Court held that the First Amendment prohibits such content-based restrictions, stating that "to allow a goverernment the choice of permissible subjects for public debate would be to allow that government control over the search for truth."

In *Metromedia* the City tried to argue that the ordinance was a valid time, place, and manner restriction that did not violate the First Amendment. The Court disagreed because such restrictions are reasonable only if (1) they are justified without reference t[o] the content of the regulated speech, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication. According to the *Metromedia* Court the ordinance failed to leave alternative channels open because advertisers might find the alternatives too costly or too ineffective or both. In addition, as mentioned above, the exceptions for off-site billboards required the government to discriminate on the basis of content.

The Regulation of Non-Commercial Speech Is Facially Invalid

The proposed ordinance will most likely be an unconstitutional regulation on non-commercial speech. Just as in *Metromedia*, Benton does not explain why on-site billboards

with non-commercial messages would be a threat to aesthetics while commercial billboards will not. This is probably an impermissible content-based regulation of non-commercial speech. Furthermore, as was the case in *Metromedia*, Benton's proposed ordinance allows some non-commercial messages on off-site billboards. In Section 3 sub-section B, it limits the non-commercial messages to commemorative historical signs, service club signs, or signs depicting time, temperature, and news. Clearly, the exceptions would require the City to choose the content of the non-commercial messages which would be unconstitutional.

The Ordinance Discriminates On The Basis Of Content And Is Unconstitutional

In rare cases it is permissible to regulate non-commercial speech based upon its content. In *National Advertising Company v. City of Orange,* the Ninth Circuit struck down a law which permitted on-site billboards but prohibited off-site billboards with exceptions for government signs, recreational signs, political signs and a few other types of signs. The plaintiff, an advertising company, applied for a permit to erect off-site billboards and was denied, and brought suit challenging the statute. Essentially, the ordinance allowed commercial speech and non-commercial messages on on-site billboards but restricted non-commercial speech on off-site billboards. In *Orange* the Court declared that because stricter standards apply to the restriction of non-commercial speech an ordinance is invalid if it imposes greater restrictions on non-commercial speech than commercial speech or if it discriminates based on content with regard to non-commercial speech. Ultimately the Court held that the City's ordinance was invalid because the exceptions to the restrictions on non-commercial messages necessarily required examination of the content of the messages. Such content-based restrictions will almost always violate the First Amendment.

In *Orange* the Court stated that "the First Amendment might tolerate the regulation of non-commercial speech based on its content if the government were to establish that it is necessary to compelling governmental interest and that it is narrowly drawn to achieve that

end." Finally, the Court concluded that State interest in traffic safety and aesthetics are not compelling.

Our situation presents similar issues to those resolved in *Orange.* The proposed ordinance clearly allows for commercial speech in on-site billboards and prohibits non-commercial speech on both on-site and off-site billboards. The proposed ordinance places greater restrictions on non-commercial speech as well as discriminating based on content against non-commercial speech. The only interest implicated in Benton's proposed ordinance is aesthetics, and as the Court in *Orange* noted, this is not a compelling State interest. Hence, the law would not survive strict scrutiny as a content-based regulation.

Benton's proposed ordinance could not be characterized as a valid time, place, and matter regulation. As discussed above, the ordinance requires reference to the content of the speech, so it would fail the first part of the test. In addition, it is not clear that the proposed ordinance will leave open ample alternative channels for communication. According to the Columbia Outdoor Advertising Association Fact Sheet, billboards are more affordable than other media as judged by the cost of reaching their audience. In addition, they quickly build awareness, create continuity of a brand or message, are adaptable, and provide geographic and demographic flexibility. In other words, it is highly unlikely that advertisers will be able to find a medium as effective for communication of their messages in that the proposed ordinance would deprive both the public and the advertisers of an irreplaceable forum.

DISCRETION OF OFFICIALS ENFORCING THE ORDINANCE

Ordinances that regulate speech may be unconstitutional if they allow public officials too much discretion in enforcing them. In *Desert Outdoor Advertising v. City of Moreno Valley,* the Ninth Circuit considered an ordinance regulating off-site and on-site billboards. Off-site billboards could include commercial or non-commercial messages while on-site billboards

could only contain commercial speech. The ordinance also required the Director of Public Works to issue a permit for any off-site billboard after the finding that the billboard will not be detrimental to the public health or welfare and aesthetic quality of the community. Off-site billboards could be erected without a permit if they qualified for an exception for official notice, directions, and signs for civic organizations. On-site billboards could always be erected without a permit.

The Court was concerned because the Director of Public Works had discretion to deny a permit for off-site billboards based on ambiguous and subjective reasons such as a harmful effect upon the health or welfare of the public. The Court stated that any law that subjects the exercise of First Amendment freedoms to the prior restraint of a permit must have narrow, objective, and definite standards to guide the permitting authority. In *Moreno Valley* the Director of Public Works had unbridled discretion in determining whether a billboard would violate the community's health, welfare, or aesthetic quality. There were no standards to guide the Director in making a determination whether a billboard would harm a community's health, welfare or safety. The Court held that the ordinance violated the First Amendment in its permit requirement.

The Ordinance Gives The Director Of Public Works Too Much Discretion

We have a very similar situation to that addressed by the Court in *Moreno Valley.* Here, the proposed ordinance in Section 4 entitled Declaration of Public Nuisance and Removal declares as a public nuisance any billboard erected in violation of the provisions of the ordinance. Furthermore, Section 4 also authorizes the Director of Public Works to immediately remove any billboard found to be a public nuisance. Unlike the situation in *Moreno Valley,* here the Director does not have completely unlimited discretion to strike down a billboard. Rather, the standards with which the Director must comply are set forth in the proposed ordinance Section 2. However, the Director has almost unlimited discretion to

determine whether a billboard is off-site or on-site, which will substantially determine whether it is permissible or not. In other words, it appears that the Director has very broad authority to declare something an off-site billboard to keep it from being erected. Thus, there is a good argument that this violates the First Amendment because it gives the Director too much discretion to regulate the billboards that may be erected in the historical district.

PUNITIVE NATURE OF PROPOSED ORDINANCE

Where an ordinance regulates speech in order to punish the speaker the ordinance will violate the First Amendment. In *City Council v. Taxpayers for Vincent,* the Supreme Court ruled that an ordinance prohibiting the posting of signs on public property in the City of Los Angeles did not violate the First Amendment. In *Vincent*, supporters of a candidate for election to the City Council posted signs bearing the candidate's name and the City removed the signs pursuant to the ordinance. The Supreme Court ultimately held that the ordinance was not unconstitutional on its face or as applied. In *Vincent* the Court warned that the First Amendment forbids the government to restrict speech for the purpose of punishing the speaker. There was no hint of punitiveness in the law the Court considered in *Vincent.*

The Court held that the ordinance was a reasonable time, place, and manner restriction. The Court decided that the ordinance was justified without reference to content because it prohibited all signs for aesthetic reasons. Second, the Court reasoned that the ordinance was narrowly tailored to serve a significant government interest because Los Angeles had a weighty aesthetic interest in preventing intrusive and unpleasant formats for expression. The City's interest was unrelated to the suppression of expression and the City accomplished that interest by banning posted signs. Finally the Court stated that the ordinance left open ample alternative channels of communication because it did not affect

any individual's freedom to speak and to distribute literature where the signs were prohibited. The Court was careful to note that complete bans of signs on public property such as the one in *Vincent* were constitutional but ordinances that provide exceptions for political campaign signs or other categories of speech would likely be unconstitutional because they are content-based restrictions.

Proposed Ordinance Is Punitive In Nature And Unconstitutional

The proposed ordinance is not a valid time, place and manner restriction. First, there are punitive aspects to the City Council's proposed statute. In Section 5 of the proposed ordinance, subsection A declares that every person responsible for erecting and/or maintaining any billboard declared a public nuisance is liable for any and all expenses incurred in removal. Subsection B states that every person responsible for putting up a billboard later declared a public nuisance is subject to a fine not exceeding $10,000. These two subsections are largely punitive in nature and give the Director of Public Works discretion to impose a fine of up to $10,000. There does not seem to be any purpose for these provisions except to penalize and punish someone who violates the statue. In addition, in the July 15th *Benton Express* an article about the billboards reports that City Council member Sonia Hemphill urged the City Attorney to draft legislation to prevent Patrick Curtan from posting billboards in the historical district. Thus, the underlying purpose of the proposed ordinance seems to be to punish Curtan for his idiosyncratic billboard messages. Because of the hefty fines and the desire to keep Curtan from posting his public interest messages the statute probably violates the First Amendment because it is punitive. It would also fail as a time, place and manner regulation as discussed above.

CONCLUSION

The City of Benton's proposed ordinance will most likely be declared unconstitutional on several grounds. First, it is facially unconstitutional because it places greater restrictions on non-commercial versus commercial speech. Second, the exceptions to the ordinance for off-site billboards require discrimination based on the content of the non-commercial speech. Content-based restrictions must pass strict scrutiny, which the law undoubtedly could not. Third, the ordinance seems to be punitive in nature, to prevent Curtan from expressing himself on billboards as well as imposing large fines on any violators. Finally, the statute gives the Director of Public Works too much discretion in deciding what billboards will pass muster. As a result, without modification the statute will be struck down on First Amendment grounds.

TASK TWO

STEPHEN THOMAS' STATED GOALS

Thomas owns an outdoor advertising agency and has leased many of the best sites in the historical district of Benton to use for billboard space. The leases he entered were long term leases, generally for 25 years, and he guaranteed the lessors fixed minimum payment with increased payments as revenues increased. Thomas also manufactures billboard structures that are durable and will last for at least 25 years. Furthermore, he came up with unique designs that will conform to their surroundings. He also intends his billboards to be seasonal, in that spirit of the local festivities such as Halloween and Thanksgiving. Thomas also would like to advertise groups of stores to create districts similar to the ones in midtown Manhattan. In other words, he would like to create sub-districts within the historical district such as antiques, gourmet, arts and other types of sub-districts to enable the area to flourish. Thomas points out that when you have districts of stores that [sic] each business will get more customers despite the increased competition than it would have otherwise gotten. Thomas realizes that there are aesthetic and traffic concerns. He would not object

to regulation of the appearance of the billboards because appearance is exactly what he is selling.

BENTON'S CONCERNS AND PROBLEMS

For many years the City of Benton and its businesses were in decline. Following the establishment of the historical district, the City experienced a remarkable turnaround, attracting many visitors to craft stores, antique stores, art galleries, inns and restaurants. The City is particularly concerned that any outdoor advertising might negatively affect aesthetic values and traffic flow in the historical district. In addition, the City Council is worried that controversial advertising might offend or upset some visitors. The City Council wants to permit steady economic growth for Benton's residences and businesses and financial stability for the government itself.

PROPOSED MODIFICATIONS TO ORDINANCE

Design Review And Approval For Consistency With Surroundings

In *City of Moreno Valley,* the Ninth Circuit suggested that design review and approval of billboards does not violate the First Amendment where there are objective and definite standards to guide the regulatory bodies. The Court referred to the presence in many ordinances of provisions subjecting billboards to design review and approval for "consistency with their surroundings, size, shape, and placement." Such restrictions will most likely be lawful because they provide reasonable standards.

In Benton's historical district ordinance Section 2, subsection C contains a provision that requires design, review and approval for consistency with surroundings, size, shape, color, and placement for any modification or construction of buildings in the historical district. These types of design and approval measures are not unconstitutional because they are not aimed at suppressing any type of speech. If the proposed legislation were modified to require any billboards in the historical district to meet with the standards of size, shape, color and placement, that would be constitutional. In addition, the modification would satisfy both the City's and Thomas' needs and desires. For instance, this modification would ensure that the billboards are aesthetically pleasing and match their surroundings, which would alleviate the City's concerns about preserving the aesthetic character. Furthermore, Thomas indicated that his billboards were designed to blend in with their surroundings and he would welcome such an approach that requires approval based on the surrounding buildings.

If Curtan were to put up any billboards in the historical district he would have to conform to the aesthetics of the buildings surrounding him. This would eliminate a lot of the beauty concerns that the City Council has because his billboards would have to blend in regardless of what he wanted to do. Design review and approval would also further Thomas's goals of seasonal advertising. His displays would match the surroundings as well as promoting local festivities such as Halloween or harvest time. This would attract more people to the historical district in accordance with the City Council's desires.

Eliminate Content-Based Restrictions

To comply with the Constitution, the statute will have to eliminate any content-based restrictions. The proposed ordinance contains exceptions for certain types of non-commercial speech on off-site billboards. Rather than restricting the speech based on content, the ordinance could restrict it based on its appearance as noted above.

Eliminate The Restriction On Off-Site Commercial Advertising

Currently, the proposed legislation forbids any off-site commercial advertising, which means that the billboard must have a message that relates to business conducted on the parcel on which it is located. Thomas wants to create sub-districts by advertising groups of stores together, such as antique stores. If the ordinance were modified to allow him to do so, that would enable him to further his own interests as well as benefit the historical district. Thomas has indicated that when districts of stores are created each store will get more customers and it will promote economic growth for the whole area. This would also further the City's interest in the financial well being of its businesses and the growth of the historical district. According to the Columbia Outdoor Advertising Association, billboards provide significant economic contributions in wages and benefits to employees, and payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies especially in small cities. Thus, rather than restricting billboards too much the City Council should try to promote them because they will provide direct economic benefits to the historical district. The billboards will also quickly build awareness, according to the association. All of these are reasons that the City Council should encourage billboards rather than discourage them.

Modify The Penalty And Fine Clauses

As proposed, the law would seem to be punitive in nature. Laws that prohibit speech in order to punish the speaker violate the First Amendment. Section 5 of the statute provides that anyone violating it may be fined up to $10,000 and can be liable for all expenses incurred in the removal of a prohibited billboard. If the fine were modified so it would be a fixed fee, rather than allowing so much discretion, it would be much less like a penalty and more like a fine.

THURSDAY AFTERNOON
AUGUST 1, 2002

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

U.S. v. ALEJANDRO CRUZ

U.S. v. ALEJANDRO CRUZ

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general

background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

Law Offices of
Miles, Read and Paulete
605 Crawford Street
Carpenter, Columbia

M E M O R A N D U M

To: Applicant

From: Matt Mato

Re: U.S. v. Alejandro Cruz

Date: August 1, 2002

Our client, Alejandro Cruz, is threatened with criminal prosecution by the United States Department of the Treasury's Office of Foreign Assets Control (OFAC) following a trip to Cuba. OFAC has sent Mr. Cruz a letter requesting information concerning a possible criminal violation of Section 515.201 of the Trading With the Enemy Act.

1. Prepare a memorandum for me that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading With the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government may constitutionally use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

2. Prepare a memorandum for me on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will also see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

TRANSCRIPT OF
ALEJANDRO CRUZ INTERVIEW

Matt Mato: OK, Alejandro, it was good to catch up on what you've been doing since we were in the Peace Corps in Nepal.

Alejandro Cruz: Indeed it was, Matt.

MATO: Well, let's get to work. We've covered the basics, costs, retainer, and information that you and I will need to keep in touch. So, as I told you, I've turned on the tape recorder to get the full story. Do you have any questions before we start?

CRUZ: I don't think so. This whole thing is overwhelming. I don't feel that I'm on familiar or solid ground. I went on a tropical vacation and now I'm facing fines of six figures and even prison.

MATO: I'm sure it is a shock. Thanks for the documents you've brought. We'll go over them in a minute. Let's go back to what's happened and start at the beginning.

CRUZ: Certainly. About a year ago, I began looking at a trip to Cuba. I was reading a lot of news stories about Cuba. There was the Pope's visit in 1998, the 40th anniversary of Castro's revolution the next year, and then all the news coverage on the little boy, Elían González, who was the center of the controversy involving Cuban-Americans in Miami. For a couple of years, it's seemed as though there was a news story every week about Cuba. I was curious about Cuba, and frankly I wanted to learn for myself what was left of communism in the 21st century. I'm not of Cuban extraction myself, but I was interested.

MATO: Would it be fair to say that as a result of the news coverage you were aware of the U.S. embargo?

CRUZ: Yes. For example, in 2000 there were many stories about the possibility of the U.S. easing the embargo against the sale of food and medicine to Cuba, even though it didn't actually succeed. I definitely recall reading those with interest. Running my

own business, I couldn't believe that the United States Congress would prohibit U.S. farmers from selling their agricultural commodities to Cubans.

MATO: So you knew about the legal problems of going to Cuba before you went?

CRUZ: Let me think about that. There was extensive coverage on doing business with Cuba, for example, comparing the conflicting U.S. policies toward China and Vietnam and toward Cuba, but I can't recall ever reading about the travel restrictions. I don't think that many people in America realize that a trip to Cuba could land them in federal prison for 10 years.

MATO: So you knew about the trade embargo, but perhaps not about the travel restrictions?

CRUZ: I think that I discovered those only after I decided to go, and began doing research on traveling there.

MATO: What did you do?

CRUZ: I went to a bookstore and checked out the Internet. All the major guidebook publishers have guides to Cuba. I scanned many of them, and finally chose the Freedom one, probably because I've liked using their guides on trips to Latin America.

MATO: That's the guidebook you've shown me?

CRUZ: Yes.

MATO: So, before going, how would you describe your understanding of the legality of traveling to Cuba?

CRUZ: That it was illegal, but that the travel restrictions were a relic of the long dead and buried Cold War, that thousands of Americans were going, and there was no punishment, not even a slap on the wrist. Everyone seemed to be going. I had received announcements of organized tours from my university alumni association.

MATO: Did you keep any of them?

CRUZ: I don't think so. No, I didn't. I preferred to go on my own, traveling independently rather than on a packaged tour. Perhaps that was a mistake. Are the tours legal?

MATO: I really don't know. So would it be fair to say that you understood that without some kind of permission, a license I think it says, it was illegal to go?

CRUZ: Yes.

MATO: You knew the rules, you just did not think that there would be any consequences?

CRUZ: Yes, and, I guess, that it was so commonplace, that I would not be caught.

MATO: So how did you go?

CRUZ: I followed the guide's instructions. I booked flights to Montego Bay and then to Havana. It's very easy to do on the Internet, except that you can't pay for the flight to Havana with a U.S. credit card. Only cash is accepted, but it's easy. It's the same in Cuba. You cannot use your American credit card, but the dollar is the common currency. There's no need to change any money for Cuban pesos.

MATO: How long were you there?

CRUZ: Two weeks.

MATO: Any idea what you spent?

CRUZ: Less than $2,000, including airfare.

MATO: What was that for?

CRUZ: Hotel rooms, meals, and transportation basically.

MATO: Again, is it fair to say that those were the kinds of expenditures that you believed were prohibited?

CRUZ: Pretty much. I just did not think it mattered to anyone.

MATO: Any records of your expenditures?

CRUZ: I can't recall any that I retained.

MATO: So, when you came back to the U.S., what happened?

CRUZ: I was not even thinking that there would be a problem. I took a few precautions, and then forgot about it until I was suddenly searched and given the "third degree" by Customs.

MATO: What precautions?

CRUZ: I stashed the Cuban cigars and rum I'd bought. And I removed the baggage tags from the flights to and from Havana.

MATO: But they found the cigars and rum?

CRUZ: Just bad luck to be the one they picked out to search. As I said, I was not prepared for it. I tried to think of an explanation, but I did not do it very well. The Customs guy could tell I wasn't being straight.

MATO: That comes through in his report.

CRUZ: I felt that he could see right through me. I finally decided to tell him the truth: I had been to Cuba. And then not say anything else. At least I had the presence of mind to remember that from the guidebook.

MATO: I don't know how this is going to turn out, Alejandro, but I think that you made the right decisions on both counts. Is the inspector's report accurate?

CRUZ: It embarrasses me to say that it is. He probably could have put in some more shuddering and stammering while I tried to think of something to say. I don't think that I raised my voice as he claims, but I did go through a phase of being angered that I was caught, because I recalled reading of Little Leaguers being able to get away with going to Cuba. I guess I thought of myself as an experienced world traveler, and I felt very foolish.

MATO: Then what?

CRUZ: I thought that giving up 70 or 80 dollars worth of cigars and rum at the airport was the end of it. That's ironic: I bought them on the black market, so the money did not go to the Cuban government, but to some Cuban undercutting the government stores.

MATO: Then what? You received the letter from OFAC?

CRUZ: Yes, the "Request to Furnish Information" from a "Sanctions Coordinator." That is when I decided that this was getting out of control and called you.

MATO: This is obvious, but I assume that you don't have one of the licenses mentioned in the OFAC request?

CRUZ: No. I do not know who gets them or how. Although I guess the tour companies have that figured out.

MATO: Probably. I notice that OFAC has to ask if you have a license. But I guess that's what they're stuck with. They can't send the FBI to Cuba to prove that you committed a crime. Are these then the only documents you have?

CRUZ: Yes. It's my entire Cuba file, guidebook and all.

MATO: I'll look them over. As I said, the Trading With the Enemy Act is not something I'm familiar with, so I'll probably ask one of our associates to look into it. We will probably want to respond in some way to the request, since criminal sanctions are being threatened. We'll draft something and be in touch.

CRUZ: Thank you.

* * * * * * *

CHAPTER 4

The Choice For Americans: Licensed or Unlicensed Travel

Travel to Cuba itself is not difficult, but it is very difficult to understand or reconcile the technicalities and the realities of travel to Cuba. For those not interested in tackling the details of the grotesquely named Trading With the Enemy Act or licenses to qualify for legal travel to Cuba, these key facts may be sufficient:

- Thousands of Americans, perhaps 200,000, are illegally traveling to Cuba annually through Canada, Mexico, and the Caribbean.
- Many other Americans are going legally on tours for apparent educational, religious, and cultural purposes.
- Despite the flow of travelers, prosecution by U.S. authorities for violating the travel ban is rare.

Although there is a travel ban, it is flouted with impunity by thousands, and unevenly and inconsistently applied by the United States.

To begin with, what is legal or permitted involves TWO governments: the U.S. and Cuba. So, when one asks, "What is allowed?" The answer may be, "According to whom, the U.S. or Cuba?"

On the Cuban side, the situation is much clearer. Cuba welcomes tourists, including those from the United States. (An exception is returning Cuban-Americans whose right to return is tightly regulated.) The Cuban government wants tourists to come and spend money. Cuban airport immigration officials facilitate U.S. tourism and usually will not stamp American passports. In general, travel to and within Cuba is not restricted, although there are many harsh, incomprehensible restrictions on the Cubans with whom tourists may travel, stay, and eat.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

In terms of U.S. law, travel to Cuba is either (1) legal, more accurately "licensed," or (2) illegal, that is, "unlicensed." From this point on, the rules get complicated and arbitrary, and even simple rules are inconsistently and sometimes inexplicably applied.

Contrary to popular belief, U.S. law does not technically prohibit U.S. citizens from visiting Cuba. However, tourism is effectively banned by the U.S. embargo, which prohibits U.S. citizens or residents from spending any money there to rent a room, buy a meal, or use transportation, or buying anything from or selling anything to Cuba, and threatens those who do so with 10 years imprisonment and fines of $100,000 for individuals and $1,000,000 for businesses. The law does not allow minimal travel-related transactions or minor purchases. Any amount is unlawful. Do not try to tell Customs that you stayed in a cheap hotel or bought only one box of cigars. You will only be getting yourself into more trouble.

The trade embargo and travel restrictions are rooted in the Trading With the Enemy Act, which, in effect, puts Cuba in the category of Iraq, Libya, and North Korea. It authorizes the President to prohibit or regulate trade with hostile countries **in time of war**. According to a 1998 Pentagon report, Cuba poses no national security threat, and its military capabilities are only defensive. The State Department says that Cuba no longer actively supports armed struggle in Latin America or elsewhere. Nevertheless, U.S. Presidents, both Democrats and Republicans, annually sign declarations putting Cuba in the official and legal category of an enemy. There was a brief opening of travel to Cuba in the 1970s, but ever since President Reagan reimposed the prohibition on travel-related transactions in Cuba, it has been practically illegal to travel to Cuba.

The legal prohibition is about controlling dollars; thus, enforcement and applications for licenses to travel to Cuba are handled by the U.S. Treasury Department, not the State Department. Specifically, it is the Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, Washington, D.C., telephone (202) 622-2520.

The U.S. sanctions for unlicensed travel to Cuba **are not limited** to U.S. citizens. Any person subject to U.S. jurisdiction who engages in any travel-related transaction in Cuba violates the law. Thus, foreign nationals who are U.S. residents should also not risk a Cuban entry stamp in their foreign passports.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

Although it is possible to travel to Cuba through a third country, such as Canada or Mexico, the circuitous route is not legal. However, if a traveler can prove that she or he did not spend any money in Cuba, then travel there may be legal. One of the categories of legal travel has been "fully-hosted travel"; that is, trips where the Cuban government or some non-U.S. organization picks up all travel expenses in Cuba. "Venceremos Brigades" used to go (and perhaps still do) to help the Revolution cut sugar cane. The Cuban government continues to operate fully-hosted trips, which reportedly are long on indoctrination and short on food and amenities. The U.S. government will not just take your word that you were "fully-hosted." You will be asked to provide a day-to-day explanation of who paid for your meals, lodging, transportation, and even gratuities.

Other than a "fully-hosted" visit, U.S. law permits only a few categories of "licensed" travel, such as to gather news or attend professional conferences and athletic competitions. "General" licenses are available to diplomats, full-time journalists, and full-time academic researchers. Everyone else must apply for and obtain a "specific license." These include religious organizations, human rights groups, and projects to directly benefit the Cuban people.

The largest category of licensed travel comprises Cubans in the U.S. who are permitted, once a year, to visit close relatives in "humanitarian need." One of the ironies of the Elían González saga is that if Congress had succeeded in making Elían a U.S. citizen or resident, he could have visited his own father only once a year and only if there was a humanitarian need.

The U.S. travel restrictions state repeatedly that all tourism or recreational travel is prohibited. However, in fact and in law, it is not so. A fully-hosted trip can be totally recreational; a Cuban who legally visits family in Cuba is free to engage in recreation.

Furthermore, in the last few years, there has been a steady flow of celebrities, tour groups, and just plain tourists going to Cuba. For example, newspapers and the Web have reported that visitors to Cuba have included:

- 60 Baltimore Little Leaguers;
- Basketball coach Bobby Knight, to fly fish and conduct basketball clinics;

- Delegations from the U.S. Chamber of Commerce (even though U.S. businesses cannot do business there).

U.S. travel companies advertise apparently legal trips for cigar aficionados, photo enthusiasts, and music and dance fanatics. The National Geographic Society and many cultural, alumni, senior, and even veteran's groups run cultural trips to Cuba; yet U.S. law does not include an exception for cultural travel. One U.S. company advertises trips to Cuba's nightlife and beaches. These licensed trips would seem to be recreational.

In total, somewhere between 160,000 to 300,000 U.S. citizens visit Cuba annually; only about 100,000 do so legally, while the rest slip in through third countries. Going through Canada, Mexico, or the Bahamas is not legal, of course, but thousands of Americans do it annually.

Prosecutions are rare, although they do occur. If you are caught, do not lie, but do not admit that you bought anything in Cuba or that you spent any money in Cuba.

DEPARTMENT OF THE TREASURY
Office of Foreign Assets Control
WASHINGTON, D.C.

OFAC No. 02-53-0798

July 26, 2002

Alejandro Cruz
463 Cespedes
San Cabo, Columbia 60001

Request to Furnish Information Regarding Possible Criminal Violation of Section 515.201 of Trading With the Enemy Act

Dear Mr. Cruz:

This is in reference to your entry into the United States on July 2, 2002 at San Cabo International Airport, State of Columbia. At that time, you acknowledged to a Customs Service Inspector that you had been to Cuba. The Customs Report is enclosed.

Section 515.201 of the Trading With the Enemy Act, administered by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury, prohibits all persons subject to the jurisdiction of the United States from travel-related transactions in Cuba, unless authorized under a license.

The Trading With the Enemy Act provides that, unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in prohibited travel-related transactions. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that (1) no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States, or (2) the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States, and payments made on the traveler's behalf were not in exchange for services provided to Cuba or any national thereof.

Accordingly, would you provide to this Office a signed statement under oath explaining whether you engaged in travel-related transactions in Cuba pursuant to a license? If you claim to have traveled pursuant to a license, provide documentation of the purpose and activities of your travel to Cuba; provide the number, date, and name of the bearer of the license; and, if still in your possession, provide a copy of the license itself.

If you claim not to have engaged in travel-related transactions in Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities.

If you claim to have been a fully-hosted traveler to Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. The statement should also state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. It must be accompanied by an original signed statement from the host, confirming that the travel was fully-hosted and the reasons for the travel.

Since there is no question that you traveled to Cuba, the failure to establish that your travel was pursuant to a license, or that there were no travel-related transactions in Cuba, or that you were a fully-hosted traveler, could result in a criminal prosecution for violation of the Trading With the Enemy Act.

Your response should be mailed within 10 days to: Sanctions Coordinator, OFAC, U.S. Department of the Treasury, Washington, D.C.

OFFICE OF FOREIGN ASSETS CONTROL

Clara Charles
Washington Sanctions Coordinator

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

Report (Customs Form 110 A)

Case No. CS: 02-53-0798
Report Type: Seizure/Forfeiture of Cuban-origin commodities
Officer's Name Badge: Customs Inspector Paul Nardella, #26262
Office/Location: San Cabo International Airport, State of Columbia
Report Date/Time: July 2, 2002, 3 p.m.
Suspect/Victim/Reporting Party: Alejandro Cruz, U.S. Passport #0534123132.
Address: 463 Cespedes, San Cabo, Columbia 60001 Telephone: (301) 703-6034
DOB: 3/30/66, Falls Church, Columbia. M. Cauc, 5-9, 160, Brn eyes
Seized or Forfeited Property: 2 boxes, 25 cigars each of Cohiba Esplendidos. 1 box, 25 cigars of Cohiba Habanos. Total 75 cigars. 2 bottles Havana Club Anejo Reserva Rum. 5 "Che" key chains. One Cuban 3-peso coin.
Action Taken: Forfeiture of Cuban-origin commodities and referral to OFAC, Washington Office.
Narrative: On date of report, Customs Inspector (CI) Nardella was assigned to an Inspector's secondary examination station, San Cabo Customs. Alejandro Cruz was selected for a random inspection by a roving inspector and referred to CI's inspection station. Passport in order. Entry and exit stamps from Jamaica, Montego Bay, in accord with Customs Declaration (Form 6059B), listing arrival on Air Jamaica # 666. No entry or exit stamps indicating travel to Cuba. Passport not retained. No commodities declared. CI asked Cruz if he had anything to declare. Cruz responded no. "No tobacco or alcohol products?" CI asked. Cruz again responded no. CI performed hand search of luggage. Discovered Cuban-origin commodities listed above wrapped in dirty clothing and stuffed inside an empty camera bag. CI asked Cruz why he had not listed the commodities on Customs Declaration. Cruz said that he estimated that they were within $400 duty-free exemption and it was not necessary to write in. CI responded that that is correct if items are orally declared. Cruz responded, "That's been done now, right?" CI responded that was correct but these are Cuban-origin commodities. Cruz volunteered that he had bought the Cuban-origin commodities in Jamaica, so he did not believe that they "were a problem with

the Cuba embargo." CI responded, "So you did not buy these commodities in Cuba?" Cruz said, "No. I bought them in the duty-free store leaving Montego Bay, Jamaica." (This Customs Officer has observed the same items carried by passengers coming from Montego Bay.) CI informed Cruz that it did not matter where he bought them, as U.S. law does not permit the importation of Cuban-origin commodities even if purchased in another country. CI informed Cruz that Cuban-origin commodities would have to be seized and that unless he was licensed to import or transport Cuban-origin commodities, he would be required to forfeit the Cuban-origin commodities. CI informed Cruz that he would have to wait while CI filled out a Seizure Report identifying the Cuban-origin commodities. Cruz was observed to be agitated and nervous. Cruz volunteered that he "misspoke." He had not bought the items. They were gifts. He said several times, "I did not pay for them." Cruz said he had read that the U.S. embargo of Cuba was "over." CI asked Cruz where he'd read that, and Cruz said, "Right here," waving a copy of the Freedom's Caribbean he was carrying. Cruz said that he read that no one had ever been prosecuted for violating the embargo. "Why did you single me out?" Cruz said in a raised voice. CI responded by asking Cruz to calm down. CI said that he thought that Cruz said he had not been to Cuba. Cruz responded, "I did not spend any U.S. dollars" on the Cuban-origin commodities. CI responded OK, that he would put on the seizure form that the commodities had not been purchased in Cuba and that Cruz had not been in Cuba. Cruz responded the CI had "misunderstood me. I was in Cuba. I received the cigars as gifts in Cuba." CI inquired what Cruz was doing in Cuba. Cruz responded that he thought he "better not say anything else." Thereafter Cruz refused to respond and repeated that he "better not say anything else." CI explained to Cruz that not all travel to Cuba was prohibited, that if he was in a category that qualified for a general license he could travel there and bring into the U.S. up to $100 worth of Cuban-origin commodities. CI explained that if he had family members in Cuba or was a journalist or a professor working in Cuba he could bring in the Cuban-origin commodities. CI asked Cruz whether he had traveled to Cuba as part of a specific license held in the name of another, such as an educational or professional tour. Cruz's response to each of these suggestions was that he "better not say anything else." CI offered Cruz the opportunity to talk to a Custom Service supervisor-on-duty if he wanted to explain his presence in Cuba. Cruz declined. CI explained process to reclaim property or accept forfeiture. Cruz said, "Keep it. You and your buddies can enjoy the cigars." CI informed Cruz that the contraband would be smoked — in the Customs Service incinerators.

THURSDAY AFTERNOON
AUGUST 1, 2002

California
Bar
Examination

Performance Test B
LIBRARY

U.S. v. ALEJANDRO CRUZ

LIBRARY

SELECTED PROVISIONS OF THE TRADING WITH THE ENEMY ACT

* * *

Section 515.201. Transactions involving designated foreign countries or their nationals.

(a) All of the following transactions are prohibited, except as authorized by the Secretary of the Treasury by means of licenses, if such transactions involve money or property in which any foreign country designated under this section, or any national thereof, has any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any money, property, or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any money, property, or property interest subject to the jurisdiction of the United States.

(b) For the purposes of this section, and subject to the President's declaration, the term "foreign country designated under this section" includes . . . Cuba . . . .

(c) Any person subject to the jurisdiction of the United States who engages in any of the foregoing transactions is in violation of this section and is subject to civil action and remedies and, if such person engages in any such transaction willfully, to criminal prosecution and sanction.

* * *

Section 515.420. Fully-hosted travel to Cuba.

A person subject to the jurisdiction of the United States who is not authorized to engage in travel-related transactions in which Cuba has an interest will not be considered to violate the prohibitions of Section 515.201 when a person not subject to the jurisdiction of the United States covers the cost of all transactions related to the travel of the person subject to the jurisdiction of the United States.

Section 515.421. Presumption of travel-related transactions.

Unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in travel-related transactions prohibited by Section 515.201. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States or showing that the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States and that payments made on the traveler's behalf were not in exchange for services provided to Cuba or any national thereof. The statement should address the circumstances of the travel and explain how it was possible for the traveler to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. If applicable, the statement should state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. Travelers fully-hosted by a person or persons not subject to the jurisdiction of the United States must also provide an original signed statement from their sponsor or host, specific to that traveler, confirming that the travel was fully-hosted and the reasons for the travel.

* * *

SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

* * *

Rule 3.21. Meritorious claims and contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding may nevertheless so defend the proceeding as to require that every element of the case be established. A lawyer for a person who may become subject to a criminal proceeding may decline to aid in the investigation of the case.

* * *

Rule 4.1. Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a contemporaneous or future criminal act by a client, unless disclosure would reveal confidential information obtained from the client and the criminal act in question is not likely to result in imminent death or substantial bodily harm.

COMMENT

Misrepresentation. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Confidential Information. A lawyer is generally under a duty to preserve client confidences. A lawyer is also generally required to be truthful to others. Rule 4.1(b) effects an accommodation between the general requirement of truthfulness to others and the general duty to preserve client confidences.

* * *

SANDSTROM v. MONTANA
Supreme Court of the United States, 1979

Defendant had confessed to the slaying of Annie Jessen. In a Montana state court prosecution for deliberate homicide, defendant's attorney informed the jury that, although defendant client admitted killing Jessen, he did not do so "purposely or knowingly," and was therefore not guilty of "deliberate homicide" but of a lesser crime. Defendant presented no evidence. At the prosecution's request, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The jury found defendant guilty of deliberate homicide. Defendant, who was 18 at the time, was sentenced to 100 years in prison. The Montana Supreme Court affirmed, and certiorari was granted.

The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the requirement of the Fifth and Fourteenth Amendments' due process clauses that the prosecution prove every element of a criminal offense beyond a reasonable doubt. We hold that it does and reverse.

The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. Defendant's jurors were told that "the law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory, as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of defendant's voluntary actions (and their "ordinary" consequences), unless defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence — thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. Although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome

only "by a preponderance of evidence contrary to the presumption." Such a requirement shifts the ultimate burden of persuasion on the issue of intent.

In In re Winship (U.S. Supreme Ct. 1979), we stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clauses of the Fifth and Fourteenth Amendments protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that defendant's jurors actually did proceed upon one or the other of these latter interpretations.

Thus, the question is whether the challenged instruction had the effect of relieving the prosecution of the burden of proof enunciated in Winship on the critical question of defendant's state of mind.

We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error, which on the facts presented must be deemed prejudicial.

Reversed.

BUSTOS v. IMMIGRATION AND NATURALIZATION SERVICE
United States Court of Appeals, Fifth Circuit, 1990

Pedro Bustos appeals from the Board of Immigration Appeals' final order of deportation. Because the immigration judge did not err in admitting an Immigration and Naturalization Service (INS) Form I-213, Record of Deportable Alien, and because Bustos did not refute any of the statements in the form which were sufficient for a prima facie showing of deportability, we affirm.

At the deportation hearing, Bustos identified himself, but refused to plead to the order to show cause and refused to answer the immigration judge's questions. The INS submitted a Form I-213 Record of Deportable Alien relating to a Pedro Bustos, which stated that he is a native and citizen of Mexico who had been in the United States since 1981. Attached to the form is an attestation by the INS's trial attorney that it is authentic and a true and correct copy of the original document taken from the INS's files. No further evidence was presented, and the judge found Bustos deportable.

We must decide whether the information in Form I-213 is by itself sufficient to make a prima facie showing of deportability, requiring the alien to produce evidence of legal presence in this country.

First, it is well established that a deportation hearing is a purely civil proceeding and that the alien is not entitled to all the constitutional safeguards of a criminal defendant.

Nonetheless, due process standards of fundamental fairness extend to the conduct of deportation proceedings. The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair. The affidavit of the examining officer shows that the information in the Form I-213 is based upon statements of Bustos, and Bustos does not contest their validity.

Although the government has the ultimate burden of proving deportability by clear and convincing evidence, in a deportation case charging deportability of an alien who entered the country without inspection, the government need only show alienage.

8 U.S.C. §1361 provides in pertinent part:

> In any deportation proceeding, the burden of proof shall be upon such person to show the time, place, and

> manner of his entry into the United States . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

Thus, 8 U.S.C. §1361 imposes a statutory presumption that the alien is in the country illegally, and that the burden shifts to the alien to prove that he is here legally.

Once the form was properly admitted, the INS's prima facie case of deportability was made. The burden of proof then shifted to Bustos. No abridgement of his constitutional rights was involved in imposing that burden on him.

Affirmed.

UNITED STATES v. FRADE

United States Court of Appeals, Eleventh Circuit, 1985

Father Joe Morris Doss, Rector of Grace Episcopal Church in New Orleans, and Father Leopold Frade, Curate of Grace Episcopal Church and Chairman of the National Commission for Hispanic Ministry, appeal their convictions for criminal violation of Section 515.415 of the Trading With the Enemy Act (TWEA). This provision makes unlawful any transaction "when in connection with the transportation of any Cuban national . . . unless otherwise licensed." The prohibited transactions included "transportation by vessel," the "provision of any services to Cuban nationals," and "any other transactions such as payment of port fees and charges in Cuba and payment for fuel, meals, lodging."

The events giving rise to the convictions are those of the now famous Mariel boatlift, or freedom flotilla, of spring 1980, by which some 114,000 Cuban refugees, in nearly 1,800 boats, crossed the 90 miles of ocean and great political divide between Cuba and the United States. In early April 1980, some 10,800 Cuban citizens claiming status as political refugees sought sanctuary in the Peruvian Embassy in Havana. On April 14, 1980, President Carter declared that up to 3,500 of these refugees would be admitted into the United States. An airlift was started, but within three days Castro stopped the flights, announcing that anyone who wanted to leave could do so through the harbor of Mariel. Almost immediately, small boats, funded by the members of the Cuban-American community, began leaving Key West.

Cuban-American parishioners of Grace Church implored Fathers Frade and Doss to help in arranging for a boat to bring their relatives from Cuba. A meeting held by the priests at Grace Church on May 3 to organize the rescue mission was attended by 650 people and met with immediate overwhelming response. Within forty-eight hours, $215,000 was raised.

Fathers Frade and Doss commenced negotiations with the Interest Section of the Cuban Government in Washington to obtain the release of family members and political prisoners. They obtained assurances that they would not be forced to bring back criminals, the mentally ill, or other undesirables that the Cuban government was then forcing into the Mariel boatlift. The Cuban Interest Section insisted that Fathers Frade and Doss turn over the list of the people they proposed to pick up. The priests submitted a list of 366 names which were immediately telexed to Havana. Although Fathers Frade and Doss understood that, in the week following their meeting at the Cuban Interest Section, the Administration's attitude towards the boatlift had changed, they

realized that, once the names had been telexed, they had passed the point of no return. Father Frade had been told by a Cuban official that a "national purge was taking place," those applying for permission to leave Cuba were losing jobs, houses, and ration cards, and sometimes being attacked, beaten and killed. As the district judge observed at sentencing, "Once the list of names had been given over to the Cuban officials . . . it would have been very difficult, a very difficult decision of conscience to stop at that time."

On May 26, 1980, the God's Mercy, a large, safe vessel, equipped with $10,000 in added safety equipment, and manned by an experienced crew, including a doctor and a nurse, set sail for Mariel. After two weeks of intense negotiation, Fathers Frade and Doss succeeded in obtaining commitments to release the persons on their lists. On June 12, 1980, the God's Mercy arrived in Key West, with the priests and 402 refugees including 288 persons from the lists.

The God's Mercy was escorted into Key West by two Coast Guard cutters. Fathers Frade and Doss were arrested immediately, and the indictment under the TWEA was brought. After trial, Fathers Frade and Doss received $431,000 in fines and the God's Mercy was forfeited to the government.

Fathers Frade and Doss contend that the trial court erred in denying their motion for judgment of acquittal on the ground that there was no evidence to establish the requisite mental state for a criminal violation of Section 515.415 of the TWEA.

To be criminal, violation of the TWEA must be "willful." "Willfulness" is expressly required in some provisions of the act, such as Section 515.201, and impliedly required in the rest, including Section 515.415, with which we are concerned here. When used in a criminal statute, the word "willfully" generally connotes a voluntary breach of a known legal duty. Section 515.415, under which the priests were convicted, was enacted into its operative form unexpectedly and with little publicity on May 15, 1980 — after the list of names had been tendered to Cuba. It criminalized behavior (travel to, from, and within Cuba), which previously had been expressly authorized and which, in fact, remained lawful for a time, except when done in connection with the transportation of Cuban nationals, an activity which also is not generally criminal. It penalized the paying of port fees in a foreign harbor and duly incurred hotel, motel and restaurant bills if done to assist the transportation of Cubans to the United States. These are activities which laymen do not consider wrong nor lawyers classify as malum in se.The government argues that the evidence demonstrated the necessary mental state for a criminal

violation of Section 515.415 of the TWEA. The government relies principally on the testimony of government officials who stated that they had warned the priests that the venture might be against the law. The government also relies on the priests' knowledge that they might be liable for repeat trips or boat safety violations; that they might be subject to forfeiture of their vessel under civil statutes; and that the government generally disapproved of the boatlift as dangerous and inadvisable.

However, the finding that a defendant is aware of matters such as those stated above is insufficient to sustain a finding of guilt under a statute requiring a voluntary breach of a known legal duty.

The government also argues that the priests' own behavior, including their fears and expressed concerns, indicated a voluntary breach of a known legal duty. The government relies on the priests' decision to captain the God's Mercy on the return voyage so that any possible onus might fall personally on them, and their own trial testimony that they would have gone ahead with the mission regardless of the law because of their moral commitment to those whose names were on the list submitted to the Cuban government. Their fears and expressed concerns, however, were understandable as normal caution and worry for the welfare of all concerned. They were simply insufficient to sustain a finding of a voluntary breach of a known legal duty. The judgment of the district court must be reversed.

UNITED STATES v. MACKO

United States Court of Appeals, Eleventh Circuit, 1999

Defendant Ralph Macko was accused of selling cigarette-packaging machinery and supplies to Cuba in violation of Section 515.201 of the Trading With the Enemy Act (TWEA). After a jury found Macko guilty, the district court held that the evidence was insufficient to support the guilty verdict. The United States appealed.

The evidence presented during the government's case-in-chief shows that the sales were through freight forwarders in Panama. The invoices did not disclose that Cuba was the ultimate destination. Macko visited Cuba by going through third countries.

In its order explaining the judgment of acquittal, the district court described the government's evidence as "primarily a paper case, made up of letters, faxes, shipping invoices, and other documents." This "paper trail," the court stated, "has too many twists and turns and dead ends to establish more than a tenuous inference that Macko acted with the requisite mental state for a criminal violation of Section 515.201 of the TWEA." The district court observed that the circumstantial evidence against Macko "is susceptible of more than one interpretation." The jury could reasonably infer that Macko knew that his conduct was generally unlawful, the court says, but such a general awareness of illegality is not sufficient to establish guilt here. Only by "mere speculation" could a jury conclude that Macko acted with the mental state required.

According to the government, the evidence against Macko, though circumstantial, established that he was aware of the prohibitions of the Cuban trade embargo and that he acted with the intent to avoid them to his profit.

In Section 515.201, the TWEA prohibits the sale of merchandise to Cuba or Cuban nationals without a license from the Office of Foreign Assets Control. Though a child of the Cold War that ended seven years ago with the Soviet Union's extinction, the Cuban embargo remains very much alive. The TWEA limits transactions with Cuba for many purposes, including both trade and travel, although subject to many exceptions. Its primary purpose is to stop the flow of hard currency from the United States to Cuba.

In United States v. Frade (11th Cir. 1985), we held that "willfulness" under the TWEA entails a voluntary breach of a known legal duty.

To establish that Macko voluntarily breached a known legal duty, the government had to prove that he knew of the prohibition against dealings with Cuba and nevertheless violated it.

In United States v. Frade, the defendants were two Episcopal priests who arranged for a ship to bring 402 Cuban refugees to the United States in 1980 during what became known as the Mariel boatlift. While the priests were laying their plans, President Carter's administration attempted to gain some control over the sudden mass immigration by amending the TWEA to generally criminalize travel to or from Cuba in connection with the transportation of Cuban nationals. We held that the evidence did not establish that the priests voluntarily breached a known legal duty, principally because the government failed to establish that the priests had knowledge of any such duty.

The case against Macko is more convincing than the case against the priests in Frade. Indeed, Frade recites considerable evidence that the priests did not know about the provision of the TWEA at issue there. That provision barred conduct that until then had been expressly authorized by a different provision. Although U.S. officials warned the priests that their boatlift might be illegal, that is all that they did, and that was insufficient. Furthermore, the priests did not attempt to hide their travel to and from Cuba.

In this case, on the other hand, the trade ban in Section 515.201 of the TWEA was promulgated neither quietly nor unexpectedly. It was in effect long before Macko involved himself in the Cuban cigarette plan, and it was widely publicized. The provision does not apply only to certain goods or activities but states a broad prohibition against transactions with Cuba or Cuban nationals. We also find it telling that Macko actively concealed his travel to Cuba as well as the final destination of the cigarette machinery and supplies. He did not attempt to shield his contacts with Panama or Panamanians, nor did he hide the fact that he was acquiring cigarette-packaging machinery and supplies. The one aspect of the operation that he kept secret was the Cuban connection. Macko traveled to Cuba through Panama in a manner that left no reference to Cuba on his passport. Macko initially lied to U.S. Customs agents about traveling and sending equipment to Cuba. Macko's correspondence about the project with other participants scrupulously avoided mentioning Cuba by name. Macko had experience in exporting machinery from the United States and was involved in international sales of various goods.

The inference that Macko acted as though it was illegal to deal directly with Cuba would seem to satisfy the element of voluntary breach of a known legal duty. A jury could reasonably conclude that Macko's secrecy about this single fact resulted from his knowledge of the Cuban embargo. Consequently, the district court erred in granting Macko's motion for a judgment of acquittal on the charge of criminal violation of Section 515.201 of the TWEA.

Reversed.

ANSWER 1 TO PERFORMANCE TEST - B

1) PT-B *(Essay)*

1. Prepare for me a memorandum that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuring criminal trial.

2. Prepare a memorandum for me on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

M E M O R A N D U M

TO: Matt Mato

FROM: Applicant

RE: U.S. v. Alejandro Cruz

DATE: August 1, 2002

You have asked that I prepare a memorandum that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

A. The elements of a criminal violation of Section 515.201 of the Trading with the Enemy Act (TWEA) are as follows:

(1) any person
(2) subject to the jurisdiction of the United States
(3) willfully
(4) engages in a transaction

(5) involving money or property in which Cuba or any national thereof has any interest of any nature whatsoever, direct or indirect,
(6) including (A) transfers, withdrawals, or exportations of any money, property, or evidences of indebtedness of evidences of ownerships of property by any person subject to the jurisdiction of the United States, and (B) transfers outside the United States with regard to any money, property, or property interest subject to the jurisdiction of the United States.

Three exceptions exist:
(I) transactions pursuant to license,
(II) "fully-hosted travel," that is, where a person not subject to the jurisdiction of the United States covers the cost of all transactions related to the travel of the person subject to the jurisdiction of the United States,
(III) "no transactions travel," that is, where a person travels to Cuba and no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States.

In some sense exceptions II and III are not really exceptions; when their terms are true, it means that no prohibited transactions occurred so that element 6 was not met.

B. Evidence the government now possesses to establish each element

"ANY PERSON"

This is not defined in the statute or materials in the file, but it is safe to assume that "any person" includes an individual human being and the government surely can prove Cruz is an individual, through his presence. That is, the fact finder will be able to observe that Mr. Cruz is an individual.

"SUBJECT TO THE JURISDICTION OF THE UNITED STATES"

This important operative phrase similarly is not defined. However, it is safe to assume that it includes a U.S. citizen. I assume that Mr. Cruz is a United States citizen. Although I cannot find a statement to that effect in the file, the Customs Service Report notes that Cruz has a U.S. Passport (#053412313 2). The Customs Report says that Cruz's passport was returned to Cruz, but the government could obtain it from him by a subpoena. The 5th Amendment right against testimonial self-incrimination, which applies to the federal government, which would be the prosecuting government here, does not extend to non-testimonial things like passports. Thus, the government can acquire the passport by subpoena and use it to prove Cruz is a U.S. citizen and subject to the jurisdiction of the United States.

"WILLFULLY"

This is doubtless the most important element in our case. Macko and Frade cases interpreted the meaning of willfully in this context. Technically Frade, a 1985 case, interpreted "willfully" as used in Section 515.415 of the TWEA. However, Macko, a 1999 case, interpreted willfully as used in Section 515.201 and cited Macko. Hence it appears that willfully has the same meaning in both sections so that both cases are relevant in construing willfully as used in 515.201. Note as well that Macko and Frade are 11th Circuit cases, which is understandable as Florida is located in the 11th Circuit and many of these cases would be expected to arise there. I do not know what circuit in which Columbia is located. The US Constitution requires that a federal criminal trial be brought in the district in which the crime allegedly occurred. The crime/alleged crime here occurred in Cuba, and I do not know how the venue would work for that; probably venue would lie in the district in which the defendant resides. Cruz resides in Columbia, so he would be tried in federal district court in the relevant district of the Columbia Federal District Court. Such court would be bound by the decisions of its circuit and not necessarily bound by the decisions of the 11th Circuit (assuming of course that Columbia is not in the 11th Circuit). Nonetheless the Macko and Frade cases are persuasive, if not binding, authority.

Macko, citing Frade, defines willfully as used in Section 515.201 as "the voluntary breach of a known legal duty." To prove that Macko voluntarily breached a known legal duty, the government had to prove that he "knew of the prohibition against Cuba and nevertheless violated it."

Macko is a very problematic case for Cruz. It permitted an inference that the defendant knew of the prohibition against Cuba and nevertheless violated it under facts remarkably similar to ours.

Presently the government has the following evidence to prove that Cruz "knew of the prohibition against Cuba and nevertheless violated it."

First I note that, from the interview, Cruz has said that the customs report is embarrassingly accurate.

One, Cruz actively concealed his travel in two regards: Cruz traveled to Cuba in a manner that left no reference to Cuba in his passport and Cruz did not attempt to hide his dealings with the third country, Jamaica, through which Cruz cleansed his travel. Macko did the exact same two things (his third country was Panama) and the court found this evidence of active concealment, that is, a scheme to make it appear that travel had been only to the third country. The government can prove these two elements from the customs report and Cruz's passport. According to the Customs Report, Cruz virtually admitted to traveling to Cuba [see discussion below] and Cruz's passport did not bear any indicia of having visited Cuba.

[Note that your question to me does not specifically whether [sic] the government's evidence would be admissible in a criminal trial, but I'll briefly address. Although the Customs Report is hearsay, many exceptions exist. In fact, the entire report probably will be admissible under the "business records" exception since the customs service regularly makes such reports, and the reports are made by customs service employees with personal knowledge of the events, and the practice is to accurately record the events. The business records exception has an exception for reports prepared in anticipation of litigation, but it is not clear that customs reports are in anticipation of litigation. Even if they are, the government could call CI Nardella and she [sic] could testify about what Cruz said. Such statements would not be hearsay, as they would be statements of a party.]

Two, Cruz initially lied to US Customs Agents about his transactions involving Cuban items. Macko identified that as relevant evidence as to willfulness. The Customs Report shows that Cruz initially said in answer to the question "So you did not buy these commodities in Cuba?" "No, I bought them in the duty-free store leaving Montego Bay, Jamaica." Later, Cruz said that he had not bought the items, that they were gifts. Still later, "CI said that he thought that Cruz had said he had not been to Cuba." Cruz did not answer that remark except to say that "I did not spend any U.S. dollars." The parsing of this language is intricate. From it, Cruz did not say, "I never have been to Cuba." However, Cruz did not affirmatively deny CI's statement, "I thought that you said you had not been to Cuba." Because Cruz did not deny it, it could be regarded as an admission that Cruz had been to Cuba. However, that affirmation by silence cannot be made if the affirmative statement would be incriminating as it would have been here. Nonetheless, the statements in the Customs Report would be strong circumstantial evidence to allow a fact finder to conclude that Cruz had been to Cuba. Indeed, the government has so concluded. Its letter states, "You admitted going to Cuba; tell us how you did not violate the TWEA." Thus, while we could intricately parse the conversations between CI and Cruz and argue that Cruz never admitted going to Cuba, a fact finder could infer that he had been there. However, the fact finder could find otherwise.

Three, Cruz otherwise lied to and was deceitful with Customs. Cruz specifically denied that he had tobacco or alcohol products, but he had them. As well, Cruz's statement that he thought they were within a $400 allowance is negated by the secretive nature in which he packed them – wrapped in dirty laundry, stuffed inside an empty camera bag. The lying and secretive nature are deadly evidence as they show knowledge of the prohibition and strongly indicate Cruz's willful violation.

Fourth, Cruz is a well-versed traveler. Macko indicated that this was relevant to a conclusion that the defendant knew of the prohibition. As well, in the report Cruz is heard to say that he thought the US embargo of Cuba was over. That was not true, and even as the statement stands, it suggests that Cruz was aware of the embargo. In addition, Cruz waved the Freedom's Caribberan book and if put into evidence it would show that it informed Cruz that what he was doing was illegal and it also gave the roadmap for deceit that Cruz followed.

ENGAGES IN A TRANSACTION

The government has the following evidence, cigars and rum and a Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba. The coin is the most damaging. It gives a strong inference that Cruz engaged in a transaction with a Cuban national.

INVOLVING MONEY OR PROPERTY IN WHICH CUBA OR ANY NATIONAL THEREOF HAS ANY INTEREST WHATSOEVER, DIRECT OR INDIRECT

The government has the cigars, rum and Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba.

INCLUDING (A) TRANSFERS, WITHDRAWALS, OR EXPORTATIONS OF ANY MONEY, PROPERTY, OR EVIDENCES OF INDEBTEDNESS OR EVIDENCES OF OWNERSHIP OF PROPERTY BY ANY PERSON SUBJECT TO THE JURISDICTION OF THE UNITED STATES, AND (B) ALL TRANSFERS OUTSIDE THE UNITED STATES WITH REGARD TO ANY MONEY, PROPERTY OR PROPERTY INTEREST SUBJECT TO THE JURISDICTION OF THE UNITED STATES

The government has the cigars, rum and Cuban 3-peso coin. It also has the above evidence tending to prove that Cruz traveled to Cuba.

C. Determine whether the government constitutionally may use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

The government may not.

Section 515.421 provides that any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in travel-related transactions prohibited by Section 515.201.

The due process clause of Fifth Amendment to the US Constitution requires that the prosecution prove each and every element of a criminal offense beyond a reasonable doubt. (US Sup Ct case of Sandstrom, which technically construed the 14th Amendment due process clause but indicated that for this purpose the clauses are the same, so did In re Winship).

The question of the permissible reach of presumptions in criminal cases is an intricate issue. Certainly a presumption cannot create an irrebuttable or conclusive presumption. That is, upon proof of the primary fact, travel to Cuba, the jury may not be told that it must conclude that the presumed fact, engaging in travel-related transactions, exists. However, the presumption under

515.421 permits the rebuttal of the presumption by evidence to the contrary. But this is still like the presumption in Sandstrom. In Sandstrom the presumption was not irrebuttable, the defendant was permitted to offer evidence against it, but there the presumption could be overcome only if the defendant showed "by a preponderance of evidence contrary to the presumption."

Thus the presumptions in Sandstrom and the TWEA are indistinguishable. Neither was an irrebuttable presumption, as each permitted a rebuttal, but each required the defendant to rebut it by evidence. Although the TWEA does not expressly state that the counter evidence must create a preponderance of the evidence, that can be fairly inferred from the text. Under Sandstrom, the government may not create a presumption in a criminal case in which an element of the offense is proven by a presumption capable of being overcome only if the defendant shows the contrary by a preponderance of the evidence. Such a requirement shifts the ultimate burden of persuasion, and the prosecution must prove each and every element of a criminal offense.

Note that such a presumption is proper in a civil case, even one in which a significant interest like deportation is at issue. Bustos. The TWEA has both civil and criminal sanctions. The presumption in Sec. 515.421 properly could be applied to the civil aspects of the TWEA.

M E M O R A N D U M

TO: Matt Mato

FROM: Applicant

RE: U.S. v. Alejandro Cruz

DATE: August 1, 2002

You have asked that I prepare a memorandum on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

First, given our knowledge from the Cruz interview, we know that Cruz is guilty of violating the TWEA. Cruz "knew of the prohibition against Cuba and nevertheless violated it." Cruz, with knowledge of the prohibition, traveled to Cuba and engaged in prohibited transactions with Cuban nationals. Thus, if the government proceeds against Cruz civilly under the TWEA, we cannot defend because we would know that such a defense is frivolous. We would violate Rule 3.21.

However, under that same rule, "A lawyer for the defendant in a criminal proceeding may nevertheless so defend the proceeding as to require that every element of the case be established.

Is The OFAC Letter a Civil or Criminal Matter?

The letter threatens criminal prosecution. It says that since there is no question that Cruz traveled to Cuba, failure to document one of the three exceptions could result in a criminal prosecution for violating TWEA.

The most appropriate response is for Cruz to decline to answer on the grounds that an answer might incriminate him. The Fifth Amendment to the US Constitution provides that no person can be made

to testify against himself. Ethically we can advise Cruz to take such a position, because under Rule 4.1, a lawyer has no affirmative duty to inform the opposing party, here the federal government, of relevant facts.

We cannot counsel Cruz to answer the letter in any way other than silence. The letter asks Cruz to establish one of the three exceptions to the TWEA travel rule. We know that none are met. Cruz did not have a license; his was not hosted travel; nor did he engage in no transactions (we know he spent about $2000). Thus, if Cruz were to answer and claim any of those exceptions we know that he would be lying and we cannot permit a client to lie. Thus, we have to tell him that he either takes the Fifth or he incriminates himself in a truthful answer. If he wanted to falsely reply, we would have to counsel him against that, and, if he insisted, we would have to withdraw.

In addition, we are in the delicate position of knowing that our client has committed a crime.
We know that all the elements of the offense were met, and although the government may have some difficulty proving them, ethically we can require the government to establish every element of the case.

As well, we are not required to disclose the fact that Cruz has committed a crime. We learned that information through a confidential communication. Under Rule 4.1 we must not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a contemporaneous or future criminal act by a client unless disclosure would reveal confidential information obtained from the client and the criminal act in question is not likely to result in imminent death or substantial bodily harm. That rule does not require us to disclose. First, Cruz's crime was in the past; it is not contemporaneous or future. Second, disclosure would reveal confidential information obtained from the client. Third, the crime did not involve death or substantial bodily harm.

CONCLUSION

"Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons."

Ethically you are required to say to Cruz that he should assert his Fifth Amendment right against self-incrimination and not answer the letter. If Cruz insists on writing a letter that is untruthful (and he might, as his conduct with the Customs Officer indicates that absolute truthfulness with government officials does not come naturally to him), you have to counsel him against making false statements, especially as any response has to be under oath and would subject Cruz to a perjury prosecution, and, if Cruz insists, you have to withdraw from the representation.

On this point, we will want to point out to Cruz that this matter is a big deal. He seems to think that this is a foot fault in tennis and that his claim of selective prosecution has some merit. No matter how many other persons subject to US jurisdiction may have gone to Cuba illegally, Little Leaguers from Baltimore or not, Cruz did violate the statute and do [sic] so knowingly. In fact he had quite good knowledge of the prohibition and went to some lengths to conceal his travel. If the facts come to light, he will be convicted as surely as Macko was convicted.

Other Ethical Issues

Your interview notes that you and Cruz agreed on costs and retainer. However, you will want to ensure that you have a signed retainer agreement. Some jurisdictions like California require signed agreements when fees are expected to exceed $1000 unless there is a prior professional or familial arrangement.

ANSWER 2 TO PERFORMANCE TEST – B

MEMO

To: Matt Mato
From: Applicant
Re: U.S. v. Cruz – Elements of Criminal Violation of §515.201
Date: August 1, 2002

Per your request, this memorandum identified the elements of a criminal violation of Section 515.201 of the Trading With the Enemy Act (TWEA), the facts that the government now possess[es] to establish element, and whether the government may constitutionally use the TWEA presumption at a criminal trial. The first two items are discussed under Section I of this memo. The constitutionality of the presumption is discussed under Section II of this memo.

I. Elements and Evidence of Criminal Violation of Section 515.201

There are four elements to a criminal violation of 515.201:

(1) A person subject to the jurisdiction of the U.S., (2) engages in a prohibited transaction (3) with a designated foreign country, and (4) the person engages in the transaction willfully.

A. Element I: Person Subject to the Jurisdiction of the U.S.

1. Definition:

Although TWEA does not define this specifically, the general understanding from the cases on TWEA suggests that any person who is either a U.S. national or a U.S. resident is a person subject to the jurisdiction of the U.S. (Frade; Macko.)

Also, anyone trying to enter the U.S. may be subject to the jurisdiction of the U.S. (Frade: also "Freedom's Caribbean".)

2. Evidence Gov't. Now Possesses

Cruz tried to enter the United States. Cruz had a United States passport, which shows that Cruz is a U.S. national. (Customs Report.) This is sufficient to establish this element.

B. Element 2: Engaging in Prohibited Transaction

1. Definition

A transaction is prohibited if it involves any exchange or expenditure of money that directly or indirectly interests a foreign country designated by TWEA (§515.201(a).)

Since both direct and indirect interests are implicated, this could include direct purchases or purchases from another locale.

2. Evidence Gov't. Now Has

The government has the seized property of Cuban origin listed in the Customs Report, including cigars, rum, key chains, and a Cuban coin.

The government also has Cruz's statement, later contradicted, that he bought the items in Jamaica at a duty-free shop. Since TWEA covers both direct and indirect purchases or transactions, the government may use this statement to establish a prohibited transaction.

The government also has Cruz's subsequent statement that he got these items as gifts. If uncontroverted and believed, this could show that no prohibited transaction took place because no money exchanged hands.

Also, a transaction is NOT prohibited if Cruz has a license or was fully-hosted, or that his expenses were fully covered by someone not under U.S. jurisdiction. The government does not have any evidence that Cruz does not have a license, or that he was not fully-hosted, since Cruz had declined to answer those questions.

The government also does not have any statements from Cruz that be engaged in any prohibited transactions.

Section 515.421 allows for a presumption that prohibited transactions took place if Cruz traveled to Cuba. Whether the government can employ this presumption at trial will be discussed below. For now, the government has Cruz's statement that he was in Cuba.

C. Element 3: Foreign Country Designated By TWEA

1. Definition

Section 515.201(b) includes Cuba as a country so designated.

2. Evidence Gov't. Now Has

The gov't. has Cruz's statement that he was in Cuba, as well as the item[s] seized that were of Cuban origin.

D. Element 4: Willfulness

1. Definition

The government must show that Cruz willfully engaged the [sic] aforementioned prohibited transactions.

The 11th Circuit Court has defined "willful," as used in Section 515.201, necessary for a criminal conviction, to mean a "voluntary breach of a known legal duty." (Frade, Macko.)

In order to convict, the government must show that Cruz knew of the prohibition beyond suspicion that the activities "might" be illegal, or that the government "generally disapproved" of them. Also, the court considers whether the activities are "malum in se," or whether laymen such as Cruz generally would know or consider to be illegal. (Frade)

The government, however, can establish the requisite knowledge through inference. (Macko.) A jury may reasonably infer willful conduct based on (1) whether the prohibition was widely publicized, (2) whether the defendant actively concealed travel to Cuba, including lying to Customs Agents, and (3) whether the defendant was experienced or involved in international transactions.

2. Evidence the Gov't. Now Posses[es]

The government has Cruz's statement that he did not believe items purchased in Jamaica "were a problem with the Cuba embargo." This statement shows that Cruz did know of the embargo and its prohibitions. But the statement also show[s] that Cruz did not know that his action violated the law.

The government has the Freedom's Caribbean article, which Cruz referred to. The discussions in the article may show that Cruz knew that certain transactions may be illegal. Again, however, it may also show that Cruz did not know his specific actions were illegal, since the article discussed many exceptions, including that certain recreational trips and expenses may not be illegal.

The government also has Cruz's conflicting statements about where be obtained the Cuban items. Cruz fist stated that he bought them in Jamaica, then said he got them as gifts. These may be used to show that Cruz was lying to the Customs Agent and/or trying to actively conceal Cuban connections, which may support in inference that he knew what he was doing was wrong.

The government has Cruz's statement that there is [sic] nothing to declare before items were found. This may be inferred as a lie. But Cruz may have been correct in estimating them to be within the $400 exemption, and an oral declaration was given.

The government did not retain Cruz's passport, but the Customs Agent noted that there was no indication of traveling to Cuba. This may be the basis for an inference that Cruz was trying to cover up his Cuban connections. (Macko.) But, the inference was created in Macko because the defendant in the case traveled extensively and did not conceal his other journeys. Here, the government does not have any evidence of the extent of Cruz's travel plans and experience.

Overall, the government has evidence to suggest that Cruz knew generally of the embargo, but not evidence that he specifically knew that his particular actions were illegal and breaching a known legal duty.

II. The Gov't. Use of the 515.421 Presumption

A. The Presumption

Under §515.421 of TWEA, Cruz is presumed to have engaged in travel-related transactions prohibited by Section 515.201 if he has traveled to Cuba. Since Cruz admitted to being in Cuba to the Customs Agent, 515.421 puts the burden on Cruz to rebut the presumption.

B. Constitutionality of the Presumption

The government may not constitutionally use the presumption at any criminal trial against Cruz.

In Sandstrom, the U.S. Supreme Court held that the government may not use a presumption to shift the burden of proof onto a criminal defendant when the presumption involves an element of the crime charged. Such a presumption would shift the burden of persuasion onto the defendant regarding an element of crime, contrary to the constitution.

As the court pointed out in In re Winship, the due process clause of the 5th and 14th Amendment[s] requires the government prosecution to prove "beyond a reasonable doubt of every fact necessary to constitute the crime" charged.

Here, "prohibited transaction" is an element of a criminal violation of §515.201. The 515.421 presumption alleviates the government of proving such a transaction by presuming that Cruz engaged in them by virtue of his presence in Cuba. Since the transaction is an element of the crime charged, the government's use of the presumption would violate the constitution.

The government may argue that presumptions requiring defendant to carry the burden of proof was permitted by the 5th Circuit in Bustos. Bustos is not applicable here, however, because Bustos involved a deportation hearing, which the court characterized as a "purely civil proceeding." The Bustos court specifically pointed out that criminal defendants are entitled to more procedural safeguards.

Thus, although the government my employ the presumption against Cruz at a civil proceeding under §515.201, the government cannot use the presumption at any criminal trial against Cruz.

MEMO

Re: U.S. v. Cruz – Ethical Considerations

Per your request, below are discussions of the ethical considerations implicated as you draft a response letter on Cruz's behalf. I discussed the general ethical rules on disclosure first, then explain[ed] my reasoning as to why particular pieces of information requested by OFAC should or should not be disclosed.

I. Your Duties

A. To Mr. Cruz

First, the Columbia Rules of Professional Conduct requires you to preserve client confidences.

Here, the information Cruz gave you during the interview was all candidly shared in the course of your attorney-client relationship. Thus, you must preserve the confidentiality.

The only applicable exception is when disclosure is necessary to avoid assisting a contemporaneous or future criminal act that is likely to result in imminent death or substantial bodily harm.

Here, there is clearly no assistance of any crime, and certainly not any that is likely to result in imminent death or bodily harm. This is a routine government inquiry into Cruz's past travel activities. Thus, the exception to confidentiality does not apply, and Cruz's confidence must be strictly preserved.

B. To OFAC

You also have a duty to be truthful when dealing with another party, such as OFAC, or Cruz's behalf.

You cannot make a false statement affirmatively to OFAC in your letter or other dealings with them. You do not, however, have the affirmative duty to inform them of any relevant facts. But you cannot

incorporate or affirm any statements that Cruz has made that you know are false. (Rule 4.1, Comment.)

II. What You Can and Cannot Say

The OFAC letter requests three pieces of information: (1) whether Cruz had a license to travel to Cuba and information regarding any license, (2) how Cruz avoided engaging in travel-related expenses, and (3) details of expense if Cruz was a fully-hosted traveler.

A. Regarding the License

You are not required to, and should not, inform OFAC either [sic] Cruz does or does not have a license.

You are not required to do so because you do not have an affirmative duty to disclose this material fact. As mentioned above, there is no imminent death or harm at risk, so you are not required to disclose.

You should not disclose this information because you obtained it by way of representing Cruz, and you are under a duty to preserve its confidentiality.

Also, Cruz has not made any false statements in this regard that can be affirmed by your silence. He said nothing when asked about a license by the Customs Agent.

Lastly, you are not required to disclose this information, and not doing so would not constitute a frivolous controversy because, as a criminal defense representative, you may defend Cruz by requiring the government to prove the elements of its case.

Here, having a license takes any transaction out of the "prohibited" category. Thus, it is up to the government to prove that Cruz is not licensed.

Travel-Related Expenses

You are not required and should not disclose what Cruz told you concerning his travel expenses.

Cruz has told you that he spent $2,000 on his trip to Cuba, and that he bought cigars and rum. As discussed above, you must preserve his confidentiality, because the exception does not apply here.

Cruz told the Customs Agent that he did not pay for the items. Although that was false, you are not required to disclose what you know, and cannot disclose and breach your duty of confidentiality.

You cannot, however, in any way affirm Cruz's false statement by referring to it or incorporating it into your letter, because you may be adopting his misrepresentation.

Thus, the best thing to do is to decline to answer. As noted above, you are within your professional obligations to require that the government prove this element of the crime.

C. Regarding Fully-Hosted Travel

The considerations here are similar to those discussed under licenses.

If Cruz's travel is fully-hosted then transaction would not be "prohibited" as required by the element of the offense. Thus, you are not required to disclose your knowledge that Cruz's trip was in fact NOT fully-hosted, because you do not have a duty to affirmatively inform OFAC of this fact, and because you are permitted to require the government to meet its burden of proof.

You should not disclose what you know, that Cruz was not fully-hosted, because your duty to preserve his confidence is not excepted by any threat of death of harm.

In sum, you are ethically required to decline OFAC's request for information because you are obligated to preserve Cruz's confidence, and because you are allowed to require the government to meet its burden of proof, as long as you don't give false statements or affirm any that Cruz has made.

California
Bar
Examination

Performance Tests
and
Selected Answers

February 2003

TUESDAY AFTERNOON
FEBRUARY 25, 2003

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

MORALES et al. v. PARSONS

MORALES et al. v. PARSONS

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of

BROWN, MARRERO & MILAN

1101 Rose Parkway

Garden City, Columbia

M E M O R A N D U M

TO: Applicant

FROM: Jane Kimmel

RE: Morales and Vargas v. Parsons

DATE: February 25, 2003

I need your help on a case we are considering filing against a strawberry grower in Washoe County, arising out of a fire in a farm worker encampment on his property. Our potential clients are Juan Morales, a farm worker who was badly burned, and the family of one of his co-workers, Alberto Vargas, who was killed. The clients were interviewed about a week ago, and since then our investigator has been out to the scene of the fire and I have interviewed a prospective witness. It looks like a sympathetic case to take to a jury, but I'm not sure we have a basis for the landowner's liability under Columbia law. As you'll see from the cases I've pulled together, the Court of Appeals ruled against plaintiffs in a pair of cases with quite similar facts a few years ago.

Please draft a memorandum that identifies and presents as strongly as possible the arguments that will most likely allow our clients to prevail on:

1) The theory of premises liability; and

2) The theory of negligence per se.

EXCERPTS FROM INTERVIEW OF JUAN MORALES

* * * * *

MS. KIMMEL (**Q**): Mr. Morales, let's talk about the night of the fire. Tell me how it happened.

MR. MORALES (**A**): No one knows for sure. I was told the fire started in Alberto Vargas' tent. He was doing something in his tent, maybe mending a shirt he had torn that day. I went to bed around nine, and the next thing I knew people were yelling and trying to get out, and the flames were all around me.

Q: Was Mr. Vargas the only one who was killed?

A: Yes.

Q: What do you think might have caused the fire?

A: I think probably his lamp got knocked over, and something like paper caught fire. He had a lot of flammable things in his tent, like cardboard boxes and magazines.

Q: What kind of lamp did he have?

A: It was an oil lamp, like most of us used. It had a glass cover, with oil in the bottom, and a wick that you light with a match. These lamps are not as bright as the kind of lamp that uses kerosene, that you pump up. But they are a lot easier to use, and cheaper. If one of them tips over, though, the oil spills everywhere, and can start a fire.

Q: Did the camp have electricity?

A: No.

Q: Was water available to fight the fire?

A: There was a shower, and a faucet where you could get water. But there was no hose, and the fire was too big to use buckets, or the cooking pots that were around.

Q: You said the flames were all around you when you woke up. How did you get out?

A: I'm not sure. I know I stood up, and saw the whole wall around the tent door was on fire, and I guess I went through it. When I got outside, with my clothes on fire, I fell to the ground and my friends threw a blanket on me to put out the flames. Then they pulled me away, to a safe place.

Q: Were these canvas tents?

A: They weren't really tents like you would buy at the store. They were more like shacks, really. Mine was made of cardboard boxes flattened out and taped together. It had sheets of plastic on the outside, in case it rained.

Q: You said earlier that Mr. Vargas' tent was right next to yours. Was it made of the same kinds of materials?

A: Yes, about the same. Most of us had a piece of plywood or a tarp for a floor, and then we just made walls of whatever we could find around the place. The owner of the

farm, Mr. Parsons, let us use old boards, cardboard, whatever he didn't want. Some people had tarps that they set up like a regular tent, but they had to find a stake or a pole or something to tie them to. There weren't any big trees where the camp was, just scrub oak and bushes.

Q: Were the shacks or tents close together?

A: Yes, very close. Somebody would make a frame with stakes, and then on each side of them people would use their neighbor's frame as part of their own frame, to attach whatever they were going to use for walls -- cardboard or plastic or whatever. The shacks were in rows or groups like that. They were very close together.

Q: Approximately how many of these dwellings were there in the camp?

A: I don't know for sure. There were about fifty of us living there, and some tents housed two or three people in the same space. So there were maybe 30 or 35 tents.

Q: Was there only one water faucet and one shower for the whole camp?

A: Yes. Before, we didn't even have that. Two years ago we had to carry water from the farm, and wash ourselves from a bucket. Last year Mr. Parsons paid for pipe and let us hook up to the irrigation system and run a water line to the camp.

Q: So it seems that Mr. Parsons provided some materials and services for the camp, but not a lot. What else did he provide?

A: I don't know everything he did when the camp was first built. This was only my third year working there. But since I've been there, it was mainly the water line, and letting us use scrap materials to build the houses. For example, the plastic on the outside of my house was from the rolls we use between the rows of strawberries to keep weeds from growing. He knew we were using that and didn't charge us for it or anything. And he provided two portable toilets, and had this truck come around to empty them.

Q: Was there a way to get mail, or use a telephone?

A: Mail, yes. There was a separate mailbox out by the road for employees. To make a telephone call, it was necessary to go into town and use the pay phone. People who had been working there for a long time could give the foreman's telephone number to their families, for emergencies. He would come over to the camp and tell people to call home. But that was just for some people, and for emergencies. There wasn't really a way for the rest of us to receive telephone calls. But since we were only there part of the year, it worked out.

Q: So except for some minimal services, it seems Mr. Parsons left you workers pretty much on your own in setting up and running the camp.

A: Setting up, maybe so. But he didn't really let us run it. He had rules about who could live there, who could even visit.

Q: What rules?

A: For example, only workers could live there. No wives or families or anyone else. Women couldn't even come there.

Q: Would he actually check to see who was there?

A: Not Mr. Parsons himself, but the foreman, Rudy Mendoza, did. He came around a few times a week, checking on things. And the road to the camp went right by his house, so if anybody came in a car, he came right out.

Q: And he would actually turn people away? Say, "You can't go in there," or something like that?

A: For sure, lots of times. He might let some friends from another farm visit for a few hours, but even then he'd check up to see if people were drinking too much, and make them leave if they were.

Q: So they even regulated how much you could drink?

A: They tried to, sure. They didn't actually search people's shacks or anything, but if Rudy thought someone was getting drunk, he would confiscate his liquor. It didn't come up much, except on Saturday nights. Most Sundays, we didn't have to work, so people would stay up late and talk, play cards, have a few beers. The other days, we had to get up early, so we went to bed pretty early.

Q: Was the night of the fire a Saturday?

A: No, a Tuesday. It was quiet that night. Almost everyone had gone to bed early.

Q: You said that families weren't allowed to live in the camp. Wasn't that a real hardship for some people, if they had families in the area?

A: Well, yes and no. If they could, people would like to be with their families, but it's hard to find work. Even if their family was living in Columbia, they might be twenty miles away, or fifty miles away–who can say? Nobody has a car to drive back and forth, so if they let you live where you're working, you take it. And if your family lives far away, or you're single, why spend money on a place to live? You have that much more to send home.

Q: Were there any workers at the farm during the time you were there who didn't live at the camp?

A: Field workers, no. People would come in to work on the irrigation system or operate machines that we didn't have on the farm, things like that. But the day-to-day workers all lived there.

Q: I guess what I'm trying to get at is whether you were required to live there. Would it have been possible to live somewhere else and simply come there to work every day?

A: Possible? Maybe. If you could get to work by six in the morning and go home at the end of the day, I think it would have been okay with Mr. Parsons and Rudy. But there was no cheap place to live anywhere around there, so, really, no one could do it. If you worked there, you lived there.

Q: You said this was only your third year working at the Parsons farm. Can you think of anyone who has worked there longer, who would be able to tell us more about how the camp was set up, how long it's been there and so forth?

A: Yes. Two of my friends said they will help us, and they have worked there many years. One of them can be reached through his brother, who lives near here. The other one we can reach by sending a letter, but it will take more time.

Q: That's fine. We'll start with the one who lives close by. At this point, as I said, we're just gathering information to decide whether we have a good enough case to take to court. If we file a lawsuit, we'll have plenty of time to track down the other witnesses.

* * * * *

Law Offices of
BROWN, MARRERO & MILAN
1101 Rose Parkway
Garden City, Columbia

M E M O R A N D U M

TO: Jane Kimmel
FROM: T.C. Gutierrez, Investigator
RE: Visit to Parsons Farms
DATE: February 21, 2003

As you suggested, I parked beyond a curve in the road about a quarter mile away from the entrance to the farm, and approached on foot. Just before I reached the entrance, a beat-up panel truck drove through the gate, passed the house next to the entrance, and turned onto the dirt track leading over to the ravine on the left, where I knew the workers' camp was located. It turned out to be the regular lunch wagon--a vendor of some sort who comes in and sells food to the workers at lunchtime every day. I just followed it down to the camp, and if the foreman saw me, he probably thought I was after a sandwich. Anyway, I wasn't challenged, and I was able to hang out for almost an hour, talking to some of the workers and looking the place over. I took some pictures, and will get those to you as soon as they are developed.

The client guessed right. The camp has been completely rebuilt, if you can call it that, since the fire. The ravine is the only place that makes sense for that kind of camp, because it's one of the few places on the farm with any shade. That's why the workers go back there for lunch. At this point there are two rows of flimsy shacks or makeshift tents along the sides of the ravine, with another cluster of shacks off by itself a little farther up. The road is only passable up to the edge of the camp, and that's where the lunch wagon pulled up, and where they put the portable toilets and the dumpster for garbage.

Anyway, you'll see from the pictures that we really are talking about cardboard shacks. Some of them have an old piece of plywood for one wall, and there's some corrugated

metal or plastic here and there, but the basic building materials are plastic tarps and flattened-out cardboard. You can see that a fire would spread through the place in no time. I was able to get a photo that shows where the water faucet and shower are located in relation to the shacks, and another that shows they are just ¾ inch pipe, nothing heavy-duty or adequate for fire protection. The faucet itself is threaded, so someone could have attached a garden hose, if there had been one, but even now there is no hose in sight. Also, there is still no electricity. I was unsure how to try to document that. My shots of the camp will show there are no overhead lines, and I also have a couple of shots of kerosene lanterns hanging over the shower and cooking area.

As I said, I talked with some of the current workers, but I didn't try to get much information about the fire from them. They were pretty wary of me, even though I told some of them that I was working for a law firm that was looking into the possibility of filing a lawsuit for the people who were injured or killed. One guy actually told me he couldn't talk to me then, but could meet me in town sometime if I wanted, and told me how to set that up. If this goes further, I'll be happy to follow up with him.

I also went to the County Recorder's Office and checked the records on Parsons Farm. Parsons is the owner of record, and the property description includes the area where the camp is located. I ordered a copy of these documents.

EXCERPTS FROM INTERVIEW OF WITNESS EMILIO CRUZ

* * * * *

MS. KIMMEL (**Q**): Mr. Cruz, thank you for agreeing to let me tape record our conversation. It really is the best way to make sure I have an accurate record of what you tell me, and it also speeds things up. Could you just restate, for the record, that the taping is fine with you?

MR. CRUZ (**A**): Sure. I have no problem with it. I already told Juan I would do whatever it takes to help him.

Q: I know you did, and I know he appreciates it. Now, as I told you, the main thing I want to discuss with you is how the camp came to be set up, and how it was run. I understand you've worked off and on at the Parsons farm for many years?

A: Yes, I first started working there about twelve years ago. I worked over in Gaston Valley for a couple of years, but the rest of the time I was at Parsons.

Q: Were you there when the camp was first set up?

A: Yes, that was about eight years ago.

Q: And how did that come about? I mean, where were you workers living before that, and why did you move to the Parsons farm?

A: Well, we were living in different places, over near Wiltsville, about 25, 30 miles from the Parsons Farm. At that time we worked for a labor contractor named Sanchez. He had a couple of trucks that he would load up at his place at five in the morning, and they would drive us over to Parsons' place. But the trucks were always breaking down, you know? And then Sanchez was taking his cut. I think Parsons just wanted to eliminate the middleman, keep more of the profits for himself.

Q: So it was Parsons' idea to set up a camp at his farm?

A: I don't know if it was him or Rudy. It was Rudy who talked to us at the lunch break one day, asked us if we wanted to set up a camp at Parsons' farm, just stay there and work for them directly, every year.

Q: And the workers thought that was a good idea?

A: Sure, who wouldn't? We had to get up an hour earlier, because of the truck ride, and most of us were living in the camp at Sanchez' place, and he charged plenty of rent, which he just deducted from our pay. So we could work the same hours for Parsons at the same pay, but save money and have more time for ourselves. And I don't know if you've ever ridden in the back of a truck with 15 or 20 other people, but

that's a hard way to go back and forth to work, too. The shape those trucks were in, it felt like we were risking our lives, every time.

Q: I can see why the move made sense. So you never had to pay rent at the Parsons place?

A: No. What would they charge for?

Q: Believe me, I'm not saying they should have charged you rent, I just need to know whether they did or not. I understand you left Parsons Farm after the fire?

A: Yes. I'm lucky. I have family nearby, and I've always been able to find work.

Q: Can you tell me how the camp was first constructed?

A: Well, as I said, it was in the middle of the season, eight years ago. We moved over there on a Sunday, after we got paid that Saturday night. Mr. Parsons sent his own trucks over to pick us up with our stuff, and I think he paid Sanchez what he owed him under their contract. I'm not sure about that part. Anyway, we got over there and spent the rest of Sunday rigging up a place to sleep. Rudy took some of us into town to buy stuff we needed, like flashlights and plastic tarps, duct tape, things like that.

Q: What did you do for food?

A: Most of us had been doing our own cooking at Sanchez' place, because there was electricity there, and hot plates to cook on. So we brought over whatever food we had, and bought more in town. But we were eating out of cans that Sunday and for a few days after that. By the middle of the week Rudy got Roberto Moya, who was already selling us food at lunchtime, to bring it in at night as well. Later on we got a couple of camp stoves and fixed up a fireplace with a grill over it, but a lot of people just bought from Moya.

Q: So the foreman, Rudy Mendoza, arranged for food to be brought in?

A: I think Moya was his brother-in-law or something. It's not like we had a choice. Toward the end of the week Moya would let us buy on credit, you know? And then Rudy would take what you owed him out of your pay. So they definitely had some kind of arrangement.

Q: Do you think they were cheating you?

A: No, the food was okay, and it was pretty reasonable. I just mean that Rudy made sure that Moya didn't have any competition.

Q: And is Moya the person who still sells food to the workers every day?

A: Yes.

Q: Let's go back to the building of the camp, those first few days. Did Mr. Parsons or Rudy provide any of the materials?

A: Oh, sure. They had piled some things they thought we could use at the campsite, and there were other locations on the farm where there were stacks of old boxes, boards, things like that, that they let us use. Like there was an old henhouse on the property that wasn't being used anymore, and we took the roof from that, and some of the boards that were in good shape.

Q: Did they provide any tools you needed?

A: Yes, they let us use all the different tools. Just hand tools, you know, like hammers and shovels, things like that. There was no way to use power tools.

Q: Did they provide garbage cans and latrines from the beginning?

A: It took awhile before they had that dumpster brought in, and had a regular garbage pick-up. But the latrines, yes. They were set up before we got there.

Q: Is there anything else like that that you can think of that shows they were preparing to have you move in there?

A: Maybe the water. Like I said, we didn't get water piped to the site until last year, but before that they installed a valve on the irrigation line that ran closest to the camp, so we could get water there and carry it to the camp. They gave us the buckets, and a couple of big coolers for drinking water to keep at the camp.

Q: I know there was no telephone. What about the mail? Did they put in the mailbox right away?

A: No, I don't think they expected us to get mail, or something. It was a year or two before we had our own mailbox.

Q: Can you think of anything else they provided? If not that first year, in the years since?

A: The water line to the camp, the shower. They would save old tarps for us, things like that. All the strawberries we could eat, especially if they were too ripe to ship. And we could take anything they were throwing away. We got some dishes and stuff that way.

Q: So they didn't do that much to help. But Juan said they also didn't leave you alone, that they had a lot to say about who could live in the camp, or even who could come there, how late they could stay and so forth. Do you agree on that?

A: Oh, yeah. Lots of rules. Every year they gave everybody a copy. I brought you one.

Q: Thanks, this could come in handy. And I take it that Rudy was the main enforcer? That he actually checked up on who was there, stopped people coming in, things like that?

A: Yeah, anybody coming in had to pass his house, and he was right out there. No women. One time a nurse from the health clinic in town came out to give a guy some tests results, and she couldn't even get in. It was their private property.

* * * * *

PARSONS STRAWBERRY FARM
CAMP RULES AND REGULATIONS

- NO ONE IS PERMITTED TO LIVE ON THESE PREMISES WITHOUT THE EXPRESS PERMISSION OF THE OWNER OR HIS AGENT.

- NO OVERNIGHT VISITORS. OTHER VISITORS PERMITTED AT SOLE DISCRETION OF OWNER OR HIS AGENT.

- NO PETS OF ANY KIND.

- PLACE ALL TRASH IN DESIGNATED RECEPTACLES.

- SMOKING PERMITTED OUTSIDE OF DWELLINGS ONLY.

- NO ALCOHOLIC BEVERAGES.

- NO FIREARMS.

- NO LOUD MUSIC, TALKING, OR OTHER LOUD NOISE AFTER 10 PM, SATURDAYS EXCEPTED (MIDNIGHT SATURDAYS).

- COOKING TO BE DONE IN DESIGNATED AREAS ONLY.

- USE LATRINE AND KEEP IT CLEAN.

MORALES et al. v. PARSONS

LIBRARY

EXCERPTS FROM
COLUMBIA EMPLOYEE HOUSING ACT

Section 1. **Findings and declarations.**
The Legislature finds and declares that protections provided to tenants of farm labor camps help ensure that minimum health standards are maintained in those camps, thus protecting the health of the farm laborers and the community. The Legislature further finds and declares that those protections have been historically found to be necessary and still are necessary today because of the extreme health violations frequently found to exist in farm labor camps.

The Legislature finds and declares that despite added statutory protections, violations of health standards continue to exist in farm labor camps. Protections for tenants who complain about substandard conditions have been weakened by the use of summary unlawful detainer actions by camp owners against complaining tenants. It is the intent of the Legislature to improve conditions in labor camps by closing these loopholes that have developed in the law's enforcement.

Section 2. Employee housing compliance with building standards.
Buildings used for human habitation, and buildings accessory thereto within employee housing, shall comply with state building standards relating to employee housing unless a local ordinance prescribing minimum standards which is equal to such regulations is applicable. If such a local ordinance is applicable to buildings used for human habitation within employee housing, these buildings shall comply with the construction and erection provisions of the ordinance.

* * * * *

Section 8. "Employee housing"
(a) "Employee housing," as used in this part, means any portion of any housing accommodation, or property upon which a housing accommodation is located, if all of the following factors exist:

(1) The accommodations consist of any living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured

home, recreational vehicle, travel trailer, or other housing accommodations, maintained in one or more buildings or one or more sites, and the premises upon which they are situated or the area set aside and provided for parking of mobile homes or camping of five or more employees by the employer.

(2) The accommodations are maintained in connection with any work or place where work is being performed, whether or not rent is involved.

(b) "Employee housing" means the same as "labor camp" as that term may be used in this or other codes.

* * * * *

Section 37. Duty to comply with requirements and regulations.

Every person, or the agent or officer thereof, constructing, operating, or maintaining employee housing shall comply with the requirements of this part, with building standards published in the State Building Standards Code relating to employee housing, and with the other regulations adopted pursuant to this part.

* * * * *

Section 61. Threats to health and safety; punishment.

(a) Any person convicted under this part, or found in contempt of a court order or injunction relating to the enforcement of this chapter, where there are violations that are determined by the trier of fact to be so extensive and of such a nature that the immediate health and safety of residents or the public is endangered and where the extent and nature of the violations are due to the defendant's habitual neglect of customary maintenance and display a flagrant lack of concern for the health and safety of residents or the public, is punishable by a fine not exceeding six thousand dollars ($6,000) and by imprisonment for not less than six months, but not exceeding one year, for each violation or day of a continuing violation, if the trier of fact finds serious violations of the following categories of violations are involved:

(1) Serious defects or lack of gas, water, or electric utility systems, unless caused by the tenant's failure to pay gas, water, or electric bills.

(2) Serious defects or lack of adequate space and water heating.

(3) Serious rodent, vermin, or insect infestation.

(4) Severe deterioration, rendering significant portions of the structure unsafe or unsanitary.

(5) Inadequate numbers of garbage receptacles or service.

(6) Unsanitary conditions affecting a significant portion of the structure as a result of faulty plumbing or sewage disposal.

* * * * *

GRIGGS v. BARNES CONSTRUCTION COMPANY

Columbia Court of Appeals (1992)

On December 7, 1988, Russell Griggs was electrocuted while working in a construction yard when a cable he was holding touched an overhead high voltage line. At the time of the accident, Griggs was working for Barnes Construction, a sole proprietorship owned by J.D. Barnes. Barnes Construction was engaged in several building projects in and around the town of Goose Creek in Adams County. Materials and equipment for these projects were stored in Barnes' "job yard" in Goose Creek. On the day in question, Griggs and another Barnes Construction employee, Clinton Morrow, were working in the job yard stacking timber. Morrow was operating a boom truck, and Griggs was assisting him by attaching the boom cable to bundles of timber. As Morrow was maneuvering the boom, he looked into the bright sunlight, which caused him to swing the boom into an overhead 12,000-volt power line. Unfortunately, Griggs was holding the boom cable at that very moment. The cable conducted the electricity into Griggs' body, causing his death by electrocution.

Griggs' widow and children filed suit against Barnes for wrongful death, alleging that, as a landowner, Barnes owed a general duty of due care to persons coming on his land, including employees, to protect them from the hazard presented by the high voltage lines. The trial court granted defendant's motion for summary judgment on the ground that defendant did not owe a duty of due care to the decedent, and plaintiffs appealed.

Under the common law, a landowner's duty of due care to a person coming onto his land turned on whether the person was classified as a trespasser, licensee or invitee. In *Rowland v. Christian (1968)* our Supreme Court repudiated this classification system and substituted the basic approach of foreseeability of injury to others. The court held that the proper test to be applied to the liability of the possessor of land is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others. In regard to those working on the land, the landowner who induces or knowingly permits a workman to enter the land for performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work. Whether a "duty" exists in a particular case is a question of law. "Duty" is merely a conclusory

expression used when the sum total of policy considerations lead a court to say that the particular plaintiff is entitled to protection.

Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. However, this is not true in all cases. It is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant owed a duty of due care to the person injured.

Plaintiffs argued in their opposition to the motion for summary judgment that Barnes should have taken steps to prevent the injury because he knew that the high voltage lines ran across his property and also knew that the boom truck was being stored and operated on the property. Consequently, plaintiffs contend that, viewing the evidence in the light most favorable to plaintiffs, Barnes should have reasonably foreseen that the boom might come into contact with the high voltage lines while the truck was being operated on the premises.

The most important policy consideration in determining whether a duty exists is the foreseeability of the harm. Viewing the evidence in the light most favorable to plaintiffs, as we must, we believe the harm--electrocution caused by the boom coming into contact with overhead power lines--was reasonably foreseeable by Barnes. In our view, the practical necessity of encountering the danger (i.e., the necessity of using the boom truck to move materials), when weighed against the apparent risk involved (electrocution by contact with electrical wires), is such that under the circumstances, a person might (and in fact did) choose to encounter the danger. We stress, however, that we find the injury "foreseeable" only as it pertains to a general duty of care. A court's task in determining “duty” is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is

sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent. Thus, the fact finder is still free to find that the particular plaintiff's injury (i.e., Griggs' electrocution) was not foreseeable in light of this particular defendant's conduct.

In addition to foreseeability, a court should consider the following factors in determining whether a duty of due care exists: (1) the degree of certainty that the plaintiff suffered injury; (2) the proximity between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability of insurance for the risk involved.

Here, the considerations numbered (1), (4), (5) and (6) militate in favor of imposing a duty in this case. The plaintiff clearly suffered injury; there is a strong policy of preventing future harm such as that which occurred here; the defendant could have easily discharged his burden by having the power lines insulated, or by specifically prohibiting the use of boom trucks or cranes in the area underneath them; and the risk here is likely covered by a standard liability policy. In short, the sum total of policy considerations lead us to say that Barnes, as a landowner, had a general duty to use due care to protect people coming onto his land from the obvious electrocution hazard on the property. Whether or not Barnes breached that duty with respect to Griggs is an issue of fact which should be left to the fact finder to decide.

Consequently, we reverse the summary judgment.

ESTEBAN RAUL LUCAS v. MURAI FARMS, INC.

Columbia Court of Appeals (1997)

Plaintiffs appeal from summary judgments granted in favor of defendants George T. R. Murai Farms, Inc. and Ramon Navarro, doing business as Chiquito Navarro Ranch. Plaintiffs Esteban Raul Lucas and Jorge Reyes (plaintiffs Guadalupe Reyes and Mario Garcia Reyes's decedent) (collectively plaintiffs) were migrant farm workers employed by Navarro at the time a fire occurred in temporary migrant farm worker housing located on property adjacent to that of Murai and Navarro. Lucas was gravely injured in the fire and Reyes was killed. Plaintiffs sued Murai and Navarro for damages for personal injuries, on theories of premises liability and negligence per se.

On October 22, 1987, when the fire occurred, Lucas and Reyes were undocumented Mexican nationals, working as migrant farm laborers and residing in an encampment known as the cancha, located along a creekbed on undeveloped land that was adjacent to the ranches owned by Murai and Navarro. As was their custom, Lucas, Reyes, and several co-workers built a living structure in the cancha from parts of wooden pallets, tomato stakes, cardboard, irrigation plastic, and twine, all taken from trash dump areas on the Murai and Navarro ranches.

According to his deposition, Lucas believed that the property on which he was living belonged to Murai. However, it was actually undeveloped land owned by defendant Perry Pollock. Lucas never obtained anyone's permission to live on the Pollock property and was never told to stay there by any authorities on the ranches where he worked. He did not rent a more standard dwelling because of his fear of immigration authorities, because he was sending a substantial portion of his wages home to Mexico, and because he wanted to live near his employment and his friends.

At the time of the fire, Lucas and Reyes had been working for Navarro for approximately two weeks. On the night of the fire, Lucas went into the sleeping structure about 10 p.m. to go to sleep, while Reyes remained outside reading by the light of a candle. Both had drank some beer that evening. Lucas does not know how the fire started. He woke up in the hospital with serious burn injuries and learned that Reyes had died in the fire.

At the time of the fire, nonparty George Hruby, owner of Ranch-Industrial Patrol Company (RIPCO), had contracted with Murai and Navarro to provide security services to the farms. Hruby's contract did not include performing services outside the borders of either the Murai ranch or the Navarro ranch. Hruby was not told by any Murai or Navarro employees to patrol any areas outside the ranch property, such as the cancha area. However, Hruby's business provided basic police protection for the farm laborers who lived in the labor camp, since Hruby felt that no other police or border patrol agencies were ensuring the safety of the workers. RIPCO's activities in the cancha included prohibiting drinking and prostitution in the labor camp, restricting access to the camp, and expelling union organizers. RIPCO former employees signed declarations stating that their instructions regarding the cancha property and the methods used to patrol it came from Hruby, rather than anyone at Murai or Navarro.

At several points in the life of the labor camp, trash from the camp blew over onto Murai and Navarro property, and foremen employed by Murai and Navarro made the workers pick up trash in their camp. In building the shelter, Lucas used materials from trash heaps on the Murai farm, and Reyes used plastic from Navarro's farm. Navarro forbade workers to take discarded materials of any kind from the ranch, including plastic. General Manager Mark Murai prohibited anyone from taking materials from the ranch as well. Murai provided some services and amenities to workers living in the cancha, such as allowing them to use water and toilet facilities on the Murai ranch, allowing them to receive mail there, and allowing caterers and vendors access to Murai land to provide services to camp inhabitants.

Approximately a year after the fire, plaintiffs filed this action for damages for personal injuries, alleging there was a duty on the part of Murai and Navarro to provide adequate and safe housing for Lucas and decedent, as well as a duty to make safe the conditions on the cancha property or to warn plaintiffs of the dangerous conditions created by the flammable structures. After extensive discovery, Murai and Navarro each filed motions for summary judgment. At the hearing on these motions, the trial court found as a matter of law that neither Murai nor Navarro had a duty to provide housing to Lucas and plaintiffs' decedent, to ensure that the cancha was safe and habitable, or to warn Lucas and Reyes of risks involved in living in the camp. The court noted that Murai was not an employer of plaintiffs, and neither defendant had any legal authority to eject the

workers from the Pollock property. The court further noted there were no triable issues of fact regarding negligence per se, as none of the statutes or ordinances relied upon applied to Murai or Navarro, who did not own or control the subject property.

Plaintiffs' main contention on appeal is that Murai and Navarro were not entitled to summary judgment because they did not completely establish an absence of control on their part over the area where the fire occurred, the cancha. They contend that triable factual issues remain as to the nature and extent of these defendants' control over the adjacent plot of land where the cancha was located. Plaintiffs also argue that alleged statutory violations occurred leading to liability on these defendants' parts under the Employee Housing Act.

Turning to the main issue of the extent of Murai's and Navarro's control over the cancha property, plaintiffs' theory is that the activities of Hruby's security service, RIPCO, constituted control over the premises such that the duty of a possessor of premises must be imposed upon the ranch owners. Plaintiffs also pursue an alternative theory that Murai and Navarro, as agents for each other, through the activities of their foremen, encouraged the workers to live at the cancha by providing services, amenities, and security at the premises, and controlling access to them, such that the ranch owners undertook a measure of obligation that would justify a court in imposing upon Murai and Navarro as a matter of law a duty to make the premises safe or to warn of dangers.

In support of their assertion that Murai and Navarro had a duty based upon their control of adjacent land, plaintiffs rely upon *Southland Corp. v. Superior Court* (Columbia Court of Appeals, 1988), where the court concluded that there were triable issues of fact concerning whether a store owner, which had an easement over adjacent land and allowed its customers to park on the land in order to gain access to the store, had a sufficient degree of control over that land, on which the plaintiff was criminally assaulted, in order to justify the imposition of a duty on the store owner to keep the premises safe for users of the property. The court noted that although the critical issue for imposition of a duty is control over premises, the concept of control as developed in case law has been somewhat elastic and the exercise of control is not necessarily confined to those premises which are owned or possessed by the defendant. A

number of circumstances led to the Court of Appeal's conclusion that triable issues remained over the extent of the store owner's control over the adjacent lot, so as to legally permit the imposition of a duty to those customers using the lot, such as regular use of the adjacent lot for parking, authorization in the store lease for such parking, knowledge on the part of the store owner of the customers' regular use of the lot, and significant commercial benefit from the use of the lot.

In this case, plaintiffs rely upon several factors to support their assertion that Murai and Navarro had an adequate degree of control over the adjacent property where the cancha was located in order to support the imposition upon them of a duty of care and/or to warn of danger. First, Lucas claims that RIPCO was an agent of Murai and Navarro inasmuch as RIPCO's security activities at the cancha, such as banning alcohol and prostitutes, showed control over the entire premises. Murai, however, made a showing that it did not instruct RIPCO to patrol the camp. Navarro made a showing that he did not know about the existence of the camp until after the fire, and his contract with RIPCO also did not cover off-premises areas. It thus does not appear that any actions of Murai or Navarro, as principals, were relied upon by Lucas and Jorge Reyes to create the impression that RIPCO was the agent for the ranchers for purposes of insuring overall camp safety. Although a principal is liable for the torts of an agent under the doctrine of respondeat superior, for this liability to be imposed on the innocent principal, the agent's tort must have been committed during the course and scope of his employment. We conclude that as a matter of law, the type and extent of activities that RIPCO engaged in at the cancha were not enough to constitute control of the cancha property for purposes of imposing a duty on Murai and Navarro.

Secondly, plaintiffs rely upon the activities of Murai and Navarro employees, such as the foremen at the farms, to make a showing of some degree of control over the cancha property. For instance, Murai and Navarro foremen instructed workers living at the camp to pick up trash, and allegedly permitted scrap materials to be taken from Murai and Navarro dumps for use in building the wood and plastic shelters. By their activities in allowing the workers to use water and toilet facilities on Murai property, and allowing the workers to receive mail at the Murai address, it is alleged that these employers encouraged the labor camp environment to exist, and gained an economic

benefit from it, so as to justify the imposition of a duty to make the premises safe or to warn of dangers.

A number of considerations lead us to reject plaintiffs' argument that a duty existed here as a matter of law. First, a duty to exercise ordinary care not to injure another will arise out of a voluntarily assumed relationship only if public policy dictates that such a duty should be imposed. Whether in a specific case the defendant will be held liable to a third person not in privity as a matter of public policy involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

The facts here showed that both Murai and Navarro ranch owners and managers made an effort to prohibit workers from using building materials from the ranch scrap heaps, Navarro in particular because he believed the plastic used for fumigation of crops was poisonous. Even though Murai and Navarro foremen apparently did not prevent the workers from taking such scrap materials from the ranch, the factors outlining the public policy for whether to impose a duty of care based on such activities indicate that no such duty should be imposed. In particular, foreseeability of this type of harm is questionable, and the necessary closeness of connection between defendants' conduct and the injury is missing, since it was the use of an open-flame candle in the shelter (over which use these defendants had no control) which caused the injury.

The law of premises liability does not extend so far as to hold a landowner liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect the condition of such adjoining property. The activities of Lucas and the plaintiffs' decedent in building the shelters and using lighted candles in them must be distinguished in kind from the activities of the customers who used the dangerous adjacent parking lot in *Southland Corp., supra*. Lucas and Jorge Reyes were not business patrons of their employers, and no third party criminal acts were inflicted upon plaintiffs for which the ranch owners should be held responsible. Instead, plaintiffs knew of the danger of using fire in the temporary structures, but did so anyway.

Although a possessor of land must exercise reasonable care to make the premises safe or to warn regarding dangerous conditions or activities the possessor knows of or could readily discover, there is no obligation to protect the invitee against dangers which are known to him, or which are so apparent that he may reasonably be expected to discover them and be fully able to watch for himself.

An owner of property is not an insurer of safety, but must use reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils. The danger of the structures at the cancha was obvious and was not in any sense latent or concealed, especially to those persons who built the structures and used them. Consequently, we see no basis for the imposition of a duty on the ranch owners to warn of dangers inherent in the use of the structures just off their premises, nor any duty to make those structures safe for the inhabitants.

Because of the conclusions reached above, that no duty of care or duty to warn may be imposed on Murai and Navarro towards plaintiffs, we find it unnecessary to discuss the statutory claims directed toward the employers as alleged owners and controllers of property.

The judgments are affirmed.

ESTEBAN RAUL LUCAS v. PERRY C. POLLOCK

Columbia Court of Appeals (1997)

This is the second of two cases decided today arising out of a fire in temporary migrant farm worker housing constructed on defendant Perry Pollock's land, in which plaintiff Esteban Raul Lucas was gravely injured and plaintiffs Guadalupe Reyes and Mario Garcia Reyes's decedent, Jorge Reyes, was killed. In granting Pollock's motion for summary judgment, the trial court found Pollock had breached no landowner's duties sounding in negligence that were owed to plaintiffs, and was not liable for damages. Plaintiffs appealed.

The farm where Lucas and Reyes were working at the time of the fire was located adjacent to Pollock's property, which was undeveloped and not used for any purpose, including farming. Pollock acquired this land in 1975 after he foreclosed on a trust deed, was holding it solely for investment purposes, and at the time of the accident was trying to sell it, using the services of real estate agent James Daley. Pollock never gave anyone permission to enter onto or live on his property, and he testified in his deposition he was unaware that anyone was present there at the time of the fire. He did admit to having seen that a fence was down on the northern edge of the property, and tire tracks indicating that vehicles might have entered at some time in the past. The area on Pollock's property where the migrant encampments were made was hidden deep within a gully and was obscured by thick underbrush. The shelters were invisible and inaccessible from the single paved road in the area, or from the southern portion of the adjoining ranch, where Lucas and Reyes worked. The owners of that farm denied that they had ever seen shelters near the Pollock property. Pollock never discussed his property with anyone who worked for the adjoining farms.

Approximately a year after the fire, Lucas and Reyes's survivors filed their complaint for personal injury and wrongful death against Pollock and the owners of the farms adjacent to his land, one of whom had employed the plaintiffs. As against Pollock, the cause of action was for premises liability.

After discovery had been conducted, Pollock filed his motion for summary judgment, arguing that he owed no legal duty of care to the plaintiffs and had acted reasonably in the management of his property in view of the probability of injuries to others, even trespassers. Plaintiffs' opposition focused upon allegations of Pollock's actual knowledge of conditions on the property, or imputed knowledge on the basis of his real estate agent's familiarity with the property resulting from his appraisal and attempts to sell it.

Regarding their claims of Pollock's actual knowledge, plaintiffs argue that a defendant's actual knowledge may be shown, not only by direct evidence, but also by circumstantial evidence. Hence, his denial of such knowledge will not, per se, prevent liability. They also argue that landowners may be held liable for failure to correct within a reasonable time such defects in the property as would have been revealed by a reasonable inspection. From all of these rules, plaintiffs argue, a triable issue of fact is created as to the existence of knowledge on the part of Pollock, impliedly creating a duty to make safe his land from the dangerous conditions which caused the fire. They argue that a landowner is responsible not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property. On the issue of Pollock's constructive knowledge, plaintiffs argue that Pollock's real estate agent, Daley, was under a duty to inform Pollock of matters in connection with the agency which would affect the marketability or value of Pollock's real property. The presence of a migrant farm worker encampment is argued to be such a matter affecting the value of real property.

We find several flaws with plaintiffs' reasoning. First, although the evidence showed Pollock had designated Daley as his agent in the proposed sale of the property, the scope of that agency created duties in Daley only to Pollock as the principal and to prospective purchasers of the property. Plaintiffs have made no showing that third party trespassers or bystanders on the property were entitled to any particular duties arising out of that agency, which was created for a limited purpose.

Here, the injured plaintiffs had no dealings with Pollock either directly or through Daley. In opposition to Pollock's motion, plaintiffs were able to raise only speculation and suggestions that Pollock "must have known" about the existence of the encampments.

However, such evidence is not sufficient to justify an inference of actual knowledge, nor is the same equivocal evidence as to Daley sufficient to support an inference of constructive knowledge on Pollock's part. Moreover, the evidence on which the plaintiffs rely to show notice of the presence of the encampment (i.e., Pollock's knowledge that an alternative access route to the property had apparently been developed and his admission after the fire in a letter to the police department that farm workers lived on the property, along with Daley's familiarity with the property) does not as a matter of law establish that Pollock, as landowner, had a duty to these plaintiffs to make the premises reasonably safe for the purposes for which they were used. A landlord should not be held liable for injuries from conditions over which he has no control. Manifestly, Pollock had no control over the existence of hazards in the migrant farm workers' encampment, which he had not authorized to be built, and the dangers of which all the evidence showed he lacked actual or constructive knowledge.

In conclusion, even if we assume that Pollock had actual or constructive knowledge of the presence of migrant encampments upon his property, we are unable to conclude as a matter of law from such evidence (if any) that a duty existed on Pollock's part to take steps to correct or prevent the particular dangers which led to plaintiffs' injuries in this case, specifically the danger of fire in the temporary structures. Pollock's status as landowner did not create in him a duty to insure the well-being of these third parties upon his property, nor any duty to protect them from their own activities, nor any duty to police an area in which he was conducting no activity whatsoever. Nor did the actual condition of Pollock's land in its undeveloped state, or his management of it, contribute to or cause the accident which injured the plaintiffs. The issue presented by this motion for summary judgment is whether any knowledge on Pollock's part, if shown, created a duty on the theory that his conduct was unreasonable in light of any such knowledge. The trial court's grant of summary judgment correctly resolved that issue.

The judgment is affirmed.

MICHAEL R., a Minor v. JEFFREY B., a Minor

Columbia Court of Appeals (1984)

Michael, a minor, appeals through his guardian ad litem from a judgment granting respondents' motion for summary judgment. The issue herein is whether verbal encouragement to commit assault with a deadly weapon is affirmative conduct sufficient, as a matter of law, to impose civil liability for damages ensuing from that assault.

On December 18, 1979, at approximately 8 p.m. Michael, while walking home from a school banquet, was struck in the eye with a marble and, as a result, was blinded in that eye. Earlier that day Lance, Bruno, Edie and Jeffrey took turns shooting marbles with a slingshot. Only Jeffrey shot marbles at automobiles driving by the open field in which they were playing. As Michael left the school after the banquet, Lance pointed him out to Jeffrey and, according to Jeffrey's testimony, Bruno, Edie and Lance prompted and encouraged him to shoot Michael with the slingshot. For purposes of the summary judgment motion, respondent Bruno admits making the statement, “Hey, shoot him; go for it.” Jeffrey testified that he did not know Michael and had no intention of shooting at him until incited by the others. Jeffrey was prosecuted in juvenile court for assault with a deadly weapon and pleaded "guilty."

Appellant's complaint alleged that defendants “negligently, recklessly, wantonly and intentionally shot a marble in the direction of plaintiff by the use of a slingshot or other device, in a reckless and wanton disregard of the possible consequences to plaintiff by reason thereof, and said defendants knew or should have known that said conduct would unreasonably expose the general public and in particular the plaintiff to probable serious harm....” Respondent Bruno moved for summary judgment on the ground that he had no duty under Columbia law to control the conduct of the third person who injured plaintiff. The motion was granted.

On appeal Michael argues that the remark, "Hey, shoot him; go for it" is a violation of Penal Code § 653f and constitutes negligence per se.[1] Solicitation consists in asking another to commit one of the crimes specified in § 653f with intent that the crime be committed, but intent may be inferred from the circumstances of the asking. The alleged cause of action is not a violation of the statute, but rather negligence of the defendant, and the statute is merely evidence offered to show such negligence.

Violation of a statute without justification constitutes presumptive failure to exercise due care if the violation proximately caused the injury and the person injured was one of the class of persons for whose protection the statute was adopted. Respondent contends that § 653f was intended neither to prosecute "verbal bystanders" nor provide for civil liability. We disagree. It is indisputable that an injury resulting from commission of an assault with a deadly weapon is the type of injury a statute prohibiting solicitation to commit assault with a deadly weapon was designed to prevent. Someone who encourages another to shoot a person is not a "verbal bystander." Such solicitation is precisely the conduct proscribed by the statute.

Additionally, the statute need not provide specifically for civil damages or liability. Violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action.

Proof that a defendant was negligent as a matter of law does not automatically establish liability; plaintiff still bears the initial burden of showing that defendant's negligence was a proximate cause of the injury. An actor may be liable, however, if his negligence is a substantial factor in causing an injury; he is not relieved of liability because of an intervening act of a third person whose act is reasonably foreseeable.

In *Rowland v. Christian (1968)* the Columbia Supreme Court identified seven factors to be considered in determining whether a duty is owed to third persons: 1) the foreseeability of

[1] Penal Code § 653f provides: "(a) Every person who solicits another to ... commit or join in the commission of...assault with a deadly weapon or instrument...is punishable by imprisonment in the county jail not more than one year or in the state prison...."

harm to the plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the proximity between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and 7) the availability of insurance for the risk involved.

The harm in the instant case was clearly foreseeable; Jeffrey had been shooting at automobiles previously. The certainty of appellant's injury was undisputed. There was a proximate connection between the verbal encouragement and the shooting. Encouragement or solicitation of an assault with a deadly or dangerous instrument was clearly wrong. Imposing a duty would promote a policy of preventing future harm; it would not impose liability which did not previously exist for mere bystanders. The burden on Bruno to abstain from encouraging or soliciting a crime was minimal.

We, therefore, find that appellant's opposition to respondents' motion for summary judgment raised a triable issue of fact whether Bruno actively encouraged, solicited or conspired to injure Michael and that verbal encouragement is included within the parameters of Penal Code § 653f to constitute negligence per se.

The judgment in favor of respondents is reversed.

ANSWER 1 TO PERFORMANCE TEST - A

MEMORANDUM

TO: Jane Kimmel

FROM: Applicant

RE: Morales & Vargas v. Parsons

DATE: February 25, 2003

Upon a review of the case background, relevant case law, and statutory provisions, our clients are most likely to prevail upon the following grounds:

1. Duty

In Griggs v. Barnes Construction Co. (Griggs), Griggs, an employee of the defendant, was electrocuted while working in a construction yard when a cable he was holding touched an overhead high voltage line. In reversing the trial court's summary judgment in favor of the employer-defendant, the Court reasoned that the total of policy considerations created upon the landowner a general duty to use due care to protect people coming onto his land from the obvious electrocution hazard. In reaching this conclusion, the court relied on Rowland v. Christian (1968).

The law in Columbia regarding a landowner's duty to due care to a person coming onto their land is based upon foreseeability of injury and public policy. Specifically, the Griggs court, relying on Rowland, re-emphasized that the liability of a possessor of land is tested based on whether: (1) in the management of his property; and (2) he has acted as a reasonable man in view of the probability of injury to others. In addition, a landowner who induces or knowingly permits a workman to enter the land for performance of duties mutually be beneficial to both parties is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work.

In addition to foreseeability, the Griggs court considered the following whether determining whether [sic] a duty of care existed: (1) the degree of certainty that the plaintiff suffered injury; (2) the proximity between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability of insurance for the risk involved.

Under the Griggs factors, Mr. Parsons should have reasonably foreseen that a fire might be started by the oil lamps that were necessitated by his failure to provide electricity to the farm worker encampment. The practical necessity of encountering the

danger, i.e., the necessity of using oil lamps to replace electricity, when weighed against the apparent risk involved, i.e., fire, was such that under the circumstances, a person might choose to encounter the danger of a fire in order to have basic necessities, i.e., light. Therefore, the injury was foreseeable. Nevertheless, it is still necessary to determine if this type of harm is such that liability should be imposed.

The facts of the instant case clearly pass the muster of the second tier of Griggs factors. First, Morales and Vargas have clearly suffered injuries. Second, Parsons' conduct was an actual and proximate cause of the risk of fire, both in his failure to provide electricity and necessitate the use of other means of light, and his failure to provide adequate fire protection through an adequate water supply and delivery system. Third, Parsons' operation and maintenance of the employees' living conditions was so inadequate as to warrant the attachment of moral blame, including Parsons' flagrant lack of concern for the health and safety of residents on his property. Fourth, there is a strong policy of preventing future harm such as that occurred here, as is outlined in the Employee Housing Act (see below under negligence per se for further discussion). Fifth, the extent of the burden to Parsons and the consequences to the community of imposing the duty with resulting liability for breach are not unreasonable. The harm of forcing workers to live in dangerous and unhealthy conditions that are clearly in violation of the Employee Housing Act outweighs the detriment to the landowner, who also economically benefits from their close proximity to his farm. Parsons also voluntarily undertook this burden when he invited the workers to live on his land. Sixth, it is likely that Parsons has property insurance to cover fire loss considering his livelihood is the farming of his land.

2. Theory of Premises Liability

In Lucas v. Murai, the court found under the Griggs test that liability could not be imposed on landowners for a fire that occurred on adjacent property since the landowners did not exhibit sufficient control over the property in order to make the imposition of a duty justifiable. Even though the plaintiffs had been allowed some services and amenities from the landowner's property — like mail, water, and toilet facilities — the court considered more persuasive the facts that the landowners prohibited the use of certain flammable and dangerous materials, that the plaintiffs never obtained anyone's permission to stay on the land, that the plaintiffs were never told to stay on the land, and that the security patrol that patrolled the camp was not hired by the landowners for this purpose. Essentially, the court determined that the landowners could not be held liable simply because the property was adjacent when the landowner actions did not influence or affect the condition of the adjoining property. Furthermore, the Murai court found persuasive that the use of fire in temporary structures created a danger that plaintiffs knew of or was so apparent that they were reasonably expected to discover it and protect themselves. The Court refused to impose liability on the landowners to warn of, or to make safe, dangers inherent in structures used off their premises.

In Lucas v. Pollock, the court, in reviewing the same facts as Murai but under a premises liability cause of action against the actual owner of the property in Murai, determined that the owner had no duty to the workers because: (1) he had no control over the existence of hazards in the encampment; (2) he had not authorized the encampment; (3) no duty to protect the workers from their own activities; (4) no duty to police an area in which he was conducting no activity; (5) no liability for the actual condition of the land in its undeveloped state or his management of it; and ([6]) that even if Pollock knew of the presence of the workers, that such knowledge alone was insufficient to impose a duty upon him to make the premises reasonably safe for the third parties.

The Murai case is easily distinguishable on its facts for two reasons: (1) unlike Murai, Mr. Parsons clearly owned the property that the workers lived on; and (2) unlike Murai, Mr. Parsons clearly controlled and encouraged the encampment environment. The reasoning in Pollock supports this distinction. Although the Murai and Pollock courts declined to impose duties on certain landowners, both cases can be read to establish the general principle that a duty will only be imposed where injured parties were on the land of the defendant, with defendant's knowledge, and that the defendant exercised enough control over, and received enough benefit from, the arrangement as to justify the imposition of a duty to make safe a foreseeable danger.

The facts in the instant case fit are not offensive to the principles in Murai and Pollock. Moreover, the workers were trespassers, anticipated or discovered -- as was the case in Pollock. The workers on Parsons farm were invited to the property by Parsons, for Parsons' benefit. As such, Parson[s] owned a duty to warn of nonobvious, dangerous artificial and natural conditions, had a duty to conduct active operations on his property with reasonable care, and had a duty to inspect and make safe additional dangerous conditions.

To begin, there is no question that Parsons owned the property on which the workers were encamped. In fact, had he chosen to, he had the legal authority to have the workers ejected. Additionally, Parsons, both personally and through his agent, foreman Rudy Mendoza, clearly controlled the subject property. Parsons is responsible for the acts of his agents under the theory of respondeat superior. Under negligence theories, an employer is vicariously liable for the acts of his employee if the acts are undertaken within the scope of his employment. The facts indicate that Rudy performed his duties as foreman under the direction of Parsons, including enforcement of the Rules and Regulations imposed upon the workers. Furthermore, Rudy held himself out to the workmen as an authority on behalf of Parsons, and the workers followed his instructions as a result.

Parsons was also clearly the employer for which our clients worked. For example, Parsons formulated Rules and Regulations for the property, which were handed out yearly. The Rules specifically gave permission to certain types of persons to live on the land. The Rules regulated visitors "at sole discretion of owner or his agent," banned pets, women, alcohol, firearms, and noise at certain times. Mr. Cruz related an incident where a nurse visited the encampment to deliver test results to a worker but was

refused entry because it was "private property." Furthermore, the Rules regulated smoking, trash dumping, cooking, and cleanliness. As a result, Parsons exhibited a tremendous amount of control over how the encampment operated [and] was maintained.

Parsons also received economic benefits by the workers living on his land. Before the workers lived directly on his land, they lived on the land of Mr. Sanchez. Approximately 8 years ago, Rudy spoke with the workers about setting up a camp at Parsons' farm and staying there rent-free. By having the workers stay directly on the farm, it appears that Mr. Parsons could eliminate the need to pay for their transportation to and from the farm by Mr. Sanchez.

Parsons also encouraged the encampment environment by allowing workers to take whatever trash materials they could use from the farm -- mostly plastic tarps and flattened-out cardboard -- and going to the point of putting certain materials out for the workers -- like old tarps. The workers were also allowed to use hand tools in the construction of their 'homes'. In addition, Rudy took the workers into town to buy additional items that might be used in building shelters. Parsons also provided a separate mailbox out by the road for employees. It appears that Rudy also arranged for a vendor to come onto the camp and sell food at lunchtime. When the workers began living at the encampment, Rudy arranged for the vendor to visit in the evening as well. If the workers were not able to pay for the food, then Rudy would deduct the debt owed from their pay.

The conditions of the camp were also grave, including an absence of an adequate water system for fire protection. There was one water faucet and shower with ¾ inch pipe for the entire camp, which was inadequate for fire protection. Even though the faucet was threaded for a garden hose, no garden hose was present. Moreover, the fire that is the subject of this claim was too big to use buckets for. The encampment was also highly dense, including 30 or 35 tents with 50 persons inhabiting them, built very close together. In addition, there was [sic] scrub oak and bushes in the area - - highly flammable natural conditions. The water situations appears [sic] to have always been bad. Water did not get piped into the site until last year; before that time, a valve was placed on the irrigation line and the workers were given buckets and coolers. Sanitation is also inadequate. Even though there were two latrines before the workers arrived, it took some time before dumpsters for garbage were brought in and regular garbage pick-up was instituted[.]

Rudy would have been aware of these conditions as he lived on the road that went to the encampment, and visited the encampment several times a week; he was, therefore. The scope of Rudy's agency status created a duty to inform Parsons of matters in connection with Rudy's role as foreman, especially given the extensive rules and regulations that Parsons imposed on the workers and the traditional role that Rudy had played in enforcing them, as they were renewed yearly.

Turning to the incident at hand, it appears that Parsons did not have direct control over the oil lamp that is alleged to have caused the fire. Furthermore, Morales indicates that

items in the workers' tents were flammable. Nevertheless, it was Parsons that made possible the environment in which oil lamps were extensively used. It was also Parsons that failed to provide electricity -- necessitating alternate means of lighting -- and adequate water -- a basic necessity. As stated in the Griggs court, even if the danger was obvious, the risk of danger was outweighed by the need to engage in the activity.

Morales and Vargas clearly suffered injury. There was also a close proximity between Parsons' conduct and the injury suffered. Mr. Parson clearly undertook an obligation, and influenced and affected the condition of the property, when he created the encampment environment and will be held to a duty of care to the workers to make reasonably safe or warn of dangers. The duty was breached by the inadequate living conditions and fire protection as outlined above. The result was a foreseeable risk of fire. The injury was serious bodily injury and death, also foreseeable.

3. Theory of Negligence Per Se

Under a theory of negligence per se, a statute can serve to establish a duty. A violation of the statute establishes a presumption of a breach; causation and damages, however, must still be proven. (See Michael v. Jeffrey). Additionally, it must be shown that the person injured was one of the class of persons for whose protection the statute was adopted. Proximate causation exists when a person's negligence is a direct or substantial factor in causing an injury. If the action is an indirect cause, i.e., the person set into motion the events that led to the injury, then an individual can still be held liable. Such person is not relieved from liability because of an intervening act of a third person whose act is reasonably foreseeable. A person committing a negligent act is responsible for all reasonably foreseeable consequences of his action.

Under the Columbia Employee Housing Act, the legislature has put forth minimum health standards. The Act applies to any building used for human habitation. Employee housing is defined as including any accommodations that consist of, inter alia, dwellings, boarding houses, tents and the premises upon which they are situated. The accommodations must be maintained in connection with any work or place where work is being performed, regardless of rent, and specifically includes 'labor camps.' Every person, or agent thereof, that constructs, operates or maintains, employee housing is subject to the Act. Any person convicted under the Act where violations are so extensive and of such a nature as to cause danger to health and safety of residents, and where the extent and nature of the violations are due to the defendant's habitual neglect of customary maintenance and display a flagrant lack of concern for the health and safety of residents, is punishable by a maximum fine of $6,000 and imprisonment of between 6 months and 1 year for each violation if those violations involve, inter alia: (1) serious defects or lack of gas, water, or electric utility systems . . . ; and (2) serious defects or lack of adequate space and water heating.

Mr. Parsons is clearly liable under the Act. Parsons and Rudy operated and maintained the premises upon which there was housing used by persons working on Parsons land and paid by Parsons. As the facts enumerated above show, Parsons regulated and controlled the encampment, provided some services and amenities, and invited the

workers to set up camp, stay there, and work for him directly every year. The violations are also of a nature that caused danger to health and safety, and were a result of Parsons' habitual neglect of customary maintenance and flagrant indifference for health and safety. The lack of electricity alone constitutes an extensive and serious violation under this Act. The poor location and provision of water also accounts for a substantial risk of danger to health and safety, especially in the case of fire. Since Parsons is liable under the Act, and the living conditions that gave rise to the danger and harm are exactly the types of injury that the statute sought to prevent by mandating compliance with building codes, the duty to the workers, and the breach thereof, is established by the statute under a negligence per se theory.

Parsons' actions were also the proximate cause of the injury, as the injury in the instant case was clearly foreseeable. Parsons knew that the encampment did not have electricity and did not have sufficient fire protection. This made the failure to provide these services a substantial factor in causing the injuries suffered. Despite the fact that Vargas may have spilled the oil lamp that was the direct cause of the fire, reasonably foreseeable acts of a third party is not an [sic] superceding force relieving Parsons of liability. Once an individual sets into motion the negligent acts that result in an injury, he is liable for all foreseeable and probable consequences. The risk that an oil lamp would be spilled -- especially given their pervasive use in the camp, their low cost, and the lack of electricity -- was clearly foreseeable. Therefore, Parsons' actions were the proximate cause of the injuries.

Furthermore, imposing a duty on Mr. Parsons would promote the policy of preventing future harm, improving conditions in labor camps, and addressing extreme health violations. While the burden on Mr. Parsons to provide electricity may be more substantial than other burdens that the court has imposed, under these circumstances, it is the only reasonable and viable option available, and is less costly than the impact of 30 to 35 'homes' burning down, leaving 50 persons without shelter, and causing grave injuries. The Court is likely to take into account that there has [sic] already been severe losses because of these conditions.

Conclusion

Under either negligence per se or premises liability, the extension control, influence, and affect [sic] that Parsons had on the conditions of his own property, both personally and vicariously, combined with the flagrant indifference to the health and safety, living conditions, and fire prevention, create substantial grounds upon which a court would find in favor of our clients.

ANSWER 2 TO PERFORMANCE TEST - A

MEMORANDUM

TO: Jane Kimmel

FROM: Applicant

RE: Morales and Vargas v. Parsons

DATE: February 25, 2003

Statement of Facts

Juan Morales was injured and Alberto Vargas was killed when, apparently, an oil lamp used to illuminate their shacks made of cardboard, plastic and other refuse was knocked over and ignited the shanties in which they lived. The camp is situated on a parcel of land owned by their employer, Parsons Strawberry Farm, whose owner, Parsons, encouraged the formation of the camp in order to cut expenses and have a labor pool located nearby.

At the time of the fire, the camp's residents had limited access to water (one faucet and one shower), no electricity and no gas. The entire camp consisted of approximately 30 to 35 "tents" built one next to the other in two distinct sections.

Issues Presented

May Morales and Vargas' family recover damages against Parsons under either a theory of premises liability or the doctrine of negligence per se?

Short Answer

Yes. Both Morales and Vargas' family may proceed against Parsons under a theory of premises liability or, alternatively, the doctrine of negligence per se. The case law holding contrary is not on point and is distinguishable based primarily on the facts that Parsons owned the land where the camp was located, actively facilitated the camp's creation and exerted control over its operation and likely is in flagrant violation of the Columbia statutory law imposed on employers who provide employee housing.

Discussion

Under Columbia law, whether or not Parsons owned a duty to the residents of his labor camp requires the court to weigh and consider seven factors: 1) the foreseeability of harm to the plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the proximity between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the

extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and 7) the availability of insurance for the risk involved. Michael R.; accord Lucas I.

Morales and Vargas Recover Under the Theory of Premises Liability

"A possessor of land must exercise reasonable care to make the premises safe or to warn regarding dangerous conditions or activities the possessor knows of or could readily discover." Lucas I. In Lucas I, the plaintiffs were migrant farm workers residing in a camp just off the premises of two farmers [sic]. As is the case here, one plaintiff was severely injured and another plaintiff died as a result of a candle setting fire to a shanty comprised of highly flammable material. The surviving plaintiff and the deceased plaintiff's family were suing for recovery based on both premises liability and negligence per se. In regards to the premises liability theory, the court concluded that the employers owed no duty to the workers who resided on an adjacent piece of property.

"[T]he critical issue for imposition of a duty is control over the premises." Lucas I (citing Southland Corp). Generally, a party may not recover for injuries when a dangerous condition on the land is so obvious that the victim can reasonably be expected to see it. Columbia courts have held that such an "obvious" danger excuses the landowner from any further duty to remedy or warn of the condition. Griggs (employee killed by electrocution when cable he was holding on to came in contact with a high voltage, uninsulated power line). However, "[i]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger." Griggs. Under such conditions, public policy may require courts to impose a duty on the defendant to exercise due care towards the foreseeable injured person. Griggs.

Here, the danger of the camp should have been obvious to anyone. Highly flammable cardboard and plastics were used to shelter workers who used dangerous and unstable oil lamps as their primary if not sole method of illumination. As noted by Morales himself, though easier and cheaper than kerosene lamps, if one of the oil lamps tips over, the oil spills everywhere, and can start a fire. The question was not if a fire would have occurred at Parsons' labor camp, but when.

As an obvious danger, normally the landowner's duty would have been discharged under the Lucas I and Griggs analysis. However, the court in Griggs noted an applicable exception to this general rule. When the practical necessity of encountering the danger are [sic] weighed against the apparent risks involved and under the circumstances a person would choose to encounter the risk, then public policy requires the imposition of a duty on the landowner to exercise due care towards the foreseeable injured person.

Here, the plaintiffs were farm workers who had little if no choice to reside on the property in order to secure their employment. The risks of living in a tinderbox were

obvious, but these workers weighed their options and had little recourse but to accept the accommodations as they were. Even though residence in the camp was not technically required by either Parsons or Mendoza, there were no affordable accommodations available within a reasonable distance. In practice, all the farm workers resided in the camp because they had no alternative available. Thus, the fact that the danger was obvious should not preclude the imposition of a duty on Parsons.

Lucas I can easily be distinguished on its facts, the main difference being that the plaintiffs in that case resided on a parcel of land that did not belong to either defendant. "The court [in Lucas I] noted that Murai [defendant] was not an employer of the plaintiffs, and neither defendant had any legal authority to eject the workers from the . . . property." Lucas I. Unbeknownst to the Lucas I plaintiffs, the camp in this case was located on the premises of a third party and not their employers. In addition, both the employers of the migrant labor, Murai and Navarro, had policies forbidding the scavenging of materials by the migrant workers from their property in order to erect shanties.

In this case, Parsons actively encouraged the practice of scavenging highly flammable material to construct shanties and the camp was situated on his land where he possessed legal authority to eject the tenants. Thus, Parsons has a greater degree of culpability than either of the defendants in Lucas I.

In addition, the Lucas I plaintiffs were asserting that liability should attach to the defendants because [of] their agent's assertion of authority over the camp in order to insure overall camp security and safety. Though the agent of the defendants in Lucas I did impose security measures over the camp, such as banning alcohol and prostitutes, the agent was acting without the express or implied authority to do so. Neither defendant instructed the security agency to patrol and monitor the camp. The Lucas I court thus concluded that, as a matter of law, that [sic] the type of activities the security agent engaged in were not enough to constitute control of the camp property for purposes of imposing a duty on the defendants.

Again, the land in question in this case belongs to the employer and the agent he employed to monitor camp safety, foreman Rudy Mendoza, engaged in actions sufficient to establish Parsons' control over the labor camp. As the Parsons Strawberry Farm Camp Rules and Regulations, distributed and enforced by Mendoza, indicate, the laborers at Parsons were subject to tighter scrutiny than the plaintiffs in Lucas I. They were denied any female visitors, and other visitors were allowed at the sole discretion of the foreman or Parsons himself. They also restricted pets, smoking, alcohol, firearms, and imposed a curfew. In addition, they connected a water line to run a shower and for cooking, and Parsons provided two portable toilets for the men to use which he had maintained and emptied on a regular basis.

In addition, Mendoza through an agreement with a family member imposed a virtual monopoly on the farm worker's access to food for both lunch and dinner. Thus, it is clear that the legal conclusions in Lucas I are not applicable to a situation where the

owner/employer exerts this degree of authority or control over the workers' lives and property.

In Lucas II, decided the same day, the court of appeals for Columbia affirmed the dismissal of the case solely against the landowner. The court noted that the injured plaintiffs had no dealings with the landowner, Pollack, either directly or indirectly through his real estate agent, Daley. The plaintiffs were unable to show that the owner had any knowledge of the presence of the camp on his property. Due to that camp's relative isolation and hidden features, the court refused to impose a duty on the landowner merely for failing to exercise the ordinary care or skill in the management of his property. The landowner in Pollack did not reside on the land, received the land when he foreclosed on a trust deed, and at the time of the fire in Lucas II was looking for someone to purchase the property. The Lucas II court concluded that Pollack had no control over the existence of hazards in the migrant farm workers' encampment, he had not authorized its construction, and th[at] he lacked either actual or constructive knowledge of the camp's dangers.

Parsons is in exactly the opposite position. He exerted complete control over the camp in which Morales and Vargas resided. He not only authorized but assisted in the camp's constructions and he had actual knowledge of the camp's inherent dangers because he supplied the refuse that the workers used to build their "homes." The holding in Lucas II is inapplicable to Morales and Vargas' case against Parsons because Parsons's [sic] behavior is much more culpable then either the defendants in Lucas I or Lucas II.

Morales and Vargas Recover Under the Theory of Negligence Per Se

"Violation of a statute without justification constitutes presumptive failure to exercise due care if the violation proximately caused the injury and the person and the person injured was one of the class of persons for whose protection the statute was adopted." Michael R.

First, there must be an applicable statute. The statute, however, need not provide specifically for a private cause of action. Michael R. Under the theory of negligence per se, a violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Michael R.

Under the Columbia Employment Housing Act (CEHA), all "[e]mployment housing shall comply with the state building standards relating to employee housing unless a local ordinance offers equal minimum standards and the housing complies with the local standards." (Columbia Employee Housing Act § 2.) Employment housing [is] any accommodation including tents or other housing accommodations maintained on one or more sites and the premises upon which they are situated or the area set aside and provided for camping of five or more employees. (Columbia Employee Housing Act § 8(1).) The payment of rent is not required. (Columbia Employee Housing Act § 8(2).) The statute further imposes criminal penalties. Any person who violates the CEHA by displaying a flagrant lack of concern for the health and safety of the residents is punishable by a fine not to exceed six thousand dollars and by imprisonment not to

exceed six months for every day of a continuing violation. (Columbia Employee Housing Act § 61.)

Though not familiar with the minimum standards encapsulated in the state building standard and incorporated in the CEHA, it is apparent that the camp as Morales and witness Cruz depict is not fit for human habitation. The shacks were made of cardboard and may or may not have offered any protection from the elements. There was a single shower, a single faucet and two portable toilets for approximately 50 men. Whatever standards the relevant code must require, it is likely that Parsons violated them.

Proof that a Parsons has violated a law does not automatically establish liability. The plaintiffs must still show that Parson's [sic] negligence was a proximate cause of the injury. Michael R. The plaintiffs need only show that Parsons' conduct was a substantial factor in causing the injury. Michael R.

It is clear, based on the discussion of Parsons' activities in establishing and maintaining the camp and the supervisions and authority he wielded over its residents (as discussed, supra) that Parsons' negligence was an actual and proximate cause of Morales' injuries and Vargas' death. He failed to adhere to the applicable statute and as a result two of his employees were gravely injured.

Finally, in order to invoke the doctrine of negligence per se, the plaintiffs must show that they were members of the class intended to benefit from the statute and the type of harm they sufferers [sic] is the kind that the statute sought to prevent. The law's purpose states that the Legislature intended to protect tenants from substandard conditions and protect the public at large from the general health risks imposed by the disease that unsanitary and substandard conditions can generate. (Columbia Employee House Act § 1.) Though the thrust of the legislation appears to be towards ensuring minimum health standards (i.e., sanitation), the purpose is stated broadly enough to encompass death caused by fire or other natural disaster where a substandard housing is a substantial factor resulting in the injury to the worker's health or life.

Though the Lucas I court refused to impose liability under a negligence per se theory on the two defendants in that case, it should be noted that of those defendants, only one was an employer and he had not undertaken to provide housing to his population of farm workers. Parsons is in a completely different position, acting as both the employer of Morales and Vargas and providing them with inhumane and ultrahazardous living accommodations. As such, the CEHA is directly applicable to Parsons' behavior where it would not have been to the defendants in Lucas I.

Conclusion

All of the factors noted above for imposing liability on Parsons for the injuries sustained by the plaintiffs in this case are present. The harm to the plaintiffs was eminently foreseeable. There can be no doubt that the plaintiffs suffered a certain injury. The defendant's conduct is the actual and proximate cause of the plaintiffs' injury. Parsons encouraged and facilitated the camp's operation to save expenses and "cut out the middle man" he was paying to import his needed labor supply daily. He provided the flammable and substandard materials the workers scavenged from his farm in order to piece together shanties one on top of the other. He knew or had reason to know [of] or possibly provided the oil lamps the workers were using to light their hovels. Thus his conduct borders on the recklessness [sic] rather than negligence.

Additionally, society attaches moral blame upon the defendant's conduct. He was acting essentially as a slumlord and profiting at the expense of his worker's safety. The state should encourage others to comply with the statutory code and thus prevent future harm. The defendant could have protected himself with very little effort and there are negligible consequences to the community for imposing liability on the landowner/employee in situations such as this. Finally, the landowner/employer is in a far better position than his workers to protect himself from out-of-pocket expenses and being personally liable by acquiring liability insurance for the risk involved.

Thus, the courts should conclude that Parsons owed a duty to his farm workers, the standard of the duty to be determined under either premises liability or negligence per se.

THURSDAY AFTERNOON
FEBRUARY 27, 2003

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

REESE v. KENNEL KARE, INC.

REESE v. KENNEL KARE, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Rachel Bergman

214 West Elm Street

Martinville, Columbia

M E M O R A N D U M

To: Applicant

From: Rachel Bergman

Re: Reese v. Kennel Kare, Inc.

Date: February 27, 2003

Our client, Kennel Kare, Inc., is a dog boarding facility. Kennel Kare, Inc. has been sued by pet owners Amanda and George Reese for damages for alleged negligence. No other defendants are named in the action. The Reeses' prize pug was injured while being boarded at our client's kennel. The dog, Mrs. Miniver, escaped while being transferred from her cage to a dog run, became tangled in a barbed wire fence, and suffered disfiguring and severe cuts. This incident occurred some three years ago. While the action was filed more than two years ago, plaintiffs' counsel did not prosecute the action vigorously until recently.

Kennel Kare, Inc., was originally formed by Fred and Helen Dolan more than twenty-five years ago. Fred's and Helen's titles are President and Vice-President, respectively. Their daughter, Phyllis Dolan, now participates in operating the business of the corporation, too. Phyllis' title is Operations Manager.

Attached are the following:

1. My file memorandum from my recent interview with Phyllis Dolan;
2. Registration Form for Mrs. Miniver;
3. Excerpt from Procedures Manual for Kennel Kare, Inc.;

4. Incident Report;

5. Transcript of tape-recorded interview by Phyllis Dolan of Molly Taube, the employee handling Mrs. Miniver at the time of the incident; and,

6. Confidential Memorandum prepared by Phyllis Dolan as Kennel Coordinator to Operations Manager.

I am preparing to defend the depositions of Phyllis Dolan and Molly Taube. Given the lapse of time, I am trying to decide whether and which documents I should show them to prepare for their respective depositions. These documents have not yet been sought through discovery by the plaintiffs.

Referring to the attached cases and the other materials please write a memorandum advising me and giving your reasons for the following:

1. Whether, if I show **Phyllis Dolan** each of the above-listed six documents, I will be successful in resisting a motion by opposing counsel to compel production of these documents. Be sure to analyze, as to each document separately, the issues of privilege and waiver.

2. Whether, if I show **Molly Taube** each of the above-listed six documents, I will be successful in resisting a motion by opposing counsel to compel production of these documents. Be sure to analyze, as to each document separately, the issues of privilege and waiver.

Law Offices of Rachel Bergman

214 West Elm Street

Martinville, Columbia

M E M O R A N D U M

To: File

From: Rachel Bergman

Date: December 27, 2002

Re: Reese v. Kennel Kare, Inc.

These are my notes summarizing my initial interview with Phyllis Dolan on December 27, 2002.

Kennel Kare

Kennel Kare was started by Phyllis' parents, Fred and Helen Dolan, 40 years ago as a family business. The corporate entity was formed more than 25 years ago. Fred and Helen have always been President and Vice-President of the corporation, as they are now. They each originally owned 50% of the shares of Kennel Kare, and continue to maintain these shares. Phyllis has worked for the company, and later, the corporation, for more than 20 years. Over the last five years, Fred and Helen have begun to transfer control of the company to Phyllis Dolan. Phyllis became Operations Manager last year. Fred and Helen still are ultimate decision-makers of the corporation, but Phyllis makes all the day-to-day decisions regarding operations of the company. For example, she is in charge of hiring and firing personnel who work at the kennel. The Operations Manager reports directly to the President and Vice-President; likewise, the Kennel Coordinator, Office Manager, and Marketing Manager report directly to the Operations Manager.

As of the date of the incident, Phyllis' title was Kennel Coordinator. At that time, she reported directly to the Operations Manager, who in turn reported to Fred and Helen. As Kennel Coordinator, Phyllis generally made sure that the kennel was running smoothly. Phyllis could not make major decisions without the approval of the Operations Manager or her parents.

The kennel is located on 5 acres of a 25-acre parcel. Fred and Helen have a home on the parcel. Phyllis has a home closer to town. Kennel Kare boards up to 100 dogs at a time, and employs 20 full-time employees.

Incident on July 5, 2000

Amanda and George Reese dropped off their dog, Mrs. Miniver, on July 2, 2000. They filled out a standard registration form. No unusual behavioral issues were noted. Phyllis estimates that Mrs. Miniver was worth $20,000 before her injuries. Apparently, Mrs. Miniver is a pure-bred, and competed successfully in local, state and national dog shows with cash prizes.

Phyllis recalls receiving a phone call in the early evening of July 5, 2000. Molly Taube, one of the employees on duty that evening, called to let Phyllis know that Mrs. Miniver had gotten loose as Molly was removing her from her cage to take her to the dog run for her evening walk. The dog ran through an open gate and about 25 yards further to a barbed wire fence separating the kennel from an adjoining property. The dog became tangled in the barbed wire fence and suffered severe cuts on her back, side and stomach areas. Molly first called Dr. Jack Carter, the veterinarian listed on the Reeses' registration form. Neither Dr. Carter nor his on-call person was available. Molly then called Dr. Mary Donaldson, the vet on Kennel Kare's on-call list. Molly then called the Reeses at their cell phone number and advised them what had happened. Dr. Donaldson was able to come to the kennel right away, and sutured the dog's injuries. The Reeses arrived at around 11:00 p.m. and took the dog home with them.

Incident Report and Memo

Kennel Kare's Procedures Manual requires that an incident report, interview and memorandum be prepared.

Kennel Kare, Inc.

17878 Greenhaven Lane
Harveyville, Columbia

Registration Form

Tell Us About Yourself

Name_____Amanda and George Reese_____

Address_____98 Crawford Lane_____

City_____Logan City_____State__COL__Zip__97655_____

Home Phone_(555) 655-3248_____Fax_____

Work Phone__(555) 697-2323_____Emergency Phone_____

Email_____Cell_____(555) 401-9899_____

Who else is authorized to drop off/pick up the pet?____n/a_____

Instructions in case of emergency:

Call Dr. Jack Carter (Veterinarian) then call us on cell_____

_____

How did you hear about us?____friend_____

Tell Us About Your Pet

Name___Mrs. Miniver_____Breed____Pug_____Date of Birth/Age___3 years_____

Sex: Female Spayed/Neutered: No

Weight:____25_____Color___brown_____

How does your dog get along with other dogs?_____well_____

people?____well_____

Under what conditions does your dog growl, snarl, bark or cry?

___only when provoked_____

_____

Has your dog ever bitten or been bitten?

___no_____

Has your dog used any daycare/boarding facility before?

___yes_____

Does your dog use public dog runs?

___yes_____

Tell Us About Your Pet's Health

Veterinarian: Dr.___Jack Carter_____at _____Benson Valley_____Clinic/Hospital

Address:_____

Phone number____(555) 767-0934_____

Please describe your pet's general health? (include any current medical conditions)

____good_____

_____

_____

Allergies (if any)_____

Current medications:___none_____

Frequency and time administered:_____

Date of last complete physical exam _____

Vaccinations:

Rabies__current_____Date Administered_____Date Due_____

DHLP___current____Date Administered_____Date Due_____

Parvo___current_____Date Administered_____Date Due_____

Bordatella_current_____Date Administered_____Date Due_____

Please Tell Us About Your Pet's Daily Routine

Wake-up time:____6:30 a.m.,_____

Regular Food: Brand____Pet-time_____Variety___hi-pro_____Feed Times___dinnertime_____

Quantity:_____1 can_____Instructions____mix with warm water and kibble_____

Exercise/Walk____2 times_____Times_____a.m. and p.m._____

Typical Elimination Times_____6:45 a.m., 3:30 p.m. and 8 p.m._____

Sleep Time:____10:00 p.m._____

Favorite Activities/Toys

____frisbee toss and squeaky toy_____

Items brought/Luggage_____

I certify that I am the owner or the agent of the owner of the aforementioned pet, and that I am authorized to board the pet and sign this form. I authorize Kennel Kare, Inc. to contact my veterinarian in order to confirm health, temperament and vaccinations. I give consent to Kennel Kare, Inc. to act on my behalf by obtaining veterinary care at my expense, should Kennel Kare, Inc. deem it necessary. I have read the schedule of fees and agree to pay all charges at checkout, unless previously arranged. I authorize Kennel Kare, Inc. to charge my credit card account, if so provided, for any outstanding invoices. I release Kennel Kare, Inc. (and its agents and employees) from any liability or claim due to injury or death of my dog, unless Kennel Kare, Inc. has been negligent in the care of my dog. I understand that under no circumstances will Kennel Kare, Inc. be liable for consequential damages or damages beyond the replacement value of my dog.

Signed:__*Amanda Reese/ George Reese*_____Date____July 2, 2000_____

Kennel Kare, Inc.

Excerpt from Procedures Manual

* * * * * *

Section X.B. In Case of Sickness or Injury to Animals

Kennel Kare employees are required to do the following in all cases involving sick or injured animals:

1. Notify the supervisor on duty of the sick or injured animal.

2. If the supervisor determines that the animal requires veterinary services, refer to the animal's registration form and call the listed veterinarian. If emergency services are unavailable, refer to the list of on-call providers. Call the providers, in the order in which they appear on the list, and obtain the most immediate services available. Follow other steps indicated in the "Instructions in case of emergency" section of the Registration Form.

3. Once the animal is under the care of a veterinarian, fill out an Incident Report.

4. At the first available opportunity, the Kennel Coordinator or Operations Manager will conduct interviews of all employees who were on duty at the time the animal became sick or injured. These interviews shall be tape-recorded.

5. The person who conducts the interviews shall also prepare a memorandum summarizing the circumstances surrounding the sickness or injury, as well as all steps taken in response thereto.

6. The Incident Report, tape recording and memorandum may be used as the basis for disciplinary action, if so warranted. If so used, the documents will not be made a part of the employee(s)' Personnel File, but will be maintained by the central office as provided below.

7. The original Incident Report, tape recording and memorandum shall be filed in the central office file entitled "Incident Reports," which shall be confidential, kept in a locked file cabinet, and will be made available to legal counsel if litigation results from the incident.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

Incident Report

Name of employee:_____Molly Taube_____

Date of report:__July 5, 2000_____ Time of report:____11:30 p.m.____

Name of animal:_____Mrs. Miniver_____

Description of incident (time and date you first observed sickness or injury; where animal located; describe animal's condition or symptoms; describe who was present; describe steps you took in response, noting dates and times, if possible): At approximately 7:45 p.m., I went to the cage area to take Mrs. Miniver from her cage to the dog run area. For some reason, there was a lot of distracting stuff going on. There was lots of barking and commotion among many of the dogs in the cage area. I didn't notice it at the time, but a pick-up truck from a ranch down the road with 2 black labrador retrievers in the back had driven up to the gate. Those dogs were barking, too. I unlocked Mrs. Miniver's cage, and had swung open the door slightly. I was grabbing her collar so that I could attach a leash when she bolted. By then, the pick-up truck driver had rolled open the gate, and Mrs. Miniver ran through it. I lost sight of her, but ran after her. She seemed to be headed toward a tree-lined area that divides our property from the neighboring ranch. Suddenly, I heard yelping. I found Mrs. Miniver caught up in the barbed wire fence. I had trouble getting her untangled. She bit me a couple of times, but I finally got her loose. I ran her back to the office. Nobody else was around. I called Phyllis and told her what was going on. Mrs. Miniver was bleeding all over. I wrapped her in some blankets we had in the office. I called Dr. Carter, but he wasn't available, nor was his on-call person. I called Dr. Donaldson and she came out right away, I'd say in about 20 minutes. While I was waiting for Dr. Donaldson, I called the Reeses. I told them what had happened. They were really upset.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

Transcript of Interview between Phyllis Dolan (PD) and Molly Taube (MT)
Date of interview: July 8, 2000

PD: Hi, Molly. I have the tape recorder going. You know that I have to do this according to our Procedures Manual, okay?

MT: Yeah, I understand.

PD: Try not to get too stressed out about this. All you have to do is tell the truth, okay? Although, you should know that the Reeses might sue us. You just need to be careful about what you say, okay?

MT: I am really sorry about what happened, Phyllis. I have been with you guys for 7 years, and this is the first time something like this happened.

PD: We're all sorry when something like this happens, Molly. I know you didn't mean for it to end up this way, but why don't you tell me what you remember?

MT: It's pretty much what I said in the Incident Report, Phyllis.

PD: Well, take a look at it again and see if there's anything else you remember.

MT: I guess it was a lot crazier than I thought. I still can't figure out what exactly was going on, but all of a sudden all the dogs went crazy. They were barking and running around in their cages. Then the pick-up drove up. It was really noisy, the truck I mean, and the two dogs in back were also going nuts. Maybe I should have waited to get Mrs. Miniver out. There wasn't a particular hurry or anything, now that I think about it.

PD: Well, but that's in hindsight. Don't second guess yourself. You did what you thought was right at the time, didn't you?

MT: Yeah, of course, but I just feel so bad for Mrs. Miniver and the Reeses . . .and for Kennel Kare.

PD: I know you do. Well, is there anything else?

MT: I really can't think of anything.

PD: Okay, Molly. I'll be writing this up. As you know, part of my job is to make a recommendation about whether we'll be taking any disciplinary action against you. I can tell you now that I won't be recommending any disciplinary action, but I can't say I'm happy about this.

MT: I am still very sorry that this happened, you know. I promise I'll be more careful next time.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

CONFIDENTIAL MEMORANDUM

To: Operations Manager

From: Phyllis Dolan, Kennel Coordinator

Date: July 9, 2000

Re: Incident involving Mrs. Miniver on July 5, 2000

I have reviewed the applicable Registration Form and Incident Report. I also audiotaped an interview with Molly Taube yesterday. I summarize my findings as follows:

1. Molly has been an excellent employee for the past 7 years. She has had excellent performance reviews.

2. Molly does not have an explanation for why the incident occurred. It appears that she may have been distracted by a sudden widespread outburst of barking and excitement by the dogs being boarded at the time. Our facility was pretty full given that it was during the Fourth of July holiday period.

3. Another source of distraction was the unfortunate arrival at the time of the incident of our neighbor's pick-up truck. The truck was quite noisy and was carrying two large, barking dogs who seemed to further contribute to the general barking and excitement of the dogs at the kennel.

4. Under the circumstances, but in hindsight, Molly realizes that she should not have tried to take Mrs. Miniver to the dog run at that time. She could have waited until things calmed down before doing so. Perhaps because of the extra pressures created by being full over the holiday and being short-staffed, her judgment was not at its best.

Based on the above, I recommend that no disciplinary action be taken. I will have a talk with Molly and remind her that during a holiday period, and particularly when

we’re understaffed, she needs to think calmly, coolly and carefully to avoid making rash decisions. Molly agrees that she will be more careful next time.

REESE v. KENNEL KARE, INC.

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA EVIDENCE CODE AND COLUMBIA CODE OF CIVIL PROCEDURE

* * * * * *

Evidence Code § 771

(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent to the testimony of the witness.

* * * * * *

Evidence Code § 912

The right of any person to claim lawyer-client privilege [and the other privileges] is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

* * * * * *

Evidence Code § 952

"Confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a

legal opinion formed and the advice given by the lawyer in the course of that relationship.

* * * * * *

Evidence Code § 954

Subject to Evidence Code § 912, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication.

Evidence Code § 955

The attorney who received the communication or made a communication subject to the attorney-client privilege shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under Evidence Code § 954.

* * * * * *

Code of Civil Procedure § 2017

Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, if the matter either is itself admissible in evidence or appears to be reasonably calculated to lead to the discovery of admissible evidence.

* * * * * *

SULLIVAN v. SUPERIOR COURT

Columbia Court of Appeal (1972)

There is apparently no conflict as to the facts alleged in the petition. Petitioner William Sullivan alleges that he interviewed his client, Mary Spingola, concerning the events surrounding an automobile accident. The interview was conducted in the course of an attorney-client conference, during which petitioner asked questions and plaintiff in the underlying action, Spingola, gave her answers. This interview was tape-recorded.

During the taking of the deposition of Spingola, defense counsel asked her if she had used anything to refresh her memory. Her counsel as well as she stated that to refresh her recollection she used the transcription made by petitioner's secretary of the electronically recorded conference between her and the attorney.

The defendants in the underlying action then demanded the production of the transcription. Petitioner refused to produce it on the ground that it was protected by the attorney-client privilege. The trial court ordered production of the transcription.

Petitioner then filed this petition to prohibit enforcement of this order, contending that requiring the production of the transcription violated the attorney-client privilege and that Spingola's refreshing her memory from the transcription was not a waiver of the privilege.

To successfully invoke the lawyer-client privilege, three requirements must be met. There must be (1) a communication, (2) intended to be confidential, and (3) made in the course of the lawyer-client relationship. The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full

disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Furthermore, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he considers to be unfavorable facts.

Code of Civil Procedure § 2017 expressly exempts privileged matter from discovery. There can be no doubt that the document in question is privileged. Defendants do not argue otherwise. Defendants, however, contend that the provisions of Evidence Code § 771 control in a situation of this kind and require disclosure because they claim Spingola waived the privilege. Evidence Code § 771 provides in pertinent part:

(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken. (b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent to the testimony of the witness.

There is an apparent conflict between Evidence Code § 771 and other statutes dealing with the attorney-client privilege. In interpreting the various statutes on the subject, certain rules of statutory interpretation must be borne in mind. One rule provides that when two provisions of a statute are inconsistent, then a specific provision will control over a general one. Thus, under this rule, the specific provisions of the Evidence Code governing the protection of specific privileges will control over the more general provisions of Evidence Code § 771 which refers to the production of *any* document used by a witness to refresh his memory. Another rule provides that when an irreconcilable conflict exists

between two sections of a statute, the later occurring provision controls over an earlier provision, even though both were enacted at the same time. Under this rule, the Evidence Code sections governing privilege control over the earlier occurring in § 771.

Evidence Code § 952 defines a confidential attorney-client communication to include disclosures of information to those to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer is consulted. Spingola was not asked whether, despite the fact that she refreshed her memory by reading the transcription, she had an independent recollection of the facts of the accident. However, it may be assumed that any careful lawyer would grant her the opportunity before trial to refresh her memory with her first statements to her attorney.

In view of the importance of the attorney-client privilege and the nature of the writing involved here, it cannot be held that Spingola waived the privilege by refreshing her recollection from it. Moreover, to hold otherwise and thereby undermine the sanctity of the attorney-client privilege may have very far-reaching effects upon attorney-client communications which are not justified by the facts of the present case.

Petition granted.

DIXON v. SUPERIOR COURT

Columbia Court of Appeal (1968)

Petitioner Corey Dixon (Dixon) seeks a writ of mandamus directed to the Superior Court, Orange County, ordering it to grant his motion to produce certain reports.

In an action by Dixon for personal injuries resulting from an explosion on August 3, 1965, Southern Counties Gas Company (Gas Co.) was named as the defendant. Mr. Reynolds, an employee of Gas Co. at the time of the accident, was a lead man in charge of a crew of at least two other men including Alfred Jones. They did construction and maintenance work for Gas Co. Mr. Reynolds was not present at the scene of the explosion, but was required by Gas Co. to prepare certain investigation and accident reports in connection with the accident. Mr. Jones was present at the scene of the explosion. Mr. Reynolds and Alfred Jones were not named as defendants. Reynolds' reports were prepared and submitted at various dates, commencing in August 1965 and continuing to and including May 1966. Plaintiff was to take the deposition of Alfred Jones. Prior to the time when the deposition was taken, and in order to refresh his memory, Jones reviewed Reynolds' reports, which had been given to him by the attorney for Gas Co.

At the deposition, Dixon elicited the fact that Jones had refreshed his recollection in this manner. Gas Co., however, refused Dixon's request to produce the reports.

Subsequent to the taking of the deposition, Dixon moved the court for an order pursuant to Evidence Code § 771 (all further references are to provisions of the Evidence Code unless otherwise indicated), requiring Gas Co. to produce and permit him to inspect and copy the reports which had been identified. Section 771 provides in pertinent part: "(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of

an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken."

The motion specifically described and identified the papers and documents it desired to inspect and copy. This motion was denied on the basis that the papers and documents were privileged under the attorney-client privilege, and that the privilege had not been waived.

The questions presented are: (1) Were the reports privileged as attorney-client communication, and (2) if there was a privilege, was there a waiver?

Attorney-client privilege

The problem involved obviously relates to the extent of the attorney-client privilege when the client is a corporation. The problem becomes complex because a corporation can speak only through an officer, employee, or some other natural person. Certainly, this fact should not result in an absolute denial of the privilege, nor should it lead to the conclusion that the privilege attaches to every report or statement made by a corporate agent and furnished to the corporation's attorney. The existence of such a privilege in favor of a corporate client has been assumed in many Columbia cases, but the precise extent of the privilege seems never to have been discussed by the Columbia appellate courts.

Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communication will be made public. As one writer has said, "The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with their legal advisers, the more willing one should be to accord them a flexible and generous protection."

But reason dictates that the corporation not be given greater privileges than are enjoyed by a natural person merely because it must utilize a person in order to speak. If

we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles clearly emerge. These basic principles may be stated as follows:

1. When the employee of a defendant corporation is also a defendant in his own right, his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

2. When such an employee is not a co-defendant, his statement regarding the facts with which his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents the employer should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation at the time of the communication; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the non-litigant employee), and the communicating employee is a "member of the control group";[2]

3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness. The fact that the employer requires him to make a statement does not alter his status or make his statement subject to the attorney-client privilege;

4. Where the employee is not a witness and his only connection with the matter grows out of his employment to the extent that his report or statement is required to be made by the employer, his statement or report is that of the employer;

[2] The most useful definition of "member of control group" is as follows: The control group comprises all those employees, of whatever rank they may be, who are authorized to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney. All persons so authorized, in effect, personify the corporation when they make their disclosures to the lawyer and the privilege would apply.

5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;

6. When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived;

7. Finally, no greater liberality should be applied to the facts which determine privilege in the case of a corporation than would be applied in the case of a natural person (or association of persons), except as may be necessary to allow the corporation to speak.

Under the facts of this case, Reynolds was not named as a co-defendant. His position in the corporation, while in management, was not one of ultimate control. He could not be said to be speaking for the corporation when he made his report. He could be said to be speaking for the corporation only if he had the authority to make critical and key decisions on behalf of the corporation.

Reynolds' connection to the case grew out of his employment with Gas Co. His reports were required in connection with the investigation of the incident by Gas Co. Because Gas Co. directed the making of the reports for transmittal to its attorney, the reports are privileged.

Nevertheless, our inquiry does not end there. The facts require further analysis in that finding the existence of privilege is not dispositive of the conflict between a liberal interpretation required under our rules of discovery and the liberal construction in favor of the exercise of the attorney-client privilege. Nor does it decide whether the privilege was waived.

Evidence Code § 912 provides in pertinent part as follows:

(a) The right of any person to claim the lawyer-client privilege ... is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

In this case the privilege rested with Gas Co. Defendant Gas Co. had knowledge that the deposition of its employee, Mr. Jones, was to be taken and had the knowledge that Mr. Jones had read the Reynolds' reports.

Gas Co.'s legal position is that where a witness gives testimony which involves the contents of privileged reports furnished to him to refresh his memory, the holder of the privilege may assert the attorney-client privilege when the request is made to produce the document.

We disagree. When, with knowledge of their intended use, privileged records are furnished to an independent witness (as defined in number 3, above), the privilege is waived.

Let a writ of mandamus issue.

ANSWER 1 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Rachel Bergman
FROM: Applicant
DATE: February 27, 2003
RE: Reese v. Kennel Kare, Inc.

You have asked for me to draft a memorandum advising you whether we can be successful in a motion to compel production [of] six specific documents if they are disclosed to parties other than those who may be considered our clients. I will analyze the documents separately and separately discuss each other party.

First, you would like to show the six documents to Phyllis Dolan. Phyllis is currently the Operations Manager of Kennel Kare, Inc. ("Kennel"). Kennel is our client. As the Operations Manager, Phyllis reports directly to the President and Vice-President of Kennel, who happen to be her parents. Phyllis makes all of the day-to-day decisions for Kennel, but the ultimate decision makers are the President and Vice-President. Kennel, the corporation, is our client, not its officers, directors, or employees. As such, Phyllis is not our client, but depending on her status within the corporation, her statements could be construed as those of Kennel and therefore privileged. At the time of the incident, Phyllis was the Kennel Coordinator and could not make major decisions.

1. Memorandum to File regarding Interview with Phyllis

On December 27, 2002, you interviewed Phyllis and drafted a memorandum to the file summarizing the interview. Under our facts, Phyllis [is] not a co-defendant in the case. This memorandum would be privileged under the lawyer-client privilege if three requirements are met as set forth in Sullivan: There must be (1) a

communication; (2) intended to be confidential; and (3) made in course of lawyer-client relationship. In the context of a corporate client the matter is complex because the corporation can only speak through its officer or employees or another natural person. The court in Dixon set forth certain basic principles in connection with privilege and waiver in the corporate context. In Dixon, the court stated that if the employee is not a co-defendant, his statement regarding facts with which his employer may be charged made by such employee to employer's lawyer should not be privileged unless he is the natural person to be speaking for the corporation at the time of the communication. Therefore, the privilege will attach if the statement is made by an employee in the "control group". Employees in the control group are those who are authorized to control or take a substantial part in the decision about any action that the corporation may take upon advice of an attorney.

In our facts, we have a communication, the interview between you and Phyllis; intended to be confidential, presumably because she was being interviewed by Kennel's lawyer in the context of litigation, Phyllis intended the conversation to be confidential; and it was made in the course of the lawyer-client relationship. At the time of the interview, Phyllis was Operations Manager and made all day-to-day decisions for Kennel, therefore she was in Kennel's control group. Accordingly, she was speaking for the corporation at the time of the communication. The fact that she was not in this position at the time of the incident is irrelevant. She was in the position at the time of the communication, which is required by Dixon. Therefore, her interview and your memorandum are privileged.

The next issue is whether by showing the memorandum to Phyllis [it] waives the privilege. Under the Evidence Code § 771, if a witness, either while testifying or prior to such testimony, uses a writing to refresh his memory with respect to the matter in which he will testify, the writing must be produced at the hearing at the request of the adverse party. Presumably then, if we show Phyllis the

memorandum regarding her prior interview to refresh her memory of the events, we would be compelled to produce the memorandum if the opposing counsel requests it. However, according to Sullivan, this section is in conflict with other statutes dealing with the attorney-client privilege. The facts in Sullivan would be comparable to ours. A client used the transcript of privileged attorney-client communication to refresh his memory prior to a deposition. Opposing counsel sought production of the transcript and the trial court ordered production. The client's lawyer petitioned the court to prohibit production. Under two theories, the court found that other attorney-client privilege statutes controlled over § 771 and stated that in view of the importance of the attorney-client privilege and the nature of the writing, the client did not waive the privilege by refreshing her recollection from the writing. Therefore, d[ue] to the similarity in issues, allowing Phyllis to look at the memorandum would not waive the privilege. We should first ask Phyllis if she has any independent recollection before resorting to the memorandum. Accordingly, we would be successful in resisting a motion to compel production of the memorandum.

2. Registration of Mrs. Miniver

The registration form would not be privileged. This was not a communication between client and lawyer in the course of their relationship. Additionally, it was a form filled out by plaintiffs, so it obviously was disclosed to third parties. Therefore, there is no confidential communication under Evidence Code § 952. Because there is no privilege, no privilege can be waived by showing it to Phyllis. Whether we show it to Phyllis for her deposition or not, opposing counsel could compel production of the registration form. We would not [be] successful in resisting this motion.

3. Excerpt from Kennel's Procedure Manual

Again, this is not a confidential communication between a lawyer and client pursuant to § 952. Even if the manual was intended to be confidential among Kennel and its employees, it does not meet the other requirements to invoke the lawyer-client privilege. It is not a communication made in the course of the lawyer-client relationship. Even if we argue that the excerpt was given to us in the course of our representation of Kennel, this was not the intent of the manual. Accordingly, because this is not a confidential communication, there is no privilege, it can't be waived and we can be compelled to produce the manual. Showing it to Phyllis will not affect this result.

4. Incident Report

The issue with the report is whether a report by an employee of a corporate defendant is privileged communication as to the corporate client. Dixon is the authority on this issue. Another of the basic principles stated by the court in Dixon is "when an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness; the fact that the employer requires him to make the statement does not alter his status or make his statement subject to the attorney-client privilege." This is directly on point with the incident report written by Kennel's employee Molly Taube. Molly was the only person to witness the incident. Pursuant to the procedures manual, she was required to draft a report of the incident. Pursuant to Dixon, Molly is an independent witness and the fact that Kennel's procedures required her to make the report doesn't change this. The incident report is not privileged. Furthermore, even if Molly was an employee in the control group, the report was not a communication made in the course of the lawyer-client relationship or even a communication to a lawyer, in accordance with Evidence Code § 952 and Sullivan. Accordingly, because the incident report is not privileged, there will be no waiver by showing it to Phyllis. We would lose in resisting a motion to compel the production of the incident report. The fact that the incident report, in accordance with the procedures manual, shall be kept in [a] confidential locked

file cabinet and used in case of litigation may help show that the report was confidential information. However, because Molly was the witness to the incident, the principles set forth in paragraphs 5 and 6 in Dixon, which I will discuss below, do not apply. So, as stated above, we will be compelled to produce the incident report, no matter whether it is shown to Phyllis or not.

5. Transcript of Molly's Interview

Pursuant to Kennel's procedures manual, the Kennel Coordinator or Operations Manager must interview the witness employee. The interview must be tape-recorded and as with the incident report, kept confidential and made available to counsel if litigation results. On July 8, 2000, Phyllis, as Kennel Coordinator, conducted an interview with Molly. Under the basic principles in Dixon, paragraph 4 states that where the employee making the statement or report is not a witness, and his only connection with the matter grows out of his employment to the extent the statement is required to be made by the employer, the statement or report is that of the employer. This document brings up the issue of whether it falls under this paragraph, whether it's a statement or report made by an employee who is not the witness. Here there are statements by Molly (witness) and Phyllis (non-witness). The relevant statements made are presumably by Molly. Phyllis merely asked questions. If the transcript can be considered a report or statement made by Phyllis, the analysis below regarding Phyllis' memorandum will apply if it is a statement by Molly, the same analysis regarding the incident report applies. I believe that because the relevant statements in the interview were made by Molly. Therefore, this transcript is not privileged and showing it to Phyllis will have no effect of waiver. We will not be successful in resisting the motion to produce the transcript. The fact that Phyllis states there might be a lawsuit is irrelevant.

6. Phyllis' Confidential Report

Pursuant to the procedures manual Phyllis, as the person conducting the interview, must prepare a memorandum of the incident. The memorandum, along with incident report and tape-recorded interview, may be used towards disciplinary action, but will not be placed in the employee's personnel file. The memorandum is also placed in the confidential locked file in case of litigation.

As stated above, pursuant to Paragraph 4 of Dixon, this report should be considered a report of the employer, Kennel. Phyllis was not a witness to the incident and her only connection to the matter grows out of her employment because it was required by Kennel to be made. Paragraph 5 states that in the case of Paragraph 4, the privilege of the report is to be determined by employer's purpose in requiring the report. If the report is required for confidential transmittal to Kennel's attorney it would be privileged. In our facts, Kennel requires the report. There is no express statement of its purpose, but it is to be kept in a locked cabinet in the central office to be "made available to legal counsel if litigation results from the incident." This shows that the purpose of this report was for confidential transmitt[al] to Kennel's attorney. Opposing counsel may argue that the purpose of the report was to discipline the employee. Under Paragraph 6 of Dixon, if the employer has more than one purpose in directing the employee to make the report, the dominant purpose controls, unless the secondary use causes confidentiality to be waived. In our facts, the manual states the memorandum, with the incident report and interview, "may be used as a basis for disciplinary action." Discipline is not the dominant purpose. This leaves confidential attorney communication as the dominant purpose. The secondary purpose for discipline does not waive confidentiality because it is not placed in employee's file. Therefore the communication is privileged.

So, under our facts, Phyllis was not named a co-defendant. Her position at the time of the memorandum was not one of ultimate control, so she could not be said to be speaking for Kennel when she made this report. Phyllis' connection grew out of her employment with Kennel. Her report was required in connection with the

investigation of the incident by Kennel. Because Kennel directed the making of these reports for transmittal to their attorney, the memorandum is privileged.

The same analysis regarding waiver that was discussed in Section 1 above relating to Phyllis' interview apply here. Phyllis will not waive the privilege if the memorandum is shown to her prior to her deposition. We will be successful in opposing the motion to produce.

Molly Taube - You would also like a discussion of privilege and waiver issues in relation to showing the same six documents to Molly in preparation of her deposition.

1) File Memorandum of Interview with Phyllis

The same analysis regarding privilege applies here as it did under Phyllis' discussion. The memorandum is privileged. The issue is whether that privilege is waived if we show it to Molly to refresh her recollection. Again, we look at Dixon, which is directly on point. A witness employee reviewed reports made by his supervisor as required by the corporation in order to refresh his recollection of the incident. Relying on § 912 of the Evidence Code, which addresses waiver of attorney-client privilege if holder of such privilege has disclosed a significant part of such communication or has consented to such disclosure, the court held that privilege was waived.

The corporation in Dixon argued that holder of the privilege does not waive the privilege where a witness gives testimony that involves contents of privileged reports furnished to refresh his memory. The court found that defendant had knowledge that his employee's deposition was to be taken and had knowledge that such employee read the privileged reports. The court held that, when, with knowledge of the[ir] intended use, privileged records are furnished to an independent witness, the privilege is waived.

This would be our case if we allow Molly to use our memorandum of Phyllis' interview. Therefore, we should not show Molly this memorandum or else the privilege will be waived.

Documents 2 - 5 (Registration Form, Procedures Manual, Incident Report, Transcription of Molly's Interview).

As analyzed above, none of these documents are privileged. So, showing them to Molly will not effect [sic] the result. We will be compelled to produce these documents.

6. Phyllis' Report

This would be the same analysis as under #1 for Molly. The report by Phyllis is privileged. Pursuant to Dixon, showing it to Molly would waive the privilege. The privilege rested with Kennel. Kennel would have knowledge that the deposition of Molly would take place and would have the knowledge, through us as Kennel's lawyers, that Molly had read the memorandum. Because Kennel has knowledge of its intended use, for confidential transmittal to its attorney, and knows the privileged report is being furnished to Molly, an independent witness, the privilege would be waived. Therefore, we should not furnish the memorandum to Molly or we will be compelled to produce it to opposing counsel.

ANSWER 2 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Rachel Bergman

FROM: Applicant

DATE: February 27, 2003

RE: Reese v. Kennel Kare, Inc.

You have asked me to prepare a memorandum analyzing, if you show certain file documents to Phyllis Dolan and Molly Taube in preparation for their depositions, whether a motion to compel disclosure of those documents can be resisted successfully. Below, I analyze in turn each of the documents you refer to, being sure to analyze issues of privilege and waiver.

1. Your File Memorandum From Your Recent Interview With Phyllis Dolan.

Privilege

In Sullivan v. Superior Court, the Court of Appeal refused to uphold a trial court's order to compel production of a transcription of an interview between the lawyer and the client, which the lawyer gave to the client to refresh her recollection before deposition. In the case at hand, you would have Phyllis Dolan review the notes from your interview with her.

In Sullivan, the defendant herself had given the interview, and was giving the deposition. In the case of our clients, Ms. Dolan is not a named defendant. However, privilege attaches to communications between the attorney representing the defendant corporation and employees who are not co-defendants, who are in the "control group." Dixon.

Ms. Dolan is a member of the company's "control group." "The control group comprises all those employees ... who are authorized to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney." Ms. Dolan is the Operations Manager, and was Operations Manager at the time of your interview with her in December 2002. As Operations Manger, Ms. Dolan makes all the day-to-day decisions regarding operations of the company, and approves "major decisions." The Kennel Coordinator, Office Manager, and Marketing [M]anager report to Ms. Dolan. She reports directly to the [P]resident and [V]ice [P]resident of the company.

Your Interview of Ms. Dolan is Privileged.

Waiver

As in Sullivan, there is no waiver of confidentially if Ms. Dolan refreshes her recollection with your interview with her. However, the privilege can be waived if the notes are shared with Ms. Taube. S 952 allows disclosure of communications with third persons which are reasonably necessary, without waiving the privilege. However, it is not reasonably necessary to share the notes with Ms. Taube. Substantively, all of the events of the day in question are available in other documents, notably, her incident report (see below).

2. Registration From for Ms. Miniver

Privilege

This registration form is not a confidential communication between client and attorney. First, it is not confidential, it is signed by Amanda and George Reese, and read by whoever was working at the kennel, or whoever the Reeses chose to share it with. Second, it is not between clients and attorney.

No privilege attaches to this document. There is no problem with waiver, if you choose to allow the witnesses to read it before their depositions.

Discoverability

CCP 2017 allows discovery of any matter relevant to the action, and admissible in evidence or reasonably calculated to lead to admissible evidence. The registration form is relevant to show that the plaintiff's dog was boarded at the kennel, and is admissible as a business record.

3. Except From Procedures Manual For Kennel Kare, Inc.

Privilege

The procedures manual is not a confidential communication. It is available to all employees of the kennel. It is not between attorney and client. It is issued and published by the company, to all employees. Privilege does not attach to the manual.

Waiver is not a problem, if you wish to show it to the witnesses before their depositions.

Discoverability

The manual is discoverable under CCP 2017. It is relevant to show negligence, and admissible as a business record.

4. Incident Report

Privilege

"When an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness. The fact that the employer requires him to make a statement does not alter his status or make his statement subject to the attorney client privilege." Dixon.

The reporter here is Ms. Taube. She is an independent witness, because she witnessed the incident with the dog. Even if the Kennel had required that she make a statement about the incident that she witnessed which requires communication to a lawyer, her statement is not subject to the privilege.

Waiver

Waiver is not an issue, because no privilege attaches. The incident report is discoverable whether or not you show it to the witnesses.

Discoverability

Under CCP 2017, the report is discoverable. It is relevant to show the plaintiff's prima facie claim, and it is admissible as a business report.

5. Transcript of Tape-recorded Interview by Phyllis Dolan of Molly Taube; and

6. Confidential Memorandum Prepared by Phyllis Dolan as Kennel Coordinator to Operations Manager

The same analysis applies to both of these documents.

Privilege

The rule in Dixon states, "Where the employee is not a witness, and his only connection with the matter grows out of his employment to the extent that his report or statement is required to be made by the employer, his statement is that of the

employer; ... (and I)f ... the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same."

Here, the interview was conducted by Phyllis Dolan, and the report was written by Phyllis Dolan. She was not a witness, her only connection with the incident grows out of her employment, and the interview and the report were required by the employer, as recited in the manual. So. Ms. Dolan's statements and report are clearly "of the employer."

Whether the report and statements that are "of the employer" are privileged is determined by the employer's purpose in requiring them. Dixon. If the employer "directs the making of the report for confidential transmittal to its attorney, the communication may be privileged." In our clients' case, there are two purposes, outlined in the procedures manual, for the tape and report. (The [p]rocedures Manual also discusses the Incident Report, but its character is distinct because it is composed by a witness employee, see #4 above).

"When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control unless the secondary use is such that confidentiality has been waived." The two purposes outlined in the manual are for employee discipline and to be available to counsel in case of litigation.

The dominant purpose of our client is to make the documents available to counsel for litigation. The secondary purpose is to make decisions about employee discipline, and nothing happens in the course of that decision making to waive confidentiality.

First, the documents are kept confidential, in a locked cabinet, apart from other documents. Second, the documents are used by the person charged to make

the report (whose statements are "of the employer") and the Operations Manager, who is in the Control Group (see above), to decide employee disciplinary action, maintaining their confidentiality within the circle of representatives of the corporation whose communications to counsel are privileged. Third, the documents are not kept with personnel files, but are filed separately for access to attorneys in case of litigation. Fourth, as mentioned, the files are kept segregated and "available to legal counsel if litigation results from the incident."

Applying the rules in Dixon, privilege attaches to the confidential memorandum and the transcript of the interview between Ms. Dolan and Ms. Taube.

Waiver

The issue of waiver arises, because Ms. Taube is both a witness to the incident, and is a person outside the "control group". As discussed in #4 above, even if Ms. Taube's statements are made at obligation of her employer and for the attorney, they are not privileged.

The confidentiality of the interview is not waived because Ms. Taube participated, even though she is a witness employee (see #4 above) and she is not in the "control group." Section 952 says that the confidentiality of a communication is not waived when disclosure is reasonably necessary for the transmission of the information. Of course, for Ms. Dolan to interview Ms. Taube, it is necessary that Ms. Taube participate.

To offer the memorandum or the transcript to Ms. Dolan should not constitute a waiver of confidentiality. However, if the memorandum is disclosed to Ms. Taube, the privilege will have been waived and the memorandum will be subject to a motion to compel. It is not necessary to the representation that Ms. Taube see the transcript or the memorandum. If her recollection needs to be refreshed, she

can see the incident report, which is not privileged, and is subject to disclosure anyway.

California
Bar
Examination

Performance Tests
and
Selected Answers

July 2003

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2003 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Contents

TUESDAY AFTERNOON
JULY 29, 2003

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

IN RE MARRIAGE OF NITTARDI

IN RE MARRIAGE OF NITTARDI

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

RYCHLY & KELLY, LLP
Attorneys At Law
220 McGEE AVENUE
BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: Applicant
FROM: Mary Rychly
DATE: July 29, 2003
SUBJECT: ***In re Marriage of Nittardi***

Yesterday, we were retained by Pier Nittardi, who has asked us to advise him in a custody matter involving his former wife, Jean Dillon Nittardi, and their daughter, Silvia Nittardi. Mrs. Nittardi has expressed intention to move with Silvia from Columbia to Dakota in little more than a week. I have told Pier that I will send him an opinion letter respecting his legal position.

The facts bearing on this matter can readily be gleaned from an interview that I conducted with Mr. Nittardi yesterday, a judgment of dissolution, two custody orders, a memorandum by one of our paralegals, and a letter that Mrs. Nittardi's attorney sent to Mr. Nittardi some days ago.

Please prepare, for my signature, an opinion letter to Mr. Nittardi in accordance with the firm's guidelines.

RYCHLY & KELLY, LLP
Attorneys At Law
220 McGEE AVENUE
BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
DATE: September 27, 2001
SUBJECT: ***Opinion Letter Guidelines***

Often the firm's attorneys must prepare an opinion letter to communicate its views to a client. An opinion letter should follow this format:

- State your understanding of the client's goal or goals.
- Indicate what action the client may take to achieve such goal or goals.
- Analyze the client's legal position objectively, in light of the applicable law and the relevant facts, and resolve each of the issues implicated, arriving at a conclusion, and identifying the degree of certainty, as to each.
- Remember that many opinion letters are written to lay clients. Although you must discuss the law, you should do so as clearly and straightforwardly as possible.

INTERVIEW OF PIER NITTARDI

MARY RYCHLY: Mr. Nittardi, with your permission, I'll be tape-recording our conversation today. Is that agreeable?

PIER NITTARDI: Yes, that is alright.

RYCHLY: Prior to turning on the tape recorder, we executed the standard written retainer agreement provided by the Columbia State Bar.

NITTARDI: Yes, we did. They are the same kinds of papers that I have signed for the lawyers who represent my restaurant in land use and other matters.

RYCHLY: That's correct. You gave me a copy of three documents: a "Judgment of Dissolution; Stipulated Custody Order"; a "Stipulated Temporary Custody Order"; and a letter to you from Lucien Zachary, of Zachary, Sidney & Rose, a law firm down the street here in Bradfield.

NITTARDI: Right.

RYCHLY: Mr. Nittardi, why don't we go over the facts? You've told me some. Let's get them all.

NITTARDI: Very well. My name is Pier Nittardi — P-I-E-R N-I-T-T-A-R-D-I. I am 39 years old. I was born in Pescara, in the Abruzzi, in Italy. I am a naturalized American citizen. My wife — my former wife — is Jean Nittardi. Her maiden name was Dillon. She is 37. We have a daughter, Silvia, who is 12. She was born in this country.

RYCHLY: Can you tell me something about how you and Jean met?

NITTARDI: Surely. It was in 1987. I owned a small *trattoria* in Rome, a restaurant, not at all fancy. Jean had graduated from the University of Columbia with a major in Italian, and was teaching English to earn some money before she started graduate school at the university. She often came to *La Bella Hadley* — that was the name of my *trattoria*, given by the first owner many years ago in honor of Ernest Hemingway's first wife. At first, we were what we call in Italian "convenient" friends. She practiced her Italian with me, and I practiced my English with her. Soon, however, we fell in love. She returned to the university for graduate school. As quickly as I could, I sold *La Bella Hadley*, and followed.

RYCHLY: And then?

NITTARDI: And then, in 1988, we married. She continued her studies — it was a long, slow process to earn a doctorate — and I started working in a local Italian restaurant here in

Bradfield. In time, I was made a partner. Not long after, I sold my interest and bought my own restaurant, *IL Pavone*.

RYCHLY: *IL Pavone* has been wildly successful since it opened. I have almost always had to beg to get a reservation.

NITTARDI: A thousand thanks. I have been very lucky.

RYCHLY: Continue.

NITTARDI: The next two years, we hardly saw each other. Jean was always at the university, and I was always at the restaurant. But we saw each other sometimes. In 1991, Silvia was born. What a beautiful baby. What a beautiful little girl.

RYCHLY: What happened next?

NITTARDI: In spite of her studies, Jean was an excellent mother. And, in spite of the restaurant, I tried to be a good father. I guess we forgot to be husband and wife. We, how do you say it, bicked —

RYCHLY: Bickered.

NITTARDI: — bickered, and grew apart, and in 1994, when Silvia was three, we divorced. It was Jean's idea, but I could not disagree. We were not so much angry, we were sad. We did the divorce ourselves, without lawyers; we agreed on practically everything. Silvia was three, as I said, and we agreed that Jean should take care of her most of the time, and that I should help when the restaurant was slow or closed. Jean remained in our house, and I bought a cottage nearby.

RYCHLY: And then?

NITTARDI: We continued on, I with the restaurant and Jean with her studies. It was hard for Jean to progress in her studies because, as I said, we had agreed that she should take care of Silvia most of the time. In 1997, when Silvia was six, we agreed to divide the care, but only for three years, which is what Jean thought that she would need to finish her written and oral comprehensives and to prepare and defend her dissertation.

RYCHLY: So, in 2000, when Silvia was nine, you went back to the original arrangement?

NITTARDI: No, we never did. We continued with the arrangement as modified, dividing the care of Silvia. It took Jean longer to complete her dissertation than she had expected. She finally got her doctorate in 2001. She then had to begin looking for a permanent position. Fortunately — or so it seemed at the time — the Italian department received funding for an additional tenure-track position beginning in 2002. Jean had been the department's best student in years. The department gave her a one-year job as a lecturer as it waited to

appoint her to the new position as an assistant professor. So, with all that was going on in Jean's life, we just continued with Silvia as we had.

RYCHLY: Could you tell me something more about the arrangement? What have you done?

NITTARDI: I have organized my schedule in order to be home with Silvia as much as possible, whenever she is not in school. I help her with her homework, accompany her to her extracurricular activities, that sort of thing.

RYCHLY: What about Jean?

NITTARDI: She has done likewise, fitting her schedule around Silvia.

RYCHLY: What's changed?

NITTARDI: This last year has been good for me, but not so good for Jean. I think that is the source of some of our present difficulties. The restaurant has become even more successful than it was. I am making more money, and have more leisure — not much, but more.

RYCHLY: And Silvia?

NITTARDI: Silvia is now 12. She is in middle school, and gets very good grades. She is keen to begin Bradfield High School next year with all of her friends — she has so many. She has spoken Italian and English since she was a toddler. Because she speaks so well, and is so charming, she has endeared herself to many of my friends in the large Italian expatriate community here and to their children.

RYCHLY: Your friends like her —

NITTARDI: And she likes them too, especially, of course, their children.

RYCHLY: Her activities, what are they?

NITTARDI: She is a member of an Italian-American youth group. She helps the exchange students who come from Italy, and hopes to go to Italy next summer as an exchange student herself. She is also a member of a volleyball team that competes across the country. Because I was not born here, I always travel with her, to learn about America, but especially to look out after her. I love her dearly, and am so happy that we have become so close.

RYCHLY: You travel with Silvia even during periods when she would have been in Jean's care had she been home?

NITTARDI: Yes. Jean does not grudge me the extra time — at least, she did not before now.

RYCHLY: That brings me to my next point: You said that things have not been so good for Jean?

NITTARDI: Yes. The Italian department got an unexpected opportunity to hire a prominent professor from the University of Rome, Yolanda Fata, and did so, awarding her tenure at the same time. It used the position that was supposed to be Jean's. Jean was devastated. It was too late in the year for her to look for a position elsewhere. So she came up with some idea to develop computer software for Italian-English and English-Italian translation.

RYCHLY: I didn't know she's a software developer.

NITTARDI: She's not. She'll have to find one to work with. How she will pay him, I do not know. She has little savings, and needs a job to earn money.

RYCHLY: So the hiring of Professor Fata hit her hard?

NITTARDI: Yes — and the fact that Yolanda and I met, and have become good friends. Very good friends.

RYCHLY: You mean that the two of you have a romantic relationship?

NITTARDI: Yes, and I believe that has caused trouble.

RYCHLY: Why don't you explain?

NITTARDI: Until this year, Jean and I always got along. Not only for Silvia's sake, but also because we have remained fond of each other. Perhaps each of us had some vague hope that we might someday reconcile. After Yolanda, I guess, we do not have any such hope. And so we have started bickering again, just as before the divorce, and, for the first time in all the years I have known her, she has begun to act spitefully. Not only towards me, but also toward Silvia. I know that adolescent girls sometimes have great difficulties with their mothers as they become more independent. My sister did with my mother. Much fireworks. But when it passed, it passed, and the relationship became stronger and deeper than before. But I am troubled by Jean and Silvia. Jean seems to punish Silvia to punish me — me and Yolanda. How else can you explain her sudden plan to move with Silvia to Dakota to develop her software there? The University of Columbia has a great Italian department, and a great computer-science department and engineering school. Dakota is more than a thousand miles away. It's a wonderful state, with much agriculture and livestock. But, as far as I know, it has no Italian expatriate community. I do not even know whether its university has any Italian or computer-science department. And how else can you explain her hiring a lawyer? We had always settled everything ourselves, in a friendly manner.

RYCHLY: Well, Mr. Nittardi, Jean has indeed hired a lawyer, and you have hired me. What would you like to have happen or not to happen?

NITTARDI: I do not want to stop Jean from moving if she wants to (I cannot believe that she really wants to), but I do not want her to take Silvia. I want to continue to care for Silvia and spend time with her before she becomes older and wishes to associate more with her friends and less with her father.

RYCHLY: Have you discussed this with Silvia?

NITTARDI: Yes; she says that she's caught in the middle between us, and she does not want to choose.

RYCHLY: Are you prepared to take care of Silvia full-time?

NITTARDI: Yes, I have thought much about it, I am. I will make whatever adjustments I must.

RYCHLY: Fine. Give me some time to research the issues. But we have to act quickly since Jean's lawyer says she intends to move in about two weeks. One thing is clear; you'll have to go to court.

NITTARDI: That is what I was afraid of.

RYCHLY: It's nothing to be afraid of. It just has to be done. I'll send you an opinion letter within the next few days to help you understand your legal position. Then we'll meet again to discuss matters.

NITTARDI: Fine. Thank you very much. Good-bye.

RYCHLY: Good-bye.

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF ALSTON

IN RE THE MARRIAGE OF JEAN DILLON NITTARDI AND PIER NITTARDI.	)	No. 101747
JEAN DILLON NITTARDI, Petitioner,	)	
v.	)	**JUDGMENT OF DISSOLUTION; STIPULATED CUSTODY ORDER**
PIER NITTARDI, Respondent.	)	

IT IS HEREBY ADJUDGED, DECLARED, AND DECREED that the marriage of Petitioner, Jean Dillon Nittardi, and Respondent, Pier Nittardi, is dissolved.

On stipulation of Petitioner and Respondent, it is hereby ordered as follows with respect to the custody of Petitioner and Respondent's Child, Silvia Nittardi:

1. Petitioner and Respondent shall share joint legal custody of Child.
2. As for physical custody of Child:
    a. Petitioner shall be Child's primary caretaker.
    b. Respondent shall be allowed to visit Child from 2 p.m. to 4 p.m. at Petitioner's residence on each Monday, Wednesday, and Friday, and shall be allowed to take Child to Respondent's residence each week from 2 p.m. on Saturday until 2 p.m. on Sunday.

Dated: October 3, 1994

/s/ Peter J. Belton
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF ALSTON

IN RE THE MARRIAGE OF JEAN DILLON NITTARDI AND PIER NITTARDI.	)	No. 101747
JEAN DILLON NITTARDI, Petitioner,	)	
v.	)	**STIPULATED TEMPORARY CUSTODY ORDER**
PIER NITTARDI, Respondent.	)	

On stipulation of Petitioner, Jean Dillon Nittardi, and Respondent, Pier Nittardi, it is hereby ordered as follows with respect to the custody of Petitioner and Respondent's Child, Silvia Nittardi, effective from this date until and through June 30, 2000, and suspending the operation of the order herein dated October 3, 1994:

1. Petitioner and Respondent shall share joint legal custody of Child.
2. As for physical custody of Child:
    a. Petitioner shall be Child's primary caretaker.
    b. Respondent shall be Child's secondary caretaker, and shall be allowed to visit Child from 2 p.m. to 4 p.m. on each Friday and Saturday, and shall be allowed to take Child to Respondent's residence each week from 8 a.m. on Monday until 8 a.m. on Thursday.
3. On July 1, 2000, this order shall expire by its own terms, and the order herein dated October 3, 1994, shall automatically become operative.

Dated: June 26, 1997

/s/ Lilinda De La Cruz
Judge of the Superior Court

RYCHLY & KELLY, LLP

Attorneys At Law

220 McGEE AVENUE

BRADFIELD, COLUMBIA 09654

MEMORANDUM

TO: Mary Rychly

FROM: Brian Daley

DATE: July 28, 2003

SUBJECT: ***In re Marriage of Nittardi***

At your request, I have briefly researched the University of Dakota and the City of College Station, where the university is located. In doing so, I have visited websites maintained by the university and the city, and also websites maintained by other individuals and groups in the area.

The University of Dakota does not have an Italian department. It does, however, offer two Italian language courses each semester through its romance language department. By contrast, the university has a large and thriving computer-science department, which awards more than 100 undergraduate and graduate degrees each year. There is a burgeoning software industry in the area, employing graduates from the university and many others as well.

I understand that the above information is all that you desire at the present time. Should you want more, I will continue my research.

ZACHARY, SIDNEY & ROSE, LLP

Attorneys at Law and Counselors at Law

1710 BLAKE STREET

BRADFIELD, COLUMBIA 09654

July 24, 2003

BY CERTIFIED MAIL

Pier Nittardi

810 Mariposa Street

Bradfield, Columbia 09650

Re: *In re Marriage of Nittardi*, Alston County Superior Court No. 101747

Dear Mr. Nittardi:

We have been retained to represent Jean Dillon Nittardi in the above-referenced matter.

We are writing to inform you that Ms. Nittardi intends to move from the State of Columbia to the State of Dakota on or about August 12, 2003. Inasmuch as she has sole physical custody of her child, Silvia Nittardi, under the decision of the Columbia Supreme Court in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996), she has a right to take Silvia with her when she moves. She intends to exercise her right.

We stand ready at any time to discuss your possible visitation with Silvia once she has taken up residence in Dakota with Ms. Nittardi.

Very truly yours,

Lucien Zachary

LZ:pc

TUESDAY AFTERNOON
JULY 29, 2003

California
Bar
Examination

Performance Test A

LIBRARY

IN RE MARRIAGE OF NITTARDI

LIBRARY

SELECTED PROVISIONS OF
THE COLUMBIA FAMILY CODE

Section 3002: "Custody" refers to the right, responsibility, and supervision that a parent may have over a child.

Section 3003: "Joint legal custody" means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

Section 3004: "Joint physical custody" means that each of the parents shall have significant periods of time in which the child resides with the parent and is under the parent's supervision.

* * *

Section 3006: "Sole legal custody" means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.

Section 3007: "Sole physical custody" means that a child shall reside with and be under the supervision of one parent, subject to visitation by or with the other parent.

* * *

Section 3010: In making any order of custody, the court shall act in the best interest of the child. In determining what is in the best interest of the child, the court shall consider, among any other factors it finds relevant, the health, safety, and welfare of the child and the nature and amount of contact with both parents.

* * *

Section 3020: The Legislature declares that it is the public policy of this state: (1) to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the custody of children; and (2) to assure that children have frequent and continuing contact with both parents after the parents have dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing.

* * *

Section 3040: Custody may be granted according to the best interest of the child to both parents jointly or to either parent solely. In making an order of custody to either parent solely, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the other parent, and shall not prefer a parent as

custodian because of that parent's sex. This section establishes neither a preference nor a presumption for or against joint or sole legal or physical custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

IN RE MARRIAGE OF BURGESS

Columbia Supreme Court (1996)

Paul Burgess (the father) and Wendy Burgess (the mother) were married and had two children, Peter and Jessica. Both the father and the mother were employed by the State Department of Corrections at the State Prison in Tarrytown in Kings County and owned a home in a suburb. They separated in May 1992, when the children were four and three years old. The mother moved with the children to an apartment in Tarrytown; the father remained in their former home, pending sale of the property. The mother petitioned for dissolution shortly thereafter.

In July 1992, the trial court entered a "Stipulation and Order" dissolving the marriage and providing for temporary custody in accordance with an agreement between the father and the mother. The father and the mother agreed that they "shall share joint legal custody of the children. The mother shall have sole physical custody of the children." They agreed to a liberal schedule for weekly visitation by the father. They expressly identified as "at issue" the visitation schedule for the father "if the mother leaves Kings County."

In February 1993, the trial court entered a permanent custody order. At the hearing that preceded the entry of the order, the mother testified that she had accepted a job transfer to Linden and planned to relocate after her son's graduation from preschool in June; she explained that the move was "career advancing" and would permit greater access for the children to medical care, extracurricular activities, and private schools and day-care facilities; the travel time between Linden and her home in Tarrytown was approximately 40 minutes. The father testified that he would not be able to maintain his current visitation schedule if the children moved to Linden; he wanted to be their primary caretaker if the mother relocated. The trial court entered an order providing that the father and the mother would share joint legal custody, that the mother would have sole physical custody, that the father would have "liberal visitation" in accordance with the current schedule, and that, after June 1993, "the father will have overnight visitation with the children, assuming the mother moves to Linden, on alternate weekends."

In August 1993, the father moved for a change of custody, seeking a custody arrangement under which each parent would have the children for "about a month and a half." The trial court held a hearing on the motion. The father testified that if the children relocated with the mother he would not be able to maintain his current visitation schedule;

he admitted that he regularly traveled to Linden on alternate weekends, to shop and visit friends, characterizing the trip as "an easy commute." The mother testified that she had been working in Linden for four months and planned to move there; she again identified several advantages to the children in living there, including proximity to medical care and increased opportunities to participate in extracurricular activities; she also testified that the father objected to her move, at least in part, in order to retain control over her and the children, stating that he did not want to change his work shift "because it keeps me in Tarrytown"; she expressed her willingness to accommodate weekend visitation with the father as well as extended visitation in the summer. The trial court denied the father's motion for change of custody. It found that "it is in the best interest of the children that they be permitted to move to Linden with the mother and that the father be afforded liberal visitation." It also found that the mother did not seek to relocate in order to frustrate the father's contact with the children, but only for sound and good faith reasons.

The father appealed from the February 1993 custody order and the August 1993 order denying change of custody.

The Court of Appeal reversed. It formulated the following test for so-called move-away cases. The trial court initially must determine whether the move "will impact significantly the existing pattern of care and adversely affect the nature and quality of the contact that the nonmoving parent has with the child. The burden is on the nonmoving parent to show this adverse impact." If the impact is shown, the trial court must determine whether the move is "reasonably necessary," with "the burden of showing such necessity falling on the moving parent." If the trial court concludes that the move is "necessary" — either because not moving would impose an unreasonable hardship on the career or other interests of the moving parent or because moving will result in a discernible benefit that it would be unreasonable to expect that parent to forgo — it then "must resolve whether the benefit to the child in going with the moving parent outweighs the loss or diminution of contact with the nonmoving parent." On the facts before it, the Court of Appeal concluded that "no showing of necessity was made. The reality here is that in moving, the mother primarily gained convenience."

We granted review. We now reverse.

In entering a custody order, the trial court, under section 3040 of the Columbia Family Code, has the widest discretion to choose a custody arrangement that is in the best

interest of the child. Under section 3010 of the same code, it must look to all the circumstances bearing on the child's best interest.

In addition, in a matter involving relocation by one or both parents, the trial court must take into account the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare.

The standard of appellate review of custody orders is the deferential abuse of discretion test. We find no such abuse here.

In entering its February 1993 custody order and its August 1993 order denying change of custody, the trial court did not abuse its discretion. After extensive testimony from both the father and the mother, the trial court concluded, not unreasonably, that it was in the best interest of the children that the father and the mother retain joint legal custody and that the mother retain sole physical custody, even if she moved to Linden. First, and most important, although they had almost daily contact with both the father and the mother during the initial period after the separation, the children had been in the sole physical custody of the mother for over a year. Although they saw their father regularly, their mother was, by agreement and as a factual matter, their sole physical custodian. The paramount need for continuity and stability in custody arrangements — and the harm that may result from disruption of established patterns of care and emotional bonds — weigh heavily in favor of maintaining ongoing custody arrangements. From the outset, the mother had expressed her intention to relocate to Linden. The reason for the move was employment-related; the mother evinced no intention to frustrate the father's contact with the children. Moreover, despite the fact that the move was, as the Court of Appeal observed, primarily for the mother's "convenience," her proximity to her place of employment and to the children during the workday would clearly benefit the children as well. A reduced commute would permit increased and more leisurely daily contact between the children and their mother. It would also facilitate the children's participation, with their mother, in extracurricular activities. In the event of illness or emergency, the children could more promptly be picked up and treated, if appropriate, at their regular medical facility, which was also located in Linden. Although it would be more convenient for the father to maintain a visitation routine with the children if they remained in Tarrytown, even under his present work schedule he could still visit them regularly and often. The trial court's order of "liberal visitation" included overnight

visits on alternate weekends. The father conceded that he regularly traveled to Linden and that he considered it an "easy commute."

The Court of Appeal concluded that the trial court abused its discretion in ordering that the mother should retain sole physical custody, on the ground that her relocation to Linden was not "necessary." In effect, it concluded that because she failed to carry the burden of establishing that the relocation to Linden was "necessary," physical custody of the children might be transferred to the father. It erred thereby.

A parent with sole physical custody of a child who seeks to move with the child bears no burden of establishing that the move is necessary. Indeed, the general rule is that a parent with sole physical custody of a child is entitled to change the child's residence unless the move is detrimental to the child.

As this case demonstrates, ours is an increasingly mobile society. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for *both* parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution, and it is inappropriate to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to "micromanage" family decision making by second-guessing reasons for everyday decisions about career and family. In this matter, the parties continue to dispute whether the mother's change of employment was merely a "lateral" move or was "career enhancing." The point is immaterial. Once the trial court found that the mother did not seek to relocate in order to frustrate the father's contact with the children, but only for sound and good faith reasons, it was not required to inquire further.

Ordinarily, what is commonly called the changed-circumstances rule applies: A parent seeking to change the custody arrangement resulting from a custody order can succeed only if he or she shows that there has been a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare, taking into account, *inter alia*, the nature of the child's existing contact with both parents, the child's age, community ties, and health and educational needs, and the child's preference, if he or she is of sufficient age and maturity.

The changed-circumstances rule applies as well when, in the face of relocation by a parent with sole physical custody of a child, the other parent seeks to change the custody

arrangement: A child should not be removed from the prior sole physical custody of one parent and given to the other unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change. In a move-away case, a change of custody is not justified simply because the parent with sole physical custody has chosen, for any sound and good faith reason, to reside in a different location. The dispositive issue is, accordingly, *not* whether *relocating* is itself necessary for the parent with sole physical custody, but whether a *change of custody* is essential or expedient for the welfare of the child.

Of course, a different analysis may be required when both parents *share* joint physical custody of their child and one parent seeks to relocate with the child over the other parent's objection. In such a case, the trial court must determine *de novo* what arrangement for physical custody is in the child's best interest. But we need not consider the question further, since the father and the mother here did not share joint physical custody of their children.

Reversed.

IN RE MARRIAGE OF CASSADY

Columbia Court of Appeal (1996)

James Cassady (James) and Donna Signorelli (Donna) married in 1990, had a daughter whom they named Grace in 1992, and dissolved their marriage in 1994.

In 1994, together with the judgment of dissolution, the trial court entered a custody order, which provided that James and Donna were to have joint legal custody of Grace, and Donna was to be Grace's primary caretaker and James was to be allowed overnight visits each week from 6 p.m. on Wednesday until 8 a.m. on Thursday.

In 1995, on James's motion in response to Donna's stated intention to move away with Grace to Florida, the trial court entered a custody order that superseded the initial one. Like that of 1994, the 1995 custody order provided for joint legal custody for James and Donna, with Donna as primary caretaker and James allowed overnight visits each week from 6 p.m. on Wednesday until 8 a.m. on Thursday. Unlike that of 1994, however, the 1995 custody order was conditioned on James and Donna remaining in Columbia.

Donna has appealed from the trial court's 1995 custody order with its remain-in-Columbia condition. She attacks it as violative of what the Columbia Supreme Court in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996) recently termed "the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare." We agree that Donna had sole physical custody of Grace, in fact if not in name. Under section 3007 of the Columbia Family Code, one parent — like Donna — has "[s]ole physical custody" of a child when the child "reside[s] with," and is "under the supervision" of, that parent, "subject to visitation by or with the other parent." The trial court recognized that Grace resided with Donna, and was under her supervision, and only visited James. We do not agree, however, that Donna's "presumptive right" to change Grace's residence was violated. As *Burgess* makes plain, a parent simply does not have any right to change a child's residence when the parent acts not "for sound and good faith reasons," but instead "in order to frustrate the [other parent's] contact with the child" or in any event illogically. The trial court effectively — and properly — concluded that Donna acted in such a manner. Donna claimed that she needed to move to Florida to begin a new career as a "parapsychologist." However, there are apparently almost no jobs available in that field anywhere in the world, and she had no job in that field in prospect in Florida. As the trial court aptly observed, she apparently was

not seriously seeking employment there, but simply wished to frustrate James's contact with Grace. But, even if her reasons to move were in good faith, they were not at all sound, being altogether illogical.

Affirmed.

IN RE MARRIAGE OF WHEALON

Columbia Court of Appeal (1997)

In *In re Marriage of Burgess* (Colum. Supreme Ct. 1996), the Columbia Supreme Court held that, in a move-away case, a parent with sole physical custody of a child seeking to move bears no burden of showing that the move is "necessary."

In the wake of *Burgess*, it is clear that the basic rules for change of custody apply just as much to move-away cases as they do to others: After the trial court has entered a custody order, the custody arrangement resulting therefrom should continue, says *Burgess*, "unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change." The fact that the parent with sole physical custody is moving away does not mean the court should examine the custody question anew. Rather, the burden is on the other parent seeking to change the custody arrangement to show that a different arrangement is warranted under the new circumstances of the move.

The *Burgess* court recognized, however, that a different rule necessarily applies in move-away cases where joint physical custody is the status quo prior to the move. By definition, the existing custody arrangement will be upset by one parent's move. Accordingly, the trial court must determine *de novo* what arrangement for physical custody would be in the child's best interest.

The present case involves a father who argues that his situation fits within the *Burgess* exception to the basic rule against redetermining custody anew in the wake of one parent's moving away. The basic facts are simple: Steven and Phyllis Whealon married and had a child, Ryan. Subsequently, on Steven's petition, the trial court dissolved the marriage. At the same time, it entered a stipulated custody order, arising from Steven's and Phyllis's agreement, awarding Steven and Phyllis joint legal custody of Ryan, who was 18 months old, with Phyllis designated the primary caretaker and Steven allowed visitation one hour each weekday from 6 p.m. to 7 p.m., and from noon to 5 p.m. on Saturday and Sunday. Soon thereafter, Phyllis lost her job in Columbia as a radar engineer, and found a new one in New York. She proposed to relocate with Ryan. Steven opposed the relocation, and argued that the trial court should determine custody *de novo*, rather than place on him the

burden of showing that the changed circumstances warranted a change of custody. The trial court disagreed. Steven now appeals.

The *Burgess* court made it clear that a move-away is not enough by itself to justify a reexamination of the basic custody arrangement between two parents. "In a move-away case, a change of custody is not justified simply because the parent with sole physical custody has chosen, for any sound and good faith reason, to reside in a different location."

Of course, as the *Burgess* court pointed out, there are circumstances when a move-away does justify a change of custody in favor of the nonmoving spouse. In our view, for example, a trial court could properly consider the preferences of a 13 year-old child for remaining where he was in a case in which the nonmoving spouse had assumed substantial parenting responsibilities relating to the child's academic, athletic, social, and religious activities, even though the moving parent had sole physical custody.

Even so, the basic structure of placing the initial burden on the parent seeking a change of custody, not a change of location, remains: Under the changed-circumstances rule, the parent seeking a change of custody must show a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare. Such an initial burden is consistent with the presumptive right of a parent with sole physical custody to change residence unless the change prejudices the rights or welfare of his or her child.

As we have already mentioned, a different rule arises out of the disruption of the status quo that necessarily inheres in a move-away case where there is joint physical custody since, in such an instance, it is unavoidable that the existing custody arrangement will be disrupted. One parent or the other must be given sole physical custody. Accordingly, a *de novo* determination — in effect, a reexamination of the basic custody arrangement — makes sense.

Steven's attempt to fit himself into the joint physical custody exception fails. Ryan did not shuttle back and forth between Steven and Phyllis. Rather, Phyllis had, in substance, sole physical custody of Ryan, who spent the vast majority of his time with her, and Steven had visitation rights.

Steven then argues that the changed-circumstances rule does not apply when the custody arrangement in question results from a stipulated custody order. We cannot agree. The fact that a custody order is stipulated means that it arises from the agreement of the

parents. We accord dignity to a custody order determined by the trial court because we presume that the trial court acted in the best interest of the child. We cannot accord less dignity to a custody order arising from the agreement of the parents because we cannot presume that the parents acted in any other fashion.

Affirmed.

IN RE MARRIAGE OF BIALLAS

Columbia Court of Appeal (1998)

Mark Biallas (Father) and Hilary Gilmore Biallas (Mother) were married in 1988. Their only child, Charles (Son), was born in 1989. The trial court rendered a judgment dissolving their marriage in 1990. At the same time, it entered a custody order, awarding Father and Mother joint legal custody, and giving "primary physical custody" to Mother and visitation periods to Father extending from Sunday morning to Monday morning and from Wednesday evening until Thursday morning. As Son grew older, Father and Mother increased the amount of visitation for Father in accordance with an agreement between themselves without any new custody order. Ultimately, Father had visitation every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning.

In 1996, Mother became engaged to a man who lived in Nebraska, about a thousand miles away. Mother told Father that she intended to move to Nebraska and wanted Son to move with her, and proposed discussing a new visitation schedule. Some weeks later, Mother left for Nebraska, taking Son with her, and there married her new husband. On Father's motion, the trial court entered a custody order that, among other things, awarded sole physical custody to Father. It based its order solely on what it believed to be Son's best interest, without considering whether there had been a substantial change of circumstances so affecting him that change was essential or expedient to his welfare. Mother appealed. We now reverse.

In 1996, after the trial court entered its custody order, the Columbia Supreme Court issued its decision in *In re Marriage of Burgess* (Colum. Supreme Ct. 1996). There, the court held that a "parent with sole physical custody of a child who seeks to move with the child bears no burden of establishing that the move is necessary." It further held that the other parent, if he or she seeks a change of custody, must "show that there has been a substantial change of circumstances so affecting his or her child that change is essential or expedient to the child's welfare . . ."

The *Burgess* court stated an exception: "[A] different analysis may be required when both parents *share* joint physical custody of their child and one parent seeks to relocate with the child over the other parent's objection. In such a case, the trial court must determine

de novo what arrangement for physical custody is in the child's best interest." (Italics in original.)

We believe that the *Burgess* exception means that the trial court may make a *de novo* determination on the issue of physical custody only when the parent seeking to relocate shares joint physical custody with the other parent.

We also believe that the trial court must determine at the threshold whether the physical custody in question is sole or joint, and that it must do so by looking through any labels to the facts. Thus, the trial court must consider the existing *de facto* custody arrangement between the parents to decide whether physical custody is joint or whether one parent has sole physical custody with visitation rights accorded the other parent, and must ignore terms such as "primary physical custody" and "primary caretaker" and "second physical custody" and "secondary caretaker," which, although often used, have no legal meaning.

Here, the trial court determined that Father and Mother shared joint physical custody. It abused its discretion thereby. Joint physical custody exists, under Columbia Family Code section 3004, where the child spends significant time with both parents. That depends, as noted, on the existing *de facto* custody arrangement between the parents. The custody arrangement may result directly from a custody order. It may also result from a custody order *as effectively changed by the parents themselves*. The latter is of no lesser dignity than the former. We presume that the trial court that enters a custody order acts in the best interest of the child. We cannot presume otherwise of parents who change the custody arrangement resulting from such a custody order. The existing *de facto* custody arrangement between Father and Mother here, which resulted from the custody order as effectively changed by Father and Mother themselves, had visitation for Father every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning, and had Mother providing care at all other times. Such periods of visitation hardly amounted to significant time for Father in comparison with Mother. In our view, one parent enjoys significant time in relation to the other only when that parent enjoys time that is equal, or at least almost equal, to that which the other enjoys.

Because Father and Mother did not share joint physical custody, the trial court should have determined whether there had been a substantial change of circumstances so affecting Son that change of sole physical custody from Mother to Father was essential or

expedient to Son's welfare. It did not. Father argues that an out-of-state move constitutes such a change of circumstances as a matter of law. He is wrong. The *Burgess* court cautioned "the trial court must take into account the presumptive right of a parent with sole physical custody to change the residence of his or her child, so long as the change would not be prejudicial to the child's rights or welfare." Moving out of state is not necessarily prejudicial to a child. It is true that Son's move to Nebraska would have an effect on his relationship with Father. It is also true that Columbia Family Code section 3020 favors "frequent and continuing contact with both parents." But such contact may be effected in a variety of ways — for example, through telephone calls several times a week and visitations for the entire winter and spring holidays and the entire summer vacation, all paid for by the parent with sole physical custody. Father's contrary assumption is simply without basis.

Reversed.

ANSWER 1 TO PERFORMANCE TEST - A

OPINION LETTER

Dear Mr. Nittardi,

I am writing you this letter in response to your inquiry regarding custody over your child Silvia. I trust this will answer many of your questions.

A. STATEMENT OF CLIENT GOALS.

It is my understanding that you are strongly opposed to Jean moving to Dakota and taking Silvia with her. Your overarching goals are to continue your close level of contact with Silvia, to enable her to flourish as a growing young woman, and to further deepen your relationship with your daughter, to whom you are strongly attached. In order to make this possible, your immediate goals is [sic] to ensure that Silvia remains here in Columbia.

B. ACTIONS CLIENT MAY TAKE TO ACHIEVE GOALS.

In order to achieve your goals, Silvia must remain in Columbia. This can be achieved in several possible ways. First, Jean could stay in Columbia, which would mean that no change to current arrangements would be necessary. Second, Jean could move to Dakota but agree to leave Silvia in Columbia. This would require some sort of rearrangement of the current custody and visitation scheme, but would not involve court intervention. Third, and most likely, if Jean seeks to move to Dakota and take Silvia with her, you will have to take legal action to alter the legal custody regime between you and Jean. Depending on how the court construes the existing physical custody arrangement, you have either a very good or a good chance of getting the court to write a new custody order that would grant you sole physical custody of Silvia, which would mean that she would stay here in Columbia with you.

C. ANALYSIS OF LEGAL AND FACTUAL ISSUES.

1) Physical Custody: Sole or Joint?

Introduction.

In a divorce where there is a child or children involved, the divorce agreement typically states the type of custody arrangement. According to the Columbia Code, the term "custody" refers to the right, responsibility, and supervision that a parent may have over a child. Basically, there are two types of custody, legal custody and physical custody.

There are two documents that bear on the custody you and Jean have over Silvia. Both the stipulated custody order and the stipulated temporary custody order state that you and Jean will share joint legal custody of the child. This means that both parents – both you

and Jean – shall share the right and responsibility to make the decisions relating to the health, education, and welfare of the child. However, neither document specifically or precisely states what type of physical custody you or Jean may have over Silvia, Both documents merely state that Jean is Sylvia's primary caregiver, and that you have visitations rights during the times states [sic].

Your legal options regarding Silvia turn largely on the type of physical custody Jean has over Silvia. I will address this important point in more detail later on in this letter. For the moment, you should be aware that the State of Columbia recognizes two types of physical custody: (1) joint physical custody, in which each of the parents have significant periods of time in which the child resides with the parent and is under the parent's supervision, and (2) sole physical custody, in which the child resides with and is under the supervision of one parent, subject to visitation by or with the other parent. Again, neither custody order specifically states whether you and Jean share joint physical custody, or whether Jean has sole physical custody and you merely have visitation rights.

Because the custody orders do not specify whether physical custody is joint or sole, it is necessary to examine the law courts in Columbia use to make this determination in the absence of a specific statement. The next step is to apply that law to the facts of your situation with Jean and Silvia in order to determine whether a court would deem the physical custody joint or sole.

Legal and Factual Analysis.

Columbia courts have on several occasions considered the question of how to label physical custody – whether joint or sole – when the custody order does clearly specify the type of physical custody. The Biallas case confronted this issue head on in 1998 under facts that are in some ways similar to those involving you, Jean, and Silvia. In Biallas, the custody order provided for joint legal custody, much like you and Jean share. The Biallas court also gave the mother "primary physical custody" and gave the father certain visitation house. By comparison, the custody orders regarding Silvia do not give Jean "primary physical custody" as in Biallas, but do state that Jean is to be Silvia's "primary caretaker." In addition, the custody order in your case gives you visitation rights much like the father had in Biallas. The question the Biallas court had to decide was whether the language in the custody order, taken together with the terns of the father's visitation rights, created joint physical custody, or whether only sole physical custody in favor of the mother had been created. This is the important question that must be decided in your case as well.

The Biallas court stated how this question of whether custody is joint or legal should be decided, when, as in the situation you are facing, the custody order does not specifically state on[e] way or the other. First, the court said that it would look through any labels to the facts of the case. In other words, the court will consider the de facto custody arrangement – the arrangement that exists in fact, despite what the custody orders may state – in order to decide what type of physical custody exists. In your case, the stipulated custody order states that Jean is Silvia's "primary caregiver," and the stipulated temporary

custody order states once again that Jean is Silvia's "primary caregiver" and that you are Silvia's "secondary caregiver." It is of course true that the stipulated temporary custody order has since expired and the stipulated custody order is now in effect. However, the Biallas court directly stated that courts must ignore such terms as "primary caregiver" and "secondary caretaker," which although often used in custody orders, have no legal meaning. What this means for you is that the factual reality of the relationships Silvia has with you and Jean are what matter when it comes to determine what type of physical custody exists, and not the legal terminology that happens to have been used in the custody order.

Columbia statutes state that joint physical custody exists when the child spends significant time with both parents. The time the child spends with each parent results to some extent from the dictates of the custody orders, but it also may result from changes that the parents have effectively made themselves, and the realty of the arrangements the parents have among themselves regarding the time spent with the child are of equal importance as the written legal orders. In Biallas, the court concluded that the father and mother did not have joint physical custody. The court stated that joint physical custody would exist if the father spent an amount of time with the child that was equal or almost equal to the amount of time the mother spent with the child. There, the father was in fact visiting the child every Thursday evening until Friday morning and every other weekend from Friday evening until Monday morning, while the mother provided care at all other times. The court concluded that the father was not spending equal or nearly equal time as the mother and thus the mother had sole physical custody. Similarly, the court in the Whealon case stated that the mother had sole physical custody, and the father merely had visitation rights, when the child spent the vast majority of his time with the mother.

Therefore, in addition to examining the controlling custody order, we must compare the actual amount of contact the father in Biallas spent with his child to the amount of time you currently spend with Silvia in order to determine whether a court would say you have joint physical custody over Silvia, or whether Jean has sole physical custody and you merely have visitation rights.

As for the currently controlling stipulated custody order, you have visitation rights from 2 PM to 4 PM at Jean's residence on each Monday, Wednesday, and Friday, and you are allowed to take Silvia to your residence each week from 2 PM on Saturday to 2 PM on Sunday. Based on the custody order alone, it would be pretty clear that there is no joint custody arrangement, because you have visitation rights for only a small minority of the hours in each week.

However, in addition to looking at the custody order, the court will examine actual reality to determine how much time you really spend with Silvia. You told me in our interview that although you and Jean had earlier agreed to return to the stipulated custody order, with the visitation rights just mentioned, you in fact never did go to that original stipulated custody order. Instead, you continued with the stipulation custody order. That order was supposed to expire on July 1, 2000, but as you told me, you continued with the arrangements in that

order. That temporary stipulated custody order gave you substantially more visitation rights. You were allowed to visit Silvia from 2 PM to 4 PM each Friday and Saturday, and were also allowed to have Silvia stay at your residence each week from 8 AM on Monday until 8 AM on Thursday. In total, that order gave you visitation for 3 full days, plus an additional four hours. That amount of time is already fairly close to being equal to the time Jean had Silvia.

In addition to fact that you and Jean have continued with the temporary stipulated custody order even after it had technically expired, you told me that you have organized your schedule to be around Silvia as much as possible, whenever she is not in school. You have been helping her with homework and accompanying her to extracurricular activities, and you have more leisure time as a result of your restaurant's success. You even stated that you accompany Silvia on her volleyball trips across the company [sic], even though those travel periods are during times that Silvia would have been in Jean's care had she been home. Under the Biallas rule, since you and Jean are spending an equal or nearly equal amount of time with Silvia, you would have joint physical custody.

Conclusion.

Taking all the facts of the current situation together – both the fact that you and Jean are working under the [the] temporary stipulated custody order that expressly gives you 3 days and 4 hours per week with Silvia, and the fact that you are actually spending even more time with Silvia than allocated in that order, I would conclude that a Columbia court would determine that you and Jean have a joint physical custody arrangement over Silvia. If everything you have told me is accurate, I am fairly certain of this conclusion. However, you should be aware that Jean will seek to contradict what you have told me, saying that you in fact went back to the original stipulated custody order, and that Silvia actually spends most time with Jean. In fact, Jean's lawyer expressly, although wrongfully, I think, describes Jean's physical custody as "sole" in the letter written to you. Nevertheless, I think a court is very likely to conclude that you and Jean spend an equal or nearly equal amount of time with Silvia and that your physical custody arrangements is joint. Silvia may be able to add some information in your favor as well.

2) Effect of the existence of joint physical custody on Jean's right to move with Silvia.

In the letter he wrote to you, Jean's lawyer cites the Burgess case to support the contention that Jean has a right to take Silvia when she moves. However, that rule Jean's lawyer cites from Burgess applies only when the wife has sole physical custody. When a parent has sole physical custody, that parent has a presumptive right to change the residence of the child, so long as the change would not be prejudicial to the child's rights or welfare. The parent with sole physical custody has no burden of establishing that the move is necessary. However, a different rule, described as follows, applies when physical custody is joint, as it likely is in your case.

In a joint physical custody situation, Burgess states that when one parent seeks to relocate with the child over the other parent's objection, the court must determine de novo, or from the beginning, what arrangement is in the child's best interest. This is the rule that applies to the situation you face. As the court in Whealon stated, where there is joint physical custody and one parent seeks to move away with the child, it is unavoidable that the existing custody arrangement will be disrupted. This is exactly what is going on with you, Jean, and Silvia. Dakota is a long distance from Columbia, and there is simply no way that you would be able to have the kind of contact you currently enjoy with Silvia if the two move. Columbia case law clearly states that in this sort of circumstance, one parent or the other must be given sole physical custody. Consequently, the court must reexamine the basic custody arrangement to see what makes sense. The fundamental principle guiding the court in this determination is what meets the child's best interest.

The bottom line is that a court will have to draw up a new custody order. This requirement is certain and unavoidable if the current physical custody arrangement is indeed joint.

3) New custody order.

Because the current physical custody arrangement is joint, and because Jean's move to Dakota will disrupt the current arrangement, a new custody order is necessary.

Legal requirements.

The Columbia family code and cases interpreting it establish how a court goes about making a custody order. The court's overriding concern in this process is to effectuate the best interests of the child. The best interests of the child include both providing for the child's health, safety, and welfare, and assuring that the child has frequent and continuing contact with both parents (section 3020). Another provision of the code, section 3010, states that in determining what is in the best interest of the child, the court shall consider, among any other factors it finds relevant, the health, safety, and welfare of the child and the nature and amount of contact with both parents.

Cases decided under Columbia law and interpreting the code flesh out the meaning of achieving the child's best interests. In Burgess, for example, the court discussed the importance of providing continuity and stability in custody arrangements, which favors maintaining ongoing custody arrangements. The Burgess court also considered the proximity to medical care, extracurricular activities, and private schools. The Biallas court cited section 3020 of the Columbia Code, which favors frequent and continuing contact with both parents, but said such contact may be effectuated in a variety of ways, for example, through telephone calls several times a week and visitations for the entire winter and spring holidays and the entire summer vacation, all paid for by the parent with sole physical custody.

Application of the Law.

The Columbia Code and several cases indicate what things a court would consider in drawing up a new custody order. Now we must examine how a court would write a custody order in this specific case, governing your and Jean's custody over Silvia. Again, a court will not go so far as to bar Jean from moving, but if she does move, the current joint physical custody arrangement will be totally altered and therefore a new custody order is necessary.

In view of Silvia's best interests and welfare, there is a solid argument for granting you sole physical custody and making appropriate provisions for Jean to visit Silvia. One very important factor the court will consider is that Silvia is well-established here in Columbia, and a move to Dakota would likely cause severe distortion to her life pattern, and perhaps to her emotional well-being and happiness. Silvia is a middle school child, at the age when many children need the support of friends. In fact, you told me that Silvia has very many friends, and is eager to being Bradfield High School with them next year. Moving to Dakota would require giving up those friendships and starting anew at this tender age. In addition, Silvia speaks Italian well and is very charming, which has endeared her to my [sic] people in Columbia's Italian expatriate community, and also to their children. If Silvia has to move to Dakota, her Italian skills will probably not find any use, because Dakota has no Italian expatriate community. Furthermore, Silvia is a member of an Italian-American youth group here in Columbia, an activity she could not participate in Dakota. In connection with this youth group, Silvia helps the exchange students who come from Italy, and hopes to go to Italy next summer as an exchange student herself. This plans [sic] may be dashed if Silvia has to move. Taking all these factors together, and applying them to statements in the Columbia code and by Columbia courts, it seems that a court would conclude that Silvia's best interests in terms of education, happiness, and extracurricular activities would be better served by keeping her in Columbia.

Also, from what you have told me, it seems that you and Silvia enjoy a close relationship that is growing even closer. Dakota is 1,000 miles away, and a move could jeopardize this relationship. However, Jean may seek to impose some sort of seasonal visitation rights such as were discussed in Biallas, whereby you would get to visit Silvia during vacations and so forth. Such an arrangement would be better than nothing, but I believe we can make a strong argument that Silvia should stay here in Columbia with her friends, her school, her activities, and her father. Jean may also point out that Dakota has a burgeoning technology center, but there is no indication that Silvia has an interest in technology.

Another factor the court may take into account is what you described as Jean's spiteful behavior to both you and Silvia. You stated that Jean seems to punish Silvia in order to punish you, or even to punish your new girlfriend Yolanda. A court would not want to countenance an arrangement that is motivated by spite. If it is true that Jean is seeking to move to Dakota in large measure to punish Silvia, Yolanda, and you, the court would deem this a relevant factor in assessing Silvia's best interests.

The court will also consider the economic status of you and Jean. It appears that Jean will have a solid economic opportunity if she moves to Dakota; this works in her favor. However, your restaurant has been ver successful, and you even have more time now. In addition, while Jean has to work very hard these days, you are prepared to take care of Silvia full time.

Conclusion.

I believe that it is more likely than not that if Jean insists on moving to Dakota and thereby destroying the current joint physical custody arrangement, a court will order you sole physical custody and grant Jean visitation rights. Jean can raise some arguments in her favor, but based on the factors discussed above, I feel fairly confident that a court would rule in your favor.

4) Effect of a finding that Jean has sole physical custody.

As stated before, I am quite certain that a court would find that you and Jean currently have joint physical custody over Silvia. However, we need to at least consider the outcome if it is decided that Jean in fact has sole physical custody and you only have visitation rights. In this case, a different set of legal rules would apply and the outcome for you would be different. Again, I feel that this possibility is very small, but we must at least give it some attention.

First, and most importantly in this case, Columbia court decisions clearly state that a parent simply does not have any right to change a child's residence when the parent acts not for sound and good faith reasons, but instead in order to frustrate the other parent's contact with the child, or in any event illogically. You mentioned to me that you believe Jean is moving to Dakota simply to spite you, as well as Silvia and your girlfriend. If that is all that is at play, a court would probably not permit Jean to take Silvia to Dakota. However, Jean can argue that she does in fact have a sound and good faith reason to move to Dakota. Her hopes for tenure in the Italian department at Columbia University have been dashed by the hiring of Yolanda Fata, and it was too late for Jean to look for a position elsewhere, so she came up with the idea of developing Italian-English translation software. She needs to find a software developer to follow through with this business plan, and although Columbia University has a great computer science department, so does the University in Dakota. Thus there appear to be sound, good faith, and logical reasons for Jean to move to Dakota.

The next principle of law that would govern if Jean has sole physical custody is the Burgess rule. Under Burgess, a parent with sole physical custody of a child seeking to move bears no burden of showing that the move is necessary. However, there is an exception to the general Burgess rule known as the changed circumstances exception. In a move-away case, the existing custody order generally continues unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for

the welfare of the child that there be a change. What this means is that if Jean has sole physical custody, you would have the burden of showing that changed circumstances make a new custody order is [sic] essential or expedient for Silvia's welfare; otherwise, Jean can take Silvia with her. It would not be impossible for you to make this showing, though. For example, the Whealon court stated that a court could properly consider the preferences of a 13 year old child for remaining where he was in a case in which the nonmoving spouse had assumed substantial parenting responsibilities relating to the child's academic, athletic, social, and religious activities, even though the moving parent had sole physical custody. As I addressed earlier, you have been spending a lot of time with Silvia - about an equal amount of time as Jean. In addition, you have been heavily involved with her Italian-American and sports activities. However, you did state that Silvia is reluctant to state a preference. Another factor suggesting a sufficient change of circumstances is that you and Jean are apparently operating under the terminated custody order which gives you very liberal visitation rights, in spite of the fact that that order is technically no longer operative. Once again, the court will deem Silvia's best interest to be a paramount consideration. Therefore, you have a good change of showing that there has been a substantial change of circumstances (from the operative custody order) so affecting Silvia that a change to the legally operative custody order is essential or expedient to Sylvia's welfare.

In conclusion, even if the court determines that Sylvia has sole physical custody, you have a good chance of forcing a change to the custody order in your favor using the changed circumstances rule.

ANSWER 2 TO PERFORMANCE TEST - A

TO: Mary Rychly
FROM: Applicant
RE: In re Marriage of Nittardi

The following is an opinion letter I prepared for your signature. In it I analyze the goals and issues regarding Mr. Nittardi's custody of his daughter Silvia. If you need any additional information, please let me know and I will be happy to provide you with additional research and analysis.

TO: Pier Nittardi
FROM: Mary Rychly
RE: In re Marriage of Nittardi

CLIENT GOALS

From reading your file and interview, I believe that you have the following goals in regard to the custody arrangement with your daughter, Silvia (S). You, Pier Nittardi (N) would like to retain the current arrangement with your daughter whereby you enjoy joint custody with you[r] former wife Jean Nittardi (J). In the event that the current status quo cannot be arranged, you would like to have full and sole custody of S. In no event would you want S to move with J to Dakota (Dak), thereby significantly decreasing the amount of time you have to spend with S.

CLIENT ACTION NECESSARY TO ACHIEVE GOALS

There are several avenues of action that may be used in seeking to attain your goals. You have indicated that you would like to avoid going [to] court. That is an unlikely scenario, however there are non-court alternatives. In this letter I will present legal research which I believe supports your goals. One non-court alternative would be to share our research with J and her attorneys and impress upon them that they would lose in any court action. Hopefully with that information, and [sic] beneficial situation of joint custody could be worked out without having a trial or hearing. In addition, would could [sic] submit the issue to arbitration, if J is willing to go along with it. Also, you have informed us that your restaurant is doing well and J is financially in need. Possibly some "alimony" arrangement could be negotiated whereby J stays in Columbia (Col.) And the current custody arrangement continues.

Although the above options are available, it is most likely that a hearing will be necessary to resolve this issue. Therefore, the best course of action would be to file a motion with the court to receive a new custody order. The following analysis will walk you through the facts that would be at issue in such a hearing, as well as the applicable law and probable outcomes.

LEGAL AND FACTUAL ANALYSIS

Custody of a child between divorced parents in the State of Columbia is to be decided in the "best interest of the child." Col. Family Code (CFC) Section (Sec.) 3040. In deciding what would be in the best interests of the child, the court has discretion to order custody jointly or to one parent solely. Id. Once the parents enter into a custody order, that order is presumed to be in the best interests of the child, since it was made by parents themselves. In the current case, the issue is that one parents [sic] is seeking to move out of the state and thus disrupt the current custody scheme. This requires a specific analysis for move-away cases.

Current Custody Arrangement

The first issue would be to determine what the current custody arrangement between the parents is. There are two types of custody arrangements, joint and sole. As will be discussed further, each type of custody will have different analysis as to whether one parent may move away and take their child with them. In 1994 N and J entered into a custody agreement where they shared legal custody, but J had sole physical custody. Although both shared legal custody throughout the order between them, legal custody is not dispositive.

CFC Sec. 3003 defines legal custody as the right to make decision[s] regarding the health, education and welfare of the child. This does not however, affect the following analysis. Instead, what is critical in this case is physical custody. Physical custody as defined by CFC Sec. 3004 & 3007 states that physical custody is with the parent whom the child resides and is under the supervision of. CFC Sec. 3007 defines Sole Physical custody as the child reside[s] and [is] supervised by one parent, with the other allowed visitation. Starting in 1994, S lived with J, and N simply had visitation rights and was only allowed to take S home 1 day week. Under the 1994 arrangement, J had sole custody of S.

However, in 1997 the arrangement was changed by a subsequent custody order. Under the 1997 order, N had visitation rights two days a week as well as had S reside with N for 3 straight additional days each week. CFC Sec. 3004 defines Joint Physical custody as each parents having significant time in which the child resides and is under the supervision of each child [sic]. Under the 1994 agreement, S did not reside with N for significant periods. However, under the 1997 agreement, S spent 3 days a week with N. This would most likely be determined to be joint custody under the CFC. This is however a close issue. The Col. Court of Appeal has ruled that significant periods of time are those in which the parents enjoy time that is "equal, or at least almost equal, to that which the other enjoys." In re Marriage of Biallas. In Biallas, the court did not find joint custody where the father enjoyed visitation once a week and every other weekend. In contrast, in the current case, S spends 3 full days residing with N, almost half of the week. In addition, N enjoys visitation on 2 additional days each week. Although it is clear that J enjoys a greater degree of contact, it is most likely that a court would rule that N enjoys "almost equal" amounts of control and residence with S as does J.

The 1997 order expired in July 2000 at which time the 1994 order became effective again. This would have the effect of changing custody of S from joint to sole. However, after the expiration of the arrangement, N informed use [sic] that N and J did not revert back to the 1994 arrangement. Instead, N & J continued to abide by the same arrangement as written in the 1997 order. In order to determine the standard to apply to the move-away case, the court must determine what the current custody arrangement is. When doing so the court will look "through any labels to the facts." Biallas. Instead of simply looking at what the last order said, the court will look at the actual practice and arrangement employed by the parents. Also, any written custody order will be examined as changed when the facts of the current arrangement show a change by the parents themselves. Biallas. In such a situation, factual chances will be considered just as valid as if a changed order was issued. Biallas.

In 2000, when the 1997 arrangement expired, J & N did not revert back to the 1994 order. Instead, J & N continued to abide by the 1997 arrangement under which they each had joint custody. Given that J was still working on her degree and looking for a job, the 1997 order continued to be the best suit of the needs of J, S, and N. There, by continuing to use the 1997 arrangement, J & N effectively changed the order and ignored and canceled the 2000 end date of that order. Therefore, when analyzing the current arrangement, J & N have joint custody factually and that is what a court will most likely hold.

De Novo Review of Custody

When the status quo before a parent seeks to move is joint custody, the custody arrangement will be upset by the move of one parent. In these cases, the court will conduct a de novo review to determine what physical arrangement is in the best interests of the child. In re Marriage of Whealon. In these cases, since the status quo before the move is joint custody, the moving parent will change the circumstances. If the court rules as I previously stated under the review of the current custody situation (ruling that joint custody exists), then this is the standard it will imply.

In making a custody order, CFC Sec. 3010 directs a court to examine the health, safety and welfare of the child to determine what is in the the child's best interests. The issue would then be, what would be in the best interests of S if the court were to reexamine the custody situation starting from anew. In making this determination, CFC Sec. 3040 grants the court the widest discretion in choosing a custody arrangement that is in the best interests of the child.

Currently, S is 12. Given her age, her desire to reside with one parent or another would be taken into consideration by the court. However, N has expressed that S does not wish to take sides in the current fight between her parents. However, S is currently in middle school in Bradfield. In addition to having numerous friends, S is looking forward to attending Bradfield High School. If S stays in the same area she would not need to uproot her life and start over making all new friends. J is proposing to move to Dakota (Dak), which is over 1,000 miles away. This is a considerable distance from S's friends in Col. In addition to

school, S is involved in Italian-American youth group and activities. These Italian-American activities would not be available to S if S did move to Dak. In addition, the considerable distance would thwart contact between N & S. However, J would successfully argue that N can still contact S by phone and N has the ability, time, and financial abilities to fly to Dak to see S.

But even given the ability of N to fly to see S, the best interest of S would be not to uproot her and force her to move to Dak. S has lived for 12 years in Col and should continue, where she has friends, school, and extra-curricular activities. Thus, under de novo review, a court will award joint custody with [sic] to J & N with a clause that terminated joint custody if J moves away and awards it solely to N. Especially given the lack of financial prospect[s] of J and the relative success of N, coupled with N's ability to take time off to be with S for necessary and beneficial activities, sole custody if at all, should be awarded to N.

Even if J were successful in her new venture, the time it would take to get it running would significantl[y] impact the welfare of J. Especially considering that S would be in a new state with no friends, and alone with her mother whom S other [sic] argues with. In contract, N is able to take off many hours and days each week to be with and see to S. S has established friends and activities in Col. These factors all combine to show that custody should be awarded exclusively to N.

Substantial Change Analysis

If the court find[s], however unlikely, that the 1994 arrangement controls or that even under the 1997 order joint custody was lacking, then sole custody in favor of J will be found. In that case, J would have a presumptive right to change the residence of her child so long as the change is not prejudicial to S's rights or welfare. In re Marriage of Burgess. Instead of de novo review, N will have the burden to show that a different arrangement is warranted under the new circumstances of the move. Whealon. This is a high burden for N since N would have to overcome the presumptive right of J to change the residence of her child whom she has custody over.

Here again, the same factors would come into play as under the de novo burden. However, the difference is the amount of persuasion that N would have to make. Instead of an even playing field, N would have to prove that there is a "substantial" detriment to S in moving to Dak. N could argue that the change in schools is a burden, however, it is unlikely that the school in Dak are so lacking as to make the detriment to S substantial. N can further argue that S's involvement in Italian programs will be thwarted; this is a stronger argument, but S's involvement in choir and ability to get involved in other activities would thwart the "substantial" requirement here also.

The best hope of N in meeting this burden is that S expresses an interest in staying in Col. In Whealon, the court stated that the preference of a 13 year old would be properly considered where the non-custody parents assumed substantial responsibilities. Here, even if the court doesn't find joint custody, if may not deny that N has assumed substantial

responsibilities in raising S (traveling with S, residing 3 days a week, etc.). Therefore, if S expressed an interest in staying (even if just an interest in staying at the same school), this may be enough to carry the substantial burden that N has.

Otherwise, it is unlikely that N will meet his burden under the substantial change analysis for sole custody.

Change Made to Frustrate Parent's Contact

Even if the court finds that J has sole custody, and if N fails to meet the substantial change burden, the court may still set change [to] the custody arrangement. Although J would have a right to change residence with S is [sic] sole custody, that is not a presumptive right not [sic] and unlimited right. N can overcome that presumptive right by showing that J is making the change "not for sound and good faith reasons, but instead in order to frustrate the other parent's contact with the child or in any event illogically." In re Marriage of Cassady.

In Cassady, the court ruled that a mother's intended move was illogical when the mother claimed to be moving for a job, but where almost no such jobs existed and the mother had no prospect of one. In the present case, J claims that she is moving to Dak to work on an Italian transaction computer program. N would succeed in retaining custody if N can show that J either is not really moving to work on a computer program or is doing so illogically.

J claims that she wants to work on software in Dak. However, J does not have a job prospect in Dak. Instead, J claims that she will start her own operation. This is unlikely since J does not know anything about software development. Further, J lacks the capital necessary to start such an operation. Also, there is no evidence that J has any employees of investors that will help her realize this goal of developing software. Given that there are no actual plans for this development, it appears that J is not really moving to Dak for employment reasons. Instead, J is attempting to frustrate the contact rights of N and S. This would overcome J's presumptive rights to move with S. Thus it appears, J is not motivated by good faith reasons to move, therefore, the court may issue a custody ordering joint custody conditioned on J remaining in Col. A change to move designed to frustrate the contact between parent and child is not made in good faith and would be a reason for the court to not allow the move under the current custody scheme.

Furthermore, there is evidence that J has only pursued this course of action after N has entered into a new relationship. Retaliation for this new relationship may be J's motive for attempting to move and take S away from N. This purpose would be pure frustration and retribution and would not be good faith. Evidence of such intentions would go against allowed [sic] S to move with J to Dak, even if J did have sole physical custody.

J claims that she is moving to Dak to work with the University of Dak (UD). J is currently affiliated with the University of Col. (UC). UC has an extensive Italian department as well as a great computer science department. While UD does have a computer science department, there is no Italian department at UD. Therefore, the stated reason for J moving

is illogical, since there are more services for her Italian software development in Col than Dak. Thus, even if not made in bad faith, the attempt to move would be illogical, and again overcome the presumption that the sole custodial parent has a right to move with their child.

Therefore, even if J is successful in claiming sole custody and no significant change in custody, a court may declare J's purposes for moving not in good faith and condition joint custody on J staying in Col.

CONCLUSION

Given the facts of this case and the current state of Col. law, it is extremely likely that N will retain custody of S in at least a joint form. It is extremely likely that the court, if presented with these issues, will find that there is currently joint physical custody of S. In that case, the court will conduct de novo review of the custody arrangement and most likely award custody to N outright, or jointly if J stays in Col.

However, there is a slim possibility that the court will find there is sole custody in J. In that case, N will face a much tougher burden to show that a significant change would harm S's welfare and best interests. It is unlikely that a court will find that N meets this burden unless S declare[s] a preference with staying in Col with N.

But even if N fails to meet that burden, a court will award joint custody if it finds that the threatened move is not made in good faith, but is illogical and designed to frustrate N's contact with S. There is a slightly better than half chance that a court will find that the greater services available in Col make it illogical and in bad faith to move to Dak for some supposed development that has not been planned or prepared.

In summation, the facts and law indicate that N should retain some custody of S, but it is most likely going to need a court order.

THURSDAY AFTERNOON
JULY 31, 2003

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

IN RE RYAN COX

IN RE RYAN COX

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Dillard & Savim

Attorneys at Law
345 College Street
San Jose, Columbia

M E M O R A N D U M

To: Applicant

From: Logan Dillard

Re: In re Ryan Cox

Date: July 30, 2003

We have been retained by Ryan Cox to represent him in the sale of a piece of real property. The purchaser has backed out of the deal and is threatening to bring suit to recover the money that has already been paid. The property is in the name of Mr. Cox's son, Adam, as is the contract for sale. Adam has informed me that he considers his father the true owner of the property and will, therefore, do whatever he must to accomplish whatever his father desires.

I've conducted the initial client interview and have done some research. Before I speak to the opposing attorney I will need to speak to Mr. Cox again and counsel him concerning his options. Therefore, please do the following:

Write me a memorandum in which you (1) analyze the enforceability of the land installment contract, including what remedies are available to the seller if the contract is enforceable, and (2) assuming the contract is not enforceable, analyze what type of legal relationship the parties have, what remedies that relationship provides and what, if any, procedural steps are necessary to obtain these remedies.

EXCERPTS OF INTERVIEW WITH RYAN COX

* * * * *

LOGAN DILLARD (Q): Why don't you start at the beginning and tell me what happened?
RYAN COX (A): Well, I guess it started when my wife, Ruth, died two years ago. We had been living in our house in Columbia during the winter months, then going to Franklin during the summer to be near our older daughter, Sarah.
Q: Do you own a house in Franklin?
A: No. We would take our motor home and live in it.
Q: Okay, so what happened with the death of Ruth?
A: The kids started to talk to me about selling the place in Columbia. They were afraid I couldn't take care of myself; something might happen and I couldn't get help.
Q: Anything in particular?
A: Well, I've had a couple of heart attacks and I've got diabetes; so I guess they had a point.
Q: So, what happened?
A: My younger daughter, Emily, works with some people, Nicky and Marsha Belmont, who live in Columbia during the winter. They work a carnival, the county fair route during the summer. Well, anyway, my daughter, not Sarah, but Emily, who lives here in Columbia, says the Belmonts might be interested in buying the house, but they don't have the money up front and besides which, they can't get a bank to lend them the money because of the kind of work they do, you know, seasonal, self-employed. And besides which, I'm not sure I want to leave. I mean it's not just the house. I've got this big pole barn that has all of my tools in it. Where would I put them in Franklin, much less how much would it cost to ship them there? So I don't think anything about it.
Q: You must have a lot of tools.
A: Yes. I'm a carpenter. Used to build houses. Since I was 60, though, what with the heart disease and all I had to stop. But I kept the tools and do the odd repair jobs there at the house. You know, a merry-go-round needs a new floor, a popcorn wagon needs fixing, they bring it over and I do the work.
Q: Does that keep you busy?
A: Yes, and at my age, there aren't a lot of options.
Q: How old are you?
A: 75.
Q: So then what happens?

A: Couple of months later Emily comes back and says, “Hey Dad, this couple says they really like you and they don’t mind the idea that you could maybe sell them the house, but keep the motor home on the property and then use the pole barn for as long as you like.” Well, this sounds kind of interesting, I don’t really need that much space, but there’s still the problem that they don’t have the money. My daughter says, “Hey, why don’t you just take payments from them? You can use the income anyway. All you would do with the money is put it in the bank. You can be the bank.”

Q: So did you agree to do that?

A: Not right away. I wasn’t so sure, but I got to talking to this guy at the Showman’s Club, that’s where I go on Friday nights, a bunch of the carnival people go there. Well anyway he says he has lots of property and sometimes he sells it through what he called a land installment contract. He said if you get a big enough down payment there really is no risk. So I start thinking about it. This guy then says he would be happy to show me the contract he uses, even modify it to meet my house sale.

Q: Did he do that?

A: Yes. I’ve got it here.

Q: Good. Let me see it. I’ll read it in a minute. What happened then?

A: Well, I call Emily up and say let’s talk about price. I had it appraised for $100,000, but I figure I should get something for basically financing the sale, so I ask for $130,000. We agreed on $120,000. The other parts of the agreement are in that contract.

Q: Okay, let me read it. It says here that the seller is Adam. Who’s he?

A: That’s my younger son. When we bought the property we put it in his and my wife’s name. We figured I’d go first and it would make things easier.

Q: Did you include Adam in the negotiations to sell the property?

A: No. Emily handled all that. I don’t even think Adam knew he was on the deed at that point.

Q: You say Emily talked with the Belmonts, and they agreed to everything in the contract?

A: Yes.

Q: Then what happened?

A: Well, I had to tell my son, because he needed to sign the contract.

Q: I see that he did.

A: Yes, but that’s where things started to unravel.

Q: Okay, what happened?

A: Emily gets $40,000 from Nicky and Marsha and takes it to my son, Adam. Emily gives Adam the $40,000 and Adam gives Emily the contract to be signed by the Belmonts.

Q: Adam got the money before the Belmonts signed the contract?
A: That's right. Forty thousand, like it called for.
Q: Okay, then what happened?
A: Well this was in July, and Nicky was on the road until October, so not much for a while.
Q: Did you move out of the house?
A: Well actually, I had already done that. Nicky and his wife moved into the house in June.
Q: The month before the contract was agreed to?
A: Yes.
Q: Why?
A: Well, the deal was agreed to in May and it was only a matter of getting my son, Adam, to sign the contract and collect the down payment so I thought, what the heck.
Q: Did you ever get a copy of the contract signed by the Belmonts?
A: No.
Q: Why does the contract call for a $12,000 payment in November plus the 12 payments of $1,000 each?
A: It's just the nature of the carnival business. Nicky would get a bonus at the end of the season in October and he could use the bonus to make the payment.
Q: Why the three $1,000 payments then?
A: That was my son Adam's idea. I need to get some cash to live on and we knew we could rent the house for $1,000 per month, so it just made sense to have them pay something.
Q: How do you know you could get $1,000?
A: We had a real estate agent come in at one time. Ruth and I were thinking of moving back to Franklin and maybe renting the place out.
Q: What about the $40,000? Where is it?
A: Oh, we put that in a couple of mutual funds. I don't have a retirement plan, so we thought this would be a good investment and then I would live on Social Security and the $12,000 per year. When that ended, I would still have the $40,000 – if I'm still around.
Q: Did you get any payments?
A: Well, rather than mail checks to my son, on August 10, September 10, and October 10, Nicky gave my daughter $1,000 in cash for each of the monthly payments. Then in December there was nothing. And, of course, I didn't get the $12,000 payment in November.
Q: What did you do when the money stopped coming?
A: I called Emily and she said she'd check it out. She called Marsha, and Nicky and

Marsha said that they had changed their mind, that I was too much trouble and they wanted me off the property or to give them their $43,000 back and call the whole deal off.
Q: What do you mean by too much trouble?
A: Emily says Marsha thinks I'm too nosey, that I say things that are none of my business. They even said I've been going into the house without their permission.
Q: Is there any truth to these claims?
A: No. Nicky and I get along fine. I did go into the house once back in September, to get something out of a storage box and I will admit that I was shocked at the condition of the house and I guess I did say to Nicky that he was trashing the place.
Q: What did you do?
A: I tried to talk to Nicky, but he was never around.
Q: Have you been back in the house since then?
A: Heavens no. For one thing, they changed the locks on the house. For another, like I said, the place is trashed. They've got dogs that aren't house-trained, they never clean, the furniture is totally ruined, I don't want to go back.
Q: Is the furniture the same furniture that was in the house before you moved out?
A: Yes.
Q: Did they pay for it?
A: Not yet. They said they wanted to buy it, but they needed some time to get the money.
Q: How much did they agree to pay?
A: They haven't really agreed to buy it yet. I asked for $10,000, which is what I paid for it.
Q: Why do you think the Belmonts want out of the deal?
A: My guess is that Nicky can't make the payment so Marsha's got lots of pressure. But I figure too bad. A contract's a contract.
Q: Is that what you want, to enforce the contract as written?
A: Absolutely.
Q: Other than talking to Nicky, have you done anything to try and enforce the contract?
A: No. I've just been living on the property. I've been meaning to go to a lawyer, but you know how it is. Then my son gets this letter from Nicky and Marsha's lawyer and you can imagine he's not thrilled with the prospect of being sued. He then tries to deal with the lawyer and we get the second letter.
Q: Where are you living now?
A: I'm in the motor home on the property here in Columbia. I expect to be moving to Franklin in about four weeks to spend some time there.
Q: Are the Belmonts still in the house?

A: Sure.
Q: What does your son think of this?
A: He's not happy, but he said to go to a lawyer and he'd sign whatever the lawyer and I wanted signed.
Q: Okay, I think I have an idea about where we stand. Is there anything else you want to tell me?
A: No. That's about it. Where do I stand? A contract's a contract, right?
Q: Well, Mr. Cox, I can't say right off the top of my head what your rights are. There are some complicated legal issues that affect the ability to enforce the contract, most notably, the fact that apparently the Belmonts did not sign the contract. Here's what I would like to do. I'd like to call your son and daughter and talk to them. Then I want to do a little legal research. After I've had a chance to look at the law, I want to get back together with you and I'll be in a better position to tell you what options we have. Is that okay?
A: Sure.

Dillard & Savim

Attorneys at Law
345 College Street
San Jose, Columbia

M E M O R A N D U M

To: Cox File

From: Logan Dillard

Re: Phone Conversations with Emily and Adam Cox

Date: July 30, 2003

Spoke to both Emily Cox and Adam Cox today. Emily confirmed to me the substance of her father's story. Apparently Emily works with the Belmonts on occasion. This whole mess has hurt her business relationship, but says the Belmonts are the kind of people that if this didn't make them angry, something else would have at some point.

The Belmonts have a "noisy" relationship – lots of yelling. Emily thinks the second letter trying to cancel everything is Marsha saying "I told you so." She thinks Marsha believes Adam has taken advantage of the Belmonts. This according to Emily is a big joke, since Adam had nothing to do with it and wants nothing to do with the problem.

My conversation with Adam also confirmed the father's story. Adam said he was very surprised by the second letter from Vaughan, the Belmonts' lawyer. The big contention was his father's presence on the property. Marsha wants him off. He thought Vaughan would just come back and reiterate the demand to have complete title to the property. When I asked what was the reason his father was so adamant about not moving, Adam said he thought it was two things. First, "Dad's stubborn. I'm sure he gave you the 'contract is a contract' line." Second, the tools are not any handyman's collection. There are lots of them and they are valuable. The pole barn is a former fire substation, big enough to hold two fire trucks. His parents bought the property, then had the house constructed behind the barn. Adam figures it will take a good size semi-truck to haul the equipment to Columbia – it would probably cost $15,000.

INSTALLMENT CONTRACT

Agreement made July 9, 2002, between Adam F. Cox, of 876 Elm, Bradford, State of Franklin, Seller, and Nicholas and Marsha Belmont, San Jose, State of Columbia, Purchaser.

1. ***SALE***. Seller, in consideration of the deposit made by Purchaser hereunder, and of the covenants and agreements on the part of Purchaser herein contained, agrees to sell to Purchaser, and Purchaser agrees to buy, that real property located at 11 Lake Road, San Jose, State of Columbia, together with the tenements, hereditaments, and appurtenances belonging or appertaining thereto.

2. ***PURCHASE PRICE***. Purchaser agrees to pay to Seller the sum of $120,000, as follows:

The sum of $40,000 on execution of this agreement, receipt of which is acknowledged, and the balance of the purchase price, being the sum of $80,000, in 69 installments as follows:

The sum of $12,000, or more, on November 15, 2002, and

The sum of $1,000, or more, on the 10th day of each month, beginning August 10, 2002, and thereafter until the purchase price and interest are fully paid, provided that the purchase price shall be fully paid on or before March 10, 2008.

The unpaid balance of the purchase price shall bear interest at the rate of zero percent (0%) per year until paid. All payments of principal shall, until further notice, be made to Seller at the address set forth above.

3. ***IN LIEU OF INTEREST***. In lieu of interest on the outstanding balance as described in paragraph 2, Seller covenants that Ryan L. Cox, during his lifetime, shall:

A. have the right to use the pole barn located on the property (a former substation of the fire department currently being used for the storage and use of woodworking tools) for the continued storage and use of his woodworking tools, with the right to ingress and egress and the right to exclude Purchaser from the structure; and

B. have the right to maintain a motor home or trailer on the property as a residence, with the right to reasonable electricity, water and sewer connection at no cost.

4. ***TAXES AND ASSESSMENTS; INSURANCE***. Purchaser shall pay all taxes and assessments on the above-described property levied, assessed, or accruing after the date

of this contract, including the total of any payable in the 2003 calendar year and beyond.

5. ***HAZARD INSURANCE/RISK OF LOSS***. Upon the execution of this agreement, the Purchaser shall bear the risk of loss from all sources and shall keep the improvements on the property insured for an amount not less than the actual replacement costs of all buildings or the outstanding loan balance owing under this contract, whichever is greater.

6. ***ALTERATIONS TO THE PROPERTY***. Purchaser shall not make any major alteration or additions or improvements to the property without first obtaining permission of Seller, which permission shall not be unreasonably withheld. All expenses in making alterations, additions or improvements to the property shall be promptly paid by Purchaser and Purchaser shall furnish copies of said paid bills to Seller together with executed lien releases or lien waivers.

7. ***FAILURE TO PAY TAXES OR INSURANCE***. Should Purchaser fail to pay any taxes or assessments as herein provided, or fail to keep the property insured, Seller has the option to pay all or any of such taxes and assessments and to obtain such insurance. Purchaser shall repay to Seller, on demand, the amount of all moneys paid by Seller on account of such taxes, assessments, and/or insurance, together with interest thereon from the date of payment until repaid at the rate of 12 per cent per year.

8. ***FIXTURES***. Purchase price shall include permanently attached fixtures, but does not include personal property.

9. ***NO RECORDING***. Purchaser and Seller agree this contract shall not be recorded in public records, unless required by state statute. The recording of this agreement shall constitute a material breach of this agreement and Purchaser shall be liable to Seller for slander of title.

10. ***NO ASSIGNMENT***. This agreement is personal to Purchaser and no conveyance may be made by Purchaser of the premises, or any part, or any beneficial interest thereof without first obtaining the prior written consent of the Seller. Any conveyance of the property made by Purchaser of the premises, or any part, or any beneficial interest thereof without first obtaining the prior written consent of the Seller shall entitle Seller to accelerate payment of the balance due on this agreement and, at the option of the Seller, all sums of money secured by this agreement become due whether or not they are due and payable under other terms of this agreement. Nothing contained herein shall be construed to constitute a novation or release of Purchaser or any subsequent owner of liability or obligation under this agreement.

11. ***OCCUPANCY***. Purchaser shall occupy the premises as Purchaser's principal

residence. Purchaser shall not rent or lease the property, or any part, without the express written permission of the Seller.

12. ***INSPECTION***. Seller or his agent may make reasonable entries upon and inspections of the property. Seller shall give notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

13. ***DELIVERY OF DEED***. When the purchase price and all other amounts to be paid to Seller are fully paid as herein provided, and when all covenants and agreements on the part of Purchaser to be performed have been satisfactorily performed, Seller will execute and deliver to Purchaser a good and sufficient general warranty deed conveying the property free of all encumbrances made, done, or suffered by Seller.

14. ***POSSESSION***. Purchaser shall be entitled to possession of the property from and after the date of this contract.

15. ***DEFAULT***. If Purchaser shall fail for a period of 30 days to (1) pay Seller any of the sums herein agreed to be paid after such sums are due, or (2) pay taxes or assessments on the property after the same become due, or (3) comply with any of the covenants on Purchaser's part to be kept and performed, then Seller shall be released from all obligation to convey the property, and Purchaser shall forfeit all right thereto.

16. ***TIME OF ESSENCE***. Time is of the essence of this agreement.

17. ***BINDING EFFECT***. The terms, conditions, and covenants of this agreement shall be binding on and shall inure to the benefit of the heirs, executors, administrators, and assigns of the respective parties, but no assignment or transfer by Purchaser of this contract, or of an interest in the property described herein, shall be valid, unless made with the written consent of Seller.

Executed at the date first above written.

Adam F. Cox _____

Seller Purchaser

_____

Purchaser

AFC ___

Initials

James C. Vaughan
Attorney at Law

25687 Truman Street
San Jose, Columbia

May 2, 2003

Mr. Adam F. Cox
876 Elm
Bradford, Franklin 39856

Re: 11 Lake Road, San Jose, Columbia

Dear Mr. Cox:

I have been retained by Marsha and Nicholas Belmont to finalize a sale of the above-referenced real property or, in the alternative, obtain the return of the money they have paid. Specifically, my clients negotiated for the purchase of the property with your sister, Emily. The Belmonts delivered a down payment in the amount of $40,000 which has been subsequently supplemented by three payments of $1,000 each, for a total of $43,000.

My clients are ready, willing, and able to pay the additional sum of $77,000 and, hereby offer such payment, at such time as you are prepared to deliver a recordable warranty deed free from any mortgage or other encumbrance other than current property taxes. In the alternative, please return my clients' payment of $43,000.

Please direct all communication directly to me. However, if I have not heard from you by June 1, 2003, I will assume you have rejected each alternative. In that event I have been authorized to file an appropriate court action to resolve this matter. I trust you will honor your obligation in this matter so we all can avoid the expense and inconvenience of litigation. Please govern yourself accordingly.

Respectfully yours,

James C. Vaughan

James C. Vaughan

James C. Vaughan
Attorney at Law

25687 Truman Street
San Jose, Columbia

July 1, 2003

Mr. Adam F. Cox
876 Elm
Bradford, Franklin 39856

Re: 11 Lake Road, San Jose, Columbia

Dear Mr. Cox:

I regret you have refused to see the mutually beneficial result from acceptance of either of the proposals contained in my letter of May 2, 2003. Your demand that your father be able to retain possession of the storage barn for life is completely unacceptable to my clients.

I have been instructed by the Belmonts to withdraw their offer to purchase the property. I hereby demand return of the $43,000 previously submitted. Please remit a cashier's check to me at the above address. If I do not receive such check by August 10, 2003, I have been authorized to file an appropriate court action to recover this money. Please govern yourself accordingly.

Respectfully yours,

James C. Vaughan

James C. Vaughan

THURSDAY AFTERNOON **24 POINT**
JULY 31, 2003

California
Bar
Examination

Performance Test B

LIBRARY

IN RE RYAN COX

LIBRARY

COLUMBIA LANDLORD AND TENANT ACT

Section 704. Definitions.

In this act, unless the context indicates otherwise:

(1) "Lease" means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time.
(2) "Periodic tenant" means a tenant who holds possession without a valid lease and pays rent on a periodic basis. It includes a tenant from day-to-day, week-to-week, month-to-month, year-to-year or other recurring interval of time, with the interval between rent-paying dates normally evidencing that intent.
(3) "Tenancy" includes a tenancy under a lease, a periodic tenancy or a tenancy at will.
(4) "Tenant at will" means any tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent.

* * *

Section 710. Notice necessary to terminate periodic tenancies and tenancies at will.

(1) A periodic tenancy or a tenancy at will can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section, unless any of the following conditions is met:

(a) The parties have agreed expressly upon another method of termination and the parties' agreement is established by clear and convincing proof.

(b) Termination has been effected by a surrender of the premises.

(2) A periodic tenancy can be terminated by notice under this section only at the end of a rental period. In the case of a tenancy from year-to-year the end of the rental period is the end of the rental year even though rent is payable on a more frequent basis. Nothing in this section prevents termination of a tenancy for nonpayment of rent or breach of any other

condition of the tenancy.

(3) Length of notice. Except as provided in § 714 of this act at least 28 days notice must be given.

(4) Contents of notice. Notice must be in writing and substantially inform the other party to the landlord-tenant relation of the intent to terminate the tenancy and the date of termination.

* * *

Section 714. Notice terminating tenancies for failure to pay rent, commission of waste, etc.

(1) If a periodic tenant or a tenant at will fails to pay any installment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

(2) If a periodic tenant or a tenant at will commits waste or breaches any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice.

* * *

Section 720. Waste by tenant, action for.

If a tenant under a lease, a periodic tenant, or a tenant at will commits waste, any person injured thereby may maintain an action at law for damages against such tenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court.

Cavallaro v. Stratford Homes, Inc.

Columbia Court of Appeal (2001)

The Cavallaros filed suit against Stratford Homes, Inc., seeking specific performance of an agreement for the purchase and sale of a lot and the construction of a home thereon, or, in the alternative, damages arising from Stratford's alleged breach of that agreement. The complaint alleged that the parties had executed a lot reservation agreement which reserved a particular lot and fixed the base price for the construction of one of Stratford's model homes until a sale and purchase agreement was executed. The lot reservation provided, among other things, that: "Should [a sale and purchase] agreement not be executed within 14 days of this date, purchaser and/or seller may, at either's option, void this lot reservation." In consideration for the lot reservation, the Cavallaros gave Stratford a $500 deposit. The complaint alleged that, although the parties had subsequently executed an enforceable sale and purchase agreement, Stratford breached the agreement by improperly refusing to construct their home.

The undisputed record evidence established that the Cavallaros entered into negotiations with Stratford for the construction of a home, but that a meeting of the minds was never reached as to the price and the terms of construction of the home which were essential terms to an enforceable contract. The Cavallaros requested several changes to Stratford's basic model over a period of several months. Plans were redone and new pricing was formulated on a number of occasions. Because no final agreement was reached as to those essential terms, the entry of judgment in favor of Stratford was correct.

Even if the parties had reached a meeting of the minds as to the essential terms, any such contract would have been unenforceable under Columbia's statute of frauds. Pursuant to the statute of frauds, no action can be brought to enforce a contract for the sale of land unless the contract is in writing and signed by the party to be charged. In order to be an enforceable land sales contract, the statute of frauds requires the contract to satisfy two threshold conditions. First, the contract must be embodied in a written memorandum signed

by the party against whom enforcement is sought. Second, the written memorandum must disclose all of the essential terms of the sale and these terms may not be explained by resort to parol evidence.

The Cavallaros contend there is evidence in the record demonstrating that the parties executed a written contract. More specifically, the Cavallaros maintain that the sale and purchase agreement and addendum which was signed by them, but not by Stratford, when read in conjunction with a price list which was signed by Stratford's agent four days later, satisfied the written memorandum requirement of the statute of frauds. We disagree. In order for documents to be read in conjunction with each other to constitute a sufficient memorandum for purposes of the statute of frauds, the law strictly requires some internal reference between the documents. To that end, there must be some reference to the unsigned writing in the signed writing. Here, the signed price list did not make reference to the unsigned sale and purchase agreement.

The Cavallaros next argue that the trial court improperly rejected their claim that the partial performance doctrine removed the parties' alleged oral agreement from the requirements of the statute of frauds. We disagree that partial performance would apply in this case even if an oral agreement had been reached by the parties. The established rule is that in order to constitute partial performance sufficient to take an oral agreement to devise real property out from under the statute of frauds, delivery of possession of the real property is required. But the possession must be permissive and, most importantly, acquiescence by the parties to the terms of the agreement must be apparent. Here, a finding of partial performance could not be sustained because the Cavallaros never took possession of the property.

Having rejected all of the Cavallaros' claims of error, we affirm the trial court’s judgment.

Binninger v. Hutchinson

Columbia Court of Appeal (1978)

Genise Tatum Binninger appeals a judgment granting specific performance to Ralph Hutchinson, the intended purchaser, based upon an oral agreement for the conveyance of real property. Binninger was the owner of improved property in Bay County, Columbia, which Hutchinson was interested in buying. Binninger was then living in Houston, Texas. There is a conflict of testimony, which the trial court resolved against Binninger, as to whether an agreement was reached between the parties. While Mrs. Binninger stated no bargain was struck, Hutchinson testified that during a long distance telephone conversation, she agreed to sell him the property for $15,000, provided he pay her $10,000 and give her an installment note for the remaining $5,000. Hutchinson stated Mrs. Binninger told him that upon his making the above payment, the property was his.

Following the conversation, Hutchinson forwarded a warranty deed, mortgage, note and a check in the amount of $2,000 payable to "Genise Tatum Bissonett." The named payee was an obvious error. Bissonett was the name of the street where Binninger resided. Upon receipt of the check she attempted to call Hutchinson to advise him she was not selling the property, but without success. When she later discovered Hutchinson had taken possession, and was making substantial improvements, she returned the check uncashed to her attorney, who also attempted to contact Hutchinson, but, being unable to, left a message for Hutchinson to call him. Hutchinson finally contacted Mrs. Binninger within one or two months after receipt of the papers by her.

When further negotiations between the parties failed, Hutchinson brought an action seeking specific performance of the oral contract. The court found the parties entered into an oral agreement for the sale of the property for a price of $15,000. The prayer for specific performance was granted and the property conveyed to Hutchinson upon payment of $15,000 together with accrued interest. We reverse.

Binninger argues (1) an oral agreement was never reached, and (2) the statute of frauds bars Hutchinson from relief. Hutchinson responds there was competent substantial evidence for the trial court to determine the contract had been formed between the parties and since proof of both possession and payment of some part of the consideration was made, partial performance of the agreement was made, thus bringing into operation the partial performance exception to the statute of frauds.

Before the partial performance exception may be applied, delivery of possession must be made pursuant to the terms of the contract and acquiesced to by the other party. Even construing the conflicting testimony in Hutchinson's favor, as we must, we find no evidence entitling him to possession of the property. His possession was known to Mrs. Binninger only after she received the deed, mortgage, note and check and after she was told by relatives Hutchinson was making improvements upon the property. Hutchinson's proof concerning Mrs. Binninger's acquiescence to his possession was hardly clear and positive. Before a plaintiff may be allowed to give evidence of a contract for the sale of land not in writing, it is essential that he establish, by clear and positive proof, acts which take the contract out of the statute. The statement attributed by him to Mrs. Binninger, that after he paid $10,000 down and gave her a note for $5,000 the property was his, cannot be reasonably relied upon by Hutchinson as acquiescence for him to move onto the property without title and begin extensive improvements. The oral agreement was within the statute of frauds and unenforceable.

Additionally we find Hutchinson's forwarding of a $2,000 check, rather than the $10,000 which even he said was agreed upon by the parties, was no more than a counteroffer. It is hornbook law requiring no citations of authority, except common sense, that a contract once entered into may not thereafter be unilaterally modified; subsequent modifications require consent and a meeting of the minds of all of the initial parties to the contract whose rights or responsibilities are sought to be affected by the modification.

REVERSED.

Tanner v. Fulk

Columbia Court of Appeal (1985)

Plaintiff, George Tanner, filed an action against defendant, Michael Fulk, requesting that a land installment contract be terminated, that possession of the premises be restored to him, and that an additional judgment of $55,000 for deterioration and destruction of the premises be awarded.

A land installment contract is a type of conditional sale as, generally, possession is transferred immediately while legal title is held by the vendor until full payment of the contract price. A land installment contract means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation.

The court rendered a judgment which included findings of fact and conclusions of law. That judgment held as follows: 1) Fulk owed Tanner the actual amount called for in the land contract from its execution to the judgment canceling the contract and returning possession to Tanner, less payments made to Tanner; 2) Tanner was not entitled to any monies for destruction and deterioration of the property; 3) Tanner was not entitled to any monies based upon the fair rental value of the property; and 4) Fulk was not entitled to any monies from Tanner, and specifically could not recover the sum of $7,200 he had paid under the land contract prior to termination.

The election of the vendor to terminate the land installment contract is an exclusive remedy that bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee's use. In such case the vendor may recover the difference between the amount paid by the

vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use. Where the vendor of the land installment contract brings an action for forfeiture for vendee's default under the contract, the vendor has elected an exclusive remedy which prohibits further action except to recover any amount paid by the vendee which is less than the fair rental value plus any deterioration or destruction of the property occasioned by the vendee's use. However, if the amount paid by the vendee exceeds fair rental value plus any deterioration or destruction, the vendor is permitted to retain the excess amount paid.

This measure of damages is also consistent with the general principle that specific performance is unavailable to the seller. In a typical case, where the buyer is in default of payment, monetary damages are adequate to compensate the seller since what the seller bargained for was money. As such, a monetary award is the equivalent of specific performance.

In the instant case, the trial court specifically placed a zero amount on the difference between the amount paid by Fulk on the land contract prior to termination and the fair rental value. The trial court also placed a zero amount on destruction and deterioration. Both of these determinations are supported by competent and credible evidence. Finally, the trial court found no reason to award Fulk any of the amount of $7,200 he had paid under the land contract prior to termination. Neither do we.

AFFIRMED.

Hansen v. Academy Corp.

Columbia Court of Appeal (2002)

In 1987, Academy Corporation leased from Hansen a 22,500 square foot building located on a three-acre tract in Rosenberg, Columbia. As part of the lease agreement, Academy had exclusive use of the parking lot surrounding the building. The building and the parking lot did not comprise the entire three-acre tract.

Hansen brought a claim for intentional trespass, claiming that Academy, without his consent, used a small building and a small sign located outside the parking lot, but within the three-acre tract.

The trial court interpreted the contract as a matter of law, deciding that the disputed property upon which the small building and sign were located was outside Academy's lease of the building and its right to use the parking area. Based on that interpretation, the trial court submitted the question of trespass to the jury.

The jury charge defined "trespass to real property" as:

> any unauthorized intrusion or invasion of private premises or land of another, committed when a person enters another's land without consent. For purposes of a trespass claim, entry need not be in person, but may be made by causing or permitting something to cross the boundary of the property.

The jury was asked, "Did Academy trespass on Dr. Hansen's property?" As a matter of law, Academy neither leased nor had a right to use the disputed property. Academy's use of the disputed property was, therefore, unauthorized. We hold that this evidence was legally and factually sufficient to support the jury's finding that Academy trespassed on Hansen's property.

Academy also contends that there was no evidence or insufficient evidence of damages for trespass. Hansen offered evidence of the rental value of the sign and the small building. In Columbia, the scope of recoverable damages associated with damage to property depends on whether the injury is temporary or permanent in nature. If an injury to property is temporary in nature, the proper measure of damages is the reasonable cost of the repairs necessary to restore the property to its condition immediately prior to the injury plus the loss occasioned by being deprived of the use of the property. It has been repeatedly held that loss of rentals is an appropriate measure of damages for the temporary loss of the use of land. Given the nature of the injury in this case, we conclude that the damages for trespass based on rental values were permissible.

Vogel v. Pardon

Columbia Supreme Court (1990)

Anton and Ruth Vogel appeal from a district court judgment awarding them damages for waste arising out of the lease of an apartment building. We affirm.

In 1981 the Vogels leased an apartment building in Bismarck to Richard Pardon, Paul Rasmussen, Ronald Klein and A. Gaylord Folden (the Partners). The Partners quit making payments in September 1985, and the Vogels subsequently canceled the lease pursuant to the lease provisions and state law. The cancellation was effective March 31, 1986.

The Vogels then commenced this action seeking damages for waste. The Vogels asserted that the property had been in good repair when the Partners took possession in 1981, and that the property was in an unrentable condition when returned in 1986, due to the Partners' failure to make necessary repairs. The Partners asserted that the building, which had been constructed in 1963, was in an advanced state of disrepair when they contracted with the Vogels in 1981, and that any damage was caused by ordinary wear and depreciation of the property, not by any waste on their part.

The case was tried to the court. The court found that the Partners had failed to properly repair the roof of the building, resulting in water damage to the building and contents, for which it awarded the Vogels $4,000 in damages. The court also awarded damages of $500 for furniture which was discarded, sold, or converted by the Partners. Judgment was entered accordingly and the Vogels appealed.

The Vogels argue that the court erred in failing to award damages for waste to various items, including appliances, carpeting and linoleum. Waste may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in a substantial injury. Waste implies neglect or misconduct resulting in material damage to property, but does not include

ordinary depreciation of property due to age and normal use.

The evidence on whether there was waste to appliances, carpeting and linoleum was conflicting and the trial court found that these items were nearing the end of their useful lives when the building was leased and had simply worn out due to ordinary wear and age, rather than from any wrongful conduct of the Partners. We conclude that the trial court's findings in this regard are not clearly erroneous. The Vogels were not entitled to recover damages for items which had reached the end of their useful lives through ordinary wear.

The object of an award of damages in an action for waste is to compensate without unjust enrichment. If recovery of the replacement cost of the roof were allowed in this case, the Vogels would be unjustly enriched. The Vogels leased the Partners an eighteen-year-old building with an eighteen-year-old roof. There was testimony that the normal useful life of a roof of this type was approximately twenty years. During the period that the Partners were in possession, the roof reached the end of its useful life through ordinary depreciation, wear, and age. If the Vogels were allowed to now recover the replacement cost, they would enjoy the benefit of a brand new roof with another twenty-year life expectancy. Conversely, the Partners, through the happenstance of possessing a building with a roof nearing the end of its useful life, would be forced to bear the cost of its replacement, even though the roof required replacement through no fault of their own. Clearly, such a result would unjustly benefit the Vogels. We conclude that the trial court did not err in refusing to award damages for the replacement of the roof.

The Vogels assert that the trial court used an incorrect measure of damages. Their argument on this issue is intertwined with their assertion that the court should have awarded damages for the cost of replacing appliances, flooring, and other items of personal property in the building. The trial court, however, found, with sufficient evidentiary support, that replacement of those items was necessitated by ordinary wear and age, not by any act constituting waste by the Partners.

The Vogels' argument is, however, relevant to the award of damages for furnishings which were discarded, sold or converted. The trial court found that the parties intended that the furnishings be included in the lease and that the Partners were therefore liable for the value of any furniture lost or damaged. The trial court awarded $500 for the value of the furniture which was discarded or sold. The Vogels assert that the court should have assessed damages based upon replacement cost of the furniture, rather than its actual value.

The trial court's resolution of this issue is in accordance with the general rule that where the waste alleged to have been committed on the leased premises resulted from the destruction or removal of something from the premises, and the thing thus destroyed or removed, though a part of the realty, had a value which could be ascertained accurately without reference to the soil on which it was located, the measure of the damages recoverable by the landlord for the waste may be based on the value of the thing destroyed or removed, instead of on the diminished market value of the premises.

The object of an award of damages in a waste case is to compensate without unjust enrichment. If the Vogels were allowed to replace old, well-worn furnishings with new (or, at the least, newer) furnishings, they would be unjustly enriched. By allowing damages based upon the actual value of the items lost, the Vogels receive adequate compensation but not over compensation.

Judgment is affirmed.

ANSWER 1 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Logan Dillard
FROM: Applicant
RE: In re Ryan Cox

This memorandum addresses the legal position and options of Ryan Cox regarding the sale of real property in Columbia.

Is there an enforceable land installment contract?

The first issue is whether the contract signed by Adam Cox as seller and dated July 9, 2002 is enforceable, or whether there is an oral agreement between the parties that satisfies the Statute of Frauds.

Agreement: Meeting of Minds

To have any type of enforceable contract there must first be an agreement. This means there must be a "meeting of the minds" regarding the essential terms, including price of the contract. If there is no such meeting of the minds, as was the case in Cavallaro, there is no agreement to serve as the basis of a contract.

The idea of selling the Columbia property to the Belmonts was first raised by Mr. Cox's daughter, Emily. She told Mr. Cox that the Belmonts "might be interested" in buying the house. However, at this point, there was no agreement. Neither party had evidenced a set desire to buy or sell.

The second exchange between the Belmonts and Emily came much closer to an agreement. As Mr. Cox described, he considered various options, including a land installment contract. This period resemble the negotiations in Cavallaro when plans were redefined and new pricing formulated. Mr. Cox and the Belmonts likewise negotiated price. Mr. Cox initially asked for $130,000, but settled on $120,000.

According to Mr. Cox and confirmed by Emily, the Belmonts and Mr. Cox reached a meeting of the minds. The price was set at $120,000. It seems that the Belmonts reviewed the written contract and agreed to its terms. The essential terms included Mr. Cox's continued use of the barn, residing there in his motor home, etc.

This agreement was made orally between the parties in May. Thus, the threshold issue of finding whether there was meeting of the minds is met. Further evidence is the recognition of the agreement's terms in the letters from the Belmonts' lawyers.

Statute of Frauds

The agreement described above was made orally. It was memorialized in a writing that was signed by Adam Cox. The Columbia statute of frauds requires that a contract for the sale of land is unenforceable unless the essential terms are in writing and the writing is signed by the party being charged. (See Cavallaro).

Here, only Adam Cox signed the written contract. The Belmonts, against whom Mr. Cox wants to enforce the contract, did not sign it. The contract cannot be enforced against them unless the Statute of Frauds is somehow satisfied.

One option would be satisfaction through another written document signed by the Belmonts read in conjunction with the failed contract. So far, we know of no other writings. The letter from the Belmonts' attorney seems to acknowledge the terms of the contract; however, there is no internal reference between the documents as required by Cavallaro. In addition, the Belmonts themselves did not sign it.

Partial Performance

The Statute of Frauds may also be satisfied by the partial performance doctrine. An oral agreement to sell real property is enforceable if there is partial performance, meaning 1) delivery of possession of the property and 2) acquiescence by the parties to the terms of the contract. See Cavallaro.

Mr. Cox's situation in this regard is favorable. He moved out of his house following the oral agreement and the Belmonts moved in. The agreement was made in May and possession was delivered in June. It is not clear whether the Belmonts actually lived at the house. From the interview, it seems that Marsha Belmont did but her husband Nicky was traveling with the carnival until October. Nicky was there at some times, as shown by the meeting of Mr. Cox and Nicky in the house in September.

Possession alone, though, is not enough. In Binninger, the purchaser took possession of the property but the seller was not found to have acquiesced in either the possession or the contract terms.

Mr. Cox clearly acquiesced in the possession. The issue is whether the Belmonts acquiesced to the essential terms. The fact that the Belmonts paid the requested $40,000 down payment supports acquiescence. Had they paid less, as the purchaser in Binninger did, it would be a counteroffer because unilateral subsequent modification requires consent.

In addition, the Belmonts did not object to Mr. Cox's staying on the property in his motor home. More information is needed on whether they left the pole barn in his exclusive possession. The terms of the contract provided for Mr. Cox's remaining on the property and retaining sole access to the barn. If the Belmonts took possession and allowed these things to continue, their acquiescence may be inferred. Mr. Cox must show this

acquiescence by clear and positive proof, as required by Binninger.

In sum, Mr. Cox has a strong case for proving an enforceable contract exists. Although there were preliminary negotiations, the parties reached a meeting of the minds on the essential terms in May. This contract was oral and thus potentially unenforceable under the Statute of Frauds. However, because both possession and acquiescence are provable, the doctrine of part performance satisfies the statute.

What are the seller's remedies?

Assuming (as presented above) that the land installment contract is enforceable, the seller is entitled to certain remedies.

The contract itself provides for forfeiture if the buyer fails to – for a period of 30 days – pay seller sums due, pay taxes or assessments, or comply with any covenants.

Mr. Cox reported that the monthly payments were received for August, September and October. However, the monthly payments since then have not been paid. In addition, the $12,000 due in November was not paid. The failure of the Belmonts to pay gives rise to seller's remedies.

As explained in Tanner, the seller in a land installment contract retains legal title to the property even though the buyer takes immediate possession. The property is a security for the buyer's obligation.

The seller's election to terminate the contract – "forfeiture" – is an exclusive remedy. This means that further action on the contract is barred. But the seller can still recover damages if the amount already paid by the buyer is less than the fair rental value of the property plus deterioration or destruction from buyer's use.

Mr. Cox can seek to terminate the contract. So far, the Belmonts have paid $43,000. The fair rental value of the property is $1,000 per month. The Belmonts have been in possession since June of 2002. It is now July of 2003, meaning the total rental value is $13,000. Given that the furniture – when purchased – was worth $10,000, it is impossible/unlikely that the damage or deterioration will reach $30,000. Mr. Cox can keep the full $43,000, even though it exceeds the rental value plus damages. See Tanner.

Tanner also makes it clear that specific performance is not available to the seller. Because Mr. Cox (Adam) bargained for money, damages are adequate compensation.

Thus, if the contract is enforceable, Mr. Cox can force forfeiture but cannot get specific performance, which was the option he wanted.

What if the Contract is not enforceable?

If there is no enforceable contract between the parties, then their legal relationship must be analyzed.

Legal Relationship

Columbia Landlord and Tenant Act provides the relevant definitions for this situation.

The parties do not have a lease. A lease is an oral or written agreement that transfers possession of real or personal property §704. As discussed above, if there is an agreement it does more than just transfer possession, it attempts to transfer title.

There are two types of tenancies without leases. A periodic tenant is a tenant with possession who pays rent by period. This could have described the relationship in August, September and October when the Belmonts made monthly payments of $1,000.

Because no payments have been made since October, the legal relationship between the parties is best described as a tenancy at will. The Belmonts are in possession of the property – at least the house and furniture, not the pole barn. However, no periodic payments have been made. The Belmonts' possession is with the permission of Mr. Cox.

If their possession were unauthorized, it would constitute a trespass. See Hansen. Because Mr. Cox gave consent for their occupation of the premises, a tenancy at will exists.

Remedies Available

Section 710 defines the notice required to terminate a leaseless tenancy.

If there is an express agreement between the parties regarding termination, it controls. If there is any such agreement it would need to be proved by clear and convincing evidence. The (failed) contract provided for forfeiture. See above.

Termination may also be effected by a surrender of the premises. The Belmonts have not vacated the property.

If a periodic tenancy were in effect, it could end at the end of a rental period. This would be the 9th of the month. However, a tenancy at will can be terminated at any time, as long as 28 days notice is given.

Section 714 provides specific termination procedures if failure to pay rent or commission of waste are the basis [sic]. A tenancy at will can be terminated if the landlord gives the tenant notice to pay rent (or remedy the default) or vacate within 5 days.

Mr. Cox can terminate the tenancy by giving just 5 days notice because it is based on the Belmonts' commission of waste. Mr. Cox described the house as "trashed" and the furniture as "ruined." The presence of untrained house pets and lack of cleaning constitute "waste."

Mr. Cox can also file an action for damages at law for waste under Section 720. Vogel defines waste as neglect or misconduct resulting in material damage to the property. The things Mr. Cox observed in September have probably gotten worse.

Mr. Cox can recover compensatory damages, but unjust environment must be avoided. Vogel. Although the furniture was purchased for $10,000, it was probably not worth that much when the Belmonts took possession.

Because there was no express agreement to buy or lease the furniture, the Belmonts' possession and use was authorized only by Mr. Cox's implied consent. In Vogel, the court limited damages for waste of real property (like furniture) to the value of the thing destroyed or removed. Paying Mr. Cox the purchase price would unjustly enrich him. The Belmonts' were entitled to ordinary use and wear. It was only misuse or abuse that constitute waste.

Procedures

As mentioned above, Mr. Cox should first terminate the tenancy. He should give at least five days notice in writing that substantially informs the Belmonts of the intent to terminate and date of termination.

Mr. Cox should also file suit for damages. Section 740 permits inclusion in the judgment the costs of the prevailing party and reasonable attorney's fees.

ANSWER 2 TO PERFORMANCE TEST - B

Memo

To: Logan Dillard
From: Applicant
Re: In re Ryan Cox

You have asked me [to] write you a memo concerning Mr. Cox's case before you counsel him as to his options. Mr. Cox entered into a land sale installment contract, which the purchaser backed out of before signing but after moving in. The Belmonts (purchasers) now want reimbursed for the $43,000 they have already paid to Mr. Cox.

1. Enforceability of the land sale contract

The issue is whether the written contract is enforceable, and if so, what remedies Mr. Cox is entitled to for the Belmonts' breach of it.

a.) Enforceability

An installment land sale contract is enforceable if there is a meeting of the minds on the essential terms and if the contract satisfies the statute of frauds. (Cavallaro).

i.) Meeting of the Minds on Essential terms

A contract must demonstrate a meeting of the minds on its essential terms to be enforceable. The essential terms include the price and terms of construction in a tot agreement to construct a house (Cavallaro.). In this case, the essential terms of the contract are the price, the installment payment schedule, and Mr. Cox's remaining on the property in a mobile or trailer home and exclusively using the pole barn.

These terms are very clearly spelled out in the contract; however, the Bettons [sic] apparently never signed the contract. The Bettons [sic] did practically admit to these terms, however, by saying they changed their mind and didn't want Mr. Cox there. (Cox interview). This is tantamount to saying they agreed to it at first, when the agreement was made. Also, the Bettons' [sic] attorney Vaughan's first letter to Adam demanded finalizing the sale and offering to pay the remaining $77,000. This is evidence the price of $120,000 was agreed to, because the Bettons [sic] had already paid $43,000, in the installment method provided under the contract.

ii.) Statute of Frauds

Even if the essential terms of the contract are agreed upon, the contract will not be enforceable if it violates Columbia's statute of frauds. (Cavallaro). The statute of frauds has two requirements: writing signed by the party against whom enforcement is sought,

and that the essential terms of sale are disclosed in the writing. (Hard evidence is not admissible to explain terms).

In this case, the written contract lays out all the essential terms – the price, the property, Mr. Cox's presence, the forfeiture clause. It is very complete, and parol evidence is not necessary to explain any terms.

However, the Belmonts apparently never signed this contract. Mr. Cox signed (his son Adam, in whose name the property is formally titled), but Mr. Cox is seeking enforcement of the contract against the Belmonts. Adam gave Mr. Cox's daughter Emily the contract to have the Belmonts sign. The Belmonts had already moved into the house, and Mr. Cox never got a copy of the contract singed by the Belmonts.

Because the Belmonts are the party against whom enforcement is sought, and they did not sign the contract, the contract appears to violate the Columbian Statute of Frauds ("SOF") and would be unenforceable if there were no applicable exception.

iii.) Part performance exception to SOF

The part performance doctrine can remove and oral contract from the statute of frauds requirement. In order for part performance to apply, delivery of possession pursuant to the contract and seller's acquiescence to purchaser's possession must be shown. (Binninger).

In this case, the Belmonts took possession in June, and continued to possess the property until the current time. Mr. Cox acquiesced in their possession, as he gave them permission to move in June, before they had even paid the down payment, because he had already moved out in May. He continued to live in a different structure on the same parcel of land, so he was aware of their continued presence. He also accepted their $1,000 monthly payments from August until October.

Therefore, Mr. Cox's chances of bringing this contract under the part performance exception to the SOF are good, since the Belmonts took possession pursuant to the contract, and he acquiesced in their possession. In this case, the installment contract will be enforceable, even though there is no signed contract by the Belmonts.

b.) Remedies if the contract is enforceable

The issue is, if the contract is enforceable, what Mr. Cox is entitled to order [sic] the contract.

i.) Election to terminate the contract

A seller can elect to terminate an installment land sale contract if the buyer misses a payment and the contract provides for forfeiture. If the seller elects this, it is the seller's exclusive remedy and bars any further action on the contract unless the vendee has paid

an amount less than the fair rental value of plus [sic] deterioration or destruction of property. (Tanner).

In this case, the contract specifically provides for forfeiture in case of purchaser default by paragraph 15. Thus, Mr. Cox has a right to terminate the contract. However, this would be his exclusive remedy if he chooses to do so, because he has already received $43,000. Although there is evidence of deterioration and destruction (Mr. Cox said the Belmonts "trashed" the house and ruined the furniture inside), he cannot recover damages for this unless they exceed $43,000.

It may be a good remedy for Mr. Cox, though, because he could end the contract and keep $43,000. Under the Tanner case, if the amount paid by the vendee exceeds fair rental valve plus any deterioration or destruction, the vendor is permitted to retain the excess amount paid. Mr. Cox said his house was appraised at $100,000 and that a real estate agent had said $1,000 a month was a fair rental value. For a price of nearly half of what his house is worth, he could probably fix any damage done by the Belmonts and even improve on it.

If Mr. Cox elects to terminate the land sale contract, he is entitled to have the Belmonts leave and keep the $43,000 the Belmonts already paid to him.

ii.) Specific Performance

Specific performance is typically unavailable to the seller in an installment land sale contract, because money damages are generally adequate to compensate the seller's injury. (Tanner).

Mr. Cox had indicated (in his interview) that he would like the contract enforced. An argument could be made that this was not a typical land sale contract, so money damages would not be adequate to compensate Mr. Cox. Mr. Cox did not just contract to sell his real property – he also contracted to live on a different part of the property, receive monthly payments from the Belmonts for his income, and continue to store his tools and use the pole barn. He has many very expensive tools, and it would cost approximately $15,000 to move them somewhere else, not to mention that he doesn't have another place to move them to. Mr. Cox would therefore not be compensated by just receiving the money due to him under the contract.

2.) If the contract is not enforceable

The issue if the K is not enforceable is what type of legal relationship the parties have, what remedies the relationship provides, and what procedural steps are necessary to obtain the remedies.

a.) Legal relationship

If the contract is not enforceable, Mr. Cox is still the owner of the real property. The Belmonts, however, are staying in a house on his land and have given him money. The issue is whether a lease or tenancy arrangement has arisen.

A periodic tenant holds possession without a valid lease and pays rent on a monthly basis. (Col. LL Act §704). A lease is an agreement for transfer of possession of property for a definite period of time. Here, if there is no contract, there is no express agreement as to the transfer of Mr. Cox's real property and its terms, so there is no lease. The Belmonts paid rent at a rate of $1,000 on August 10, September 10, and October 10. It could be argued that this monthly payment arrangement constituted a periodic tenancy.

A tenant at will is a tenant holding with the permission of the tenant's landlord without a valid lease and under circumstances not involving periodic payment of rent. (§704). In this case, there is no valid lease, as discussed above. The Belmonts have at least until this point probably stayed on the property with Mr. Cox's permission. He invited them to move in, thought they had a contract, and he accepted payments from them. He has not previously brought any actions or made any requests for them to leave. Although there were periodic payments, as discussed above, there were only three. There was also the initial $40,000 payment. Then a $12,000 payment was due in November and a $1,000 payment in December that were not paid. Without a valid contract, it is possible to argue these did not constitute a periodic payment arrangement, and thus a tenancy at will was created.

If the Belmonts are on the property without Mr. Cox's permission, if for example – the contract is a condition for permission to remain on the property, then the Belmonts are trespassers.

b.) Possible remedies and procedural steps necessary for remedies

The issue is, without an enforceable contract, what Mr. Cox's remedies are are [sic] what is necessary to achieve them.

i.) Termination of periodic tenancy

If the relationship between the parties is a periodic tenancy, it can be terminated by giving notice at the end of the rental period, provided it is at least 28 days away (§710).

In this case, the Belmonts are still living in the house. To terminate the periodic tenancy and force them to leave, procedurally, Mr. Cox must give notice to the Belmonts that the tenancy is terminated on the next 10th of the month that is at least 28 days away, because if there is a periodic tenancy, it is month-to-month with payment due on the 10th of each month. Thus, the rental period is monthly from the 10th.

ii.) Terminate based on failure to pay rent

If the relationship is either a periodic tenancy or tenancy at will, it can be terminated by giving tenant notice that the tenant must pay rent or leave within 5 days. (§714).

In this case, the Belmonts did not make payment in November and December. Procedurally, Mr. Cox can give immediate notice that the Belmonts must pay rent or vacate his property in 5 days.

iii.) Terminate based on committing waste

If the relationship is either a periodic tenancy or tenancy at will, it can be terminated by the landlord giving notice that the tenant must remedy the default or vacate the premises within 5 days of the notice. (§714).

In this case, Mr. Cox alleges that the Belmonts have "trashed" his house and ruined his furniture. This is more than ordinary wear and tear and constitutes waste by tenants. Procedurally, Mr. Cox must give the Belmonts the notice required by §714.

Additionally, the Belmonts will be liable for damages based on the commission of waste. Any person injured by waste can recover treble damages (or $50 if greater), including costs and attorney's fees, in a lawsuit. (§720). Mr. Cox can sue for the damage done to his house and his furniture. He will not, however, be able to recover the full $10,000 he paid for his furniture, because it was not new when the Belmonts moved in. It was not worth $10,000 them and under Vogel, Mr. Cox would be unjustly enriched if allowed to recover its full purchase price. He will, however, be able to recover more than the decrease in rental value to his home, because the furniture has a value that could be ascertained accurately without reference to the soil on which it is located (See Vogel). It is clear than [sic] the rental amount was not intended to include the furniture, because the written agreement (though unenforceable) includes fixtures but not personal property in the price.

iv.) Trespass

Because Mr. Cox is the owner, if the Belmonts were on his property without permission he can recover in trespass. Trespass to real property is any unauthorized intrusion or invasion of private premises or land of another, committed when a person enters another's land without consent. (Hansen). Recovery is permitted for the loss of rental value for intentional trespass. (Hansen). Procedurally, he must be bring [sic] a trespass action.

If Belmonts did not have Mr. Cox's permission, because they failed to make payments, they may be liable in trespass. Mr. Cox can recover $1,000 a month, even without the contract, because it is likely the reasonable rental value of the land (as the real estate agent determined). Thus, the loss of rental income is what he could have gotten from the property if the Belmonts had not been trespassing.

California
Bar
Examination

Performance Tests
and
Selected Answers

February 2004

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2004 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Contents

TUESDAY AFTERNOON
FEBRUARY 24, 2004

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE SNOW KING MOUNTAIN RESORT

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

IN RE SNOW KING MOUNTAIN RESORT

Law Offices of Spence and Hawks
San Obispo, Columbia

MEMORANDUM

TO: Applicant
FROM: Margaret Thompson
DATE: February 24, 2004
RE: **Snow King Mountain Resort**

Our client, Snow King Mountain Resort (SKMR), needs assistance in dealing with its insurance carrier. Yesterday, I spoke to SKMR's CEO, Manuel Lopez, and he sent to me by overnight mail the relevant documents. We've done corporate and real estate work for them in the past, but because they've grown tremendously and this will be a new operation, I asked Manuel to describe the current operations and proposed program in some detail.

SKMR is a ski area and vacation second-home resort complex, which wants to add recreational mountain biking to the list of activities available to its summer guests, with bike trails, aerial tram rides, and trail fees. Everything was set until SKMR's insurer informed them that mountain biking would require the highest risk rating, possibly leading to prohibitive premiums.

Columbia has a recreational use statute, Col. Civil Code, Section 846, which protects a landowner who permits recreational use of her or his land. I'm familiar with the statute, and the insurance company is correct that the statute doesn't specifically refer to mountain biking, nor does it apply when someone charges for access. However, the statute also says that "any recreational purpose" is covered, and Manuel says that SKMR hasn't decided whether or for what to charge.

The insurer's letter is attached. It invites a response, if we believe that the recreational use statute applies. We need to research these issues, respond to the insurance company, and advise SKMR how to set up the program.

Would you please:

1. Draft a persuasive argument to the insurance company in letter form arguing that the recreational use statute will apply. Since you will need to explain to the insurance company how the mountain biking program will be operated, you should assume for purposes of drafting the letter that SKMR will set up the program as you recommend. We need to persuade the insurance company's attorneys and rating professionals, and thus you should discuss relevant case law and, as in writing a brief, assume that they will be aware of contrary cases.

2. Draft a memorandum to Manuel Lopez explaining your advice on how SKMR should operate the program to maximize the likelihood that the recreational use statute will apply. We must make recommendations on whether to charge an access fee; whether to carry mountain bikes on the aerial tram; and whether to sell and rent bikes. I will review both your letter and your memorandum with Manuel, so do not repeat discussions or recommendations contained in the letter, in the memorandum.

Also, in drafting the letter and memorandum, do not address issues of conduct which could result in negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.

MEMORANDUM FROM THE DESK OF MANUEL LOPEZ

TO: Margaret Thompson, Law Offices of Spence and Hawks
DATE: February 23, 2004
RE: **Snow King Mountain Biking Trails**

Thanks for agreeing to respond to this matter. I've attached the memos from my Operations and Marketing Directors and a letter from the insurance agent, and will outline the information about Snow King's organization and operations you requested.

As we discussed, Snow King Mountain Resort (SKMR) wants to add a mountain biking program in the area of the ski hill. It could be a major part of our effort to add activities to our summer operations and become a year-round resort. The summer-season program will fill out the non-ski off season, which the marketing department now calls our "shoulder season."

Full-year operations are not only helpful to our bottom line, but are essential to retain and develop quality employees, sustain real estate development, and retain nationally-recognized commercial tenants. In the last 5 years, real estate sales are way up, and most of our mall tenants are open year-round. Also, in just 5 years, we've built our year-round staff to 38% of our work-force, enough to allow us to extend health and dental benefits to a majority of our employees, initiate modest retirement benefits, and institute profit-sharing for department heads. A summer-season revenue increase of 12% would justify the employee benefits package and probably permit commuter shuttles from town for our employees. Also, I'd like to start on-site childcare for our employees, which our room-care staff says is their number one concern. These may sound trivial in the corporate world, but in the tourist trade, these benefits would set us apart in attracting career-oriented people.

Building year-round operations began with the name change from Snow King Ski Area to the Mountain Resort. Unlike the winter season, which turns on skiing and snowboarding, seasonal operations require that we provide a wide array of activities. In summer, the Concierge Department is the busiest site at the Village. It's now been moved from inside the Lodge to the Village to provide service not just to Lodge guests but to any visitor.

For starters, we enlarged the resort Lodge pool and health center. We've added shuttle service to and discounts at two nearby golf courses, a tennis club, and several white-water

rafting companies. Three years ago, we began summer operation of the ski area's aerial tram, which carries 50 passengers each trip, to the mountain summit. Visitors are encouraged to ride up for the spectacular view, lunch or dine at the summit restaurant, and even hike down. We converted the cross-country ski area to a summer "dude ranch," offering horseback riding and other ranching activities. This year we're starting our tent-auctions weekend series (antiques, classic cars, art), and convention seminar marketing. For the future, we're considering building an alpine slide, and the Marketing Department is even pushing paragliding tandem rides off the summit.

Mountain biking would be the easiest and cheapest new activity to add. As the memo from Sally Johnson, the Mountain Operations Director, indicates, we only need to add a few trails and signage and print trail maps to implement mountain biking. A trail fee would involve designing fee collection points and hiring personnel to collect fees. If we don't charge for access to the trails, there wouldn't even be much additional personnel cost. The Marketing Department is hot to get on this.

You asked that I outline SKMR's operations. As you know, SKMR now is a resort village complex. SKMR owns and operates some properties (such as the Lodge), owns and rents out a mall of shops and restaurants, and has developed and sells condos and residential lots which surround the Village. There are also some independent businesses within the Village, such as the Best Mountain Lodge and Aman Resort, which purchased their properties from SKMR and now operate independently. As a corporation SKMR consists of:

- Snow King Ski Mountain, which includes as its profit centers: lift ticket sales for access to the tram and 10 chair lifts, the village parking, mountain restaurants, ski and board rentals, and the ski and board schools. The majority of the ski area is on United States Forest Service (USFS) land; SKMR is the lessee and obligated by the lease to defend and indemnify the USFS no matter who gets sued.
- Snow King Lodge, which has 450 rooms, three restaurants and many shops.
- Snow King Development Company, which manages the construction of condominiums, chalets, and time-share properties.
- Snow King Realty and Property Management, which owns and sells the properties and owns and manages rentals. The latter include the condos as well as the 17 shops and restaurants which are in Snow King Village Mall.

You asked that I clearly explain all fees that we're considering charging. The first option is a trail fee. It's still an open question, which I haven't decided, and could go either way depending upon its impact on insurance costs. Charging for access would be a change from our present approach. In winter, of course, access to the ski mountain requires that one buy a lift ticket. However, in summer the mountain is open, hikers regularly use the mountain, both accessing it from the aerial tram to hike downhill or just walking up from the Village. There are resident moose, deer, hawks, and 2 pairs of golden eagles. Wildlife viewing has always been popular. As a matter of fact, after the lifts are closed in April, we have always allowed skiers to hike up and enjoy the spring snow. Basically, when the lifts aren't operating, we neither control nor charge for access.

Similarly, mountain bikers could either access the mountain and trails, as they are currently doing on their own by riding up, or by using the tram to get to the top and riding down.

All visitors pay to ride the aerial tram (which is open all year except for April and May). For most summer visitors, the one-ride $10 charge works well, but for mountain bikers we may need to create a multiple-ride or all-day charge, like a winter ski lift ticket. We may add a bike-tram charge, but my initial review of Sally's and Kyle's memos suggests that we will let the mountain bikers bring their bikes for free. We will eventually add bike sales, rental, and service, but I doubt that we've the time and capital to bring it on-line the first year.

Then there are the charges paid by all our guests and visitors. When we finished the Village and Mall, we imposed a parking fee to park within the Village. Charges are by the hour, day, or multiple-day package, and these are reduced in the summer. There's still free parking outside the Village, which is convenient to the Mall, but much less so for the Mountain and Lodge. Outside parking is heavily used, especially in winter when the Village parking lot fills by 10 am.

As I told you, the mountain biking program is still flexible. The Marketing Department thinks it's a win-win situation even if we don't charge for the trails or rent bikes. The bottom line is the insurance cost. We can design the program any way that will get us affordable insurance.

SNOW KING SKI MOUNTAIN

TO: Manuel Lopez
FROM: Sally Johnson, Mountain Operations Director
DATE: February 17, 2004
RE: *Snow King Mountain Biking Sales and Trail Fees*

This will sum up what I've reported at the staff meetings. We can easily have a mountain biking program for the summer. Most of the mountain's ski trails are too steep for ascent and descent, except perhaps for extreme games fanatics. However, the mountain is crisscrossed by snow-groomer access roads and beginner ski trails that would make excellent natural terrain for mountain biking.

You may recall that the idea for mountain bike trails came from discussions I had last summer with the mountain bikers who are already using the mountain for riding. They've given me good information on the best rides, trail links that could be added, trouble spots (usually encounters with hikers at high speed or blind spots). They also have ideas on where we could build some single-track trails, about 30" wide, which are very popular for mountain biking and would link up existing trails. Most of the trail building could be done by our own work crews, and would help provide them more off-season work. I'd budget an additional $35,000 of capital expenditures the first year for trail building, trail maps, and signage, and about $5,000 a year thereafter for maintenance. That would give us the minimum program: no trail fees, equipment sales or rentals, or tram ticket sales, but also very low cost, and assuming that we don't patrol the trails, almost no additional personnel costs.

A mountain bike trail fee would require a minimum of 4 access kiosks, costing around $144,000 in construction, and $172,000 annually to operate, assuming a 7-day, 12-hour operation from June through September. This includes one bike-patroller to prevent access to nonpaying cyclists and for safety. You may recall that we previously rejected the idea of insisting for waivers/hold-harmless to access to the trails because of the expense of access kiosks necessary to enforce such a requirement.

We can also sell mountain bike tram tickets for those who want to take the tram up and ride downhill. This would not add to the tram sales and operations personnel costs. I'd suggest we sell cyclists the same tram $10 one-time tram ticket we sell any other visitor

and add a $25 all-day tram ticket. Bikes would not be allowed inside the tram. The tram engineers can add exterior "hooks" over the ski carriages to carry the bikes, costing about $17,500.

The SKMR ski rental shops can be converted to summertime bike sales and rentals. This would be the largest inventory and personnel expense. We'd have to commit to start a bike shop operation, and hire a manager who could provide a more precise budget and income projections. My ballpark estimate is in the quarter-million dollar range to start.

I checked with the two other shops in the Village Mall that sell outdoor clothing and rent skis and snowboards, Summitt Designs and Ryan's Extreme Sports, and both said that, for summer, they definitely would add bike accessories (clothes, helmets, tubes, some parts), and with enough lead-time perhaps even bike sales, rentals, and repairs. Both strongly endorsed the bike trails idea, and seem eager to add bike sales and rentals to their business lines. Summitt Designs, noting the developing mountain biking business, had already printed up a trail map and distributed it for free last summer. So even without opening our bike shop, we will have bike services for our customers and help our lessees with the struggling off-season.

The Mountain Operations Department needs 2 months notice to design trails and plan construction, about the same for the bike-tram carriage, and 6 to 9 months for the bike shop.

SNOW KING MOUNTAIN RESORT
"THE PLACE TO COME HOME TO"

MEMORANDUM

TO: Manny Lopez
FROM: Kyle Mills, Marketing Director
DATE: February 18, 2004
RE: **Mountain Biking at Snow King Mountain Resort**

Manny, it's great that SKMR will be offering mountain biking to our guests. Marketing-wise I don't see any down-side.

Up-front, mountain biking fits the target demographics of our year-round development plan. Industry research has confirmed the Marketing Department's assumptions. Mountain bike enthusiasts aren't as young as the snowboard crowd. The majority are in the target 25-34 age group, and 35-44 is the second largest grouping. Average incomes and shopping expenditures are second only to golf and tennis guests (average annual income: $58,500). Education: 16.5 years. For casual riders, bike and accessories expenditures average $500. Self-described "serious" riders spend $1,000 to $2,000.

More importantly, mountain biking long-term growth projections are excellent, exceeding all other seasonal participation sports and are almost as strong as snowboarding.

Image-wise mountain biking is again on-target. It will make great visuals for promotions and appeal to the 20-somethings attracted to the image of extreme sports. This year the producers of the Summer Extreme Games will visit SKMR, and, with mountain biking and perhaps paragliding, we could make a viable pitch to be on their venue schedule. The Extreme Games could be our biggest seasonal attraction!

Mountain bikers' spending patterns could be their biggest up-side impact. As you know, our previous research has determined that the average daily expenditure by a summer Lodge guest is $122, and for a nonguest, $37. Income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Our research indicates that expenditures by mountain bike riders should be 20% above our previous projections. Also, I expect that a much higher

proportion of mountain bikers will come from the local and regional markets and pump up the day-use average, probably above $40. (I'll poll it this summer.)

So, even if we don't sell bikes, tram tickets, or trail passes, from an overall economic standpoint, SKMR would have substantial returns by attracting mountain bikers.

Checking the numbers confirms my previous suggestion that we should offer mountain biking to enhance our guests' unique Snow King Mountain experience, and should not charge for trail access. Unlike ski and board operations, trail access fees are not necessary for profitable operations. We can capitalize on free trails in marketing SKMR as a mountain bike park. Obviously, we'll have to charge for access to the aerial tram, just as we do for all other day-guests, but I'd recommend that we add no additional charge for carrying the bikes on the tram.

Our Lodge guest privileges presently include tram fees and parking fees; thus, Lodge guests could mountain bike without feeling that they're paying for trails, parking, or the tram--a great sales talking-point! Free trails may even help counter the "pay-to-play" rap that Marketing is burdened with because of the annual escalation of lift tickets, which next winter will break the $50/day ceiling.

Below are net income projections based on three levels of our marketing effort. The minimum level would probably be appropriate for the first year operations.

		Projected Revenue
Minimum:	Include mountain biking as part of current marketing. No additional expenditures.	$211,680
Modest:	Print advertising, especially regional and specialty publications.	$332,000
Aggressive:	Establish promotional events, races, packaged tours, national specialty publications.	$467,000

These projections don't include additional benefits which are more speculative, but are

nevertheless tangible. When we brought on board the golf, tennis, and ranch operations, real estate sales jumped; mall partners reported similar increases in sales.

Manny, let me know if you'd like anything more from Marketing.

Let's get going!

National Life and Casualty Insurance Company
One City Center Plaza
Suite 1400
Saint Francis, Columbia 99900
(111) 561-8200
www.nationallifecasualty.com

February 21, 2004

Mr. Manuel Lopez
President and Chief Executive Officer
Snow King Mountain Resort
Snow King Village, Columbia 99014

Reference: Snow King--Policy No. 2877408569867

Dear Manuel:

Thanks for giving us the opportunity to bid on insurance coverage for the new mountain biking operations. Mountain biking at Snow King, with its unique natural beauty and congenial atmosphere, could be a huge success. My partner and I love mountain biking, and are out riding almost every weekend. I'm going to talk to Jen about coming up for Memorial Day.

After our conversation, I sent a memorandum to our Rating Department in Colorado and just received a call from them. It's not good news. Rating thinks that mountain biking requires the highest risk rating. Of course, I can't give you an exact premium quote until we get some usage numbers, but for budgeting purposes I fear that you can assume that it will be in the same ballpark as the skiing operations.

I'd suggest that you consider having your lawyer review Rating's conclusions, and, if they think that Rating is incorrect, that they address a letter to me, which I'll pass along to Rating, stating Snow King's position.

For your lawyer's information, here's what our Rating Department states:

First, they acknowledged that Columbia has a recreational use statute, Columbia Civil Code Section 846, which could significantly reduce the risk of liability, and thus the risk rating. However, mountain biking is not one of the enumerated recreational activities, and they believe that the statute will likely apply only to the specifically named recreational activity. Gerkin v. Saint Clara Valley Water District, Columbia Court of Appeal, 1982.

Second, our Rating Department doesn't think that the statute's immunity applies to commercial operations, citing Danaher v. Partridge Creek Country Club, Supreme Court of Michigan, 1981, and Pratt v. State of Louisiana, Court of Appeal of Louisiana, Third Circuit, 1981.

The other alternative would be to set up the operation so that fee collections are sufficient to cover the cost of insurance. This, after all, is the fact of life that we live with in the ski industry, and unfortunately inflicts expensive lift tickets on the public.

We value our relationship as the insurer for Snow King, and will do all we can to provide coverage as you continue to grow the business. Please let me know how you decide to proceed.

Best wishes.

Sincerely,

Tamara Scott

Tamara Scott
Registered Agent

TUESDAY AFTERNOON
FEBRUARY 24, 2004

California
Bar
Examination

Performance Test A
LIBRARY

IN RE SNOW KING MOUNTAIN RESORT

LIBRARY

§ 846. Permission to Enter for Recreational Purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purposes, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

SCHNEIDER v. MOUNT DESERT ISLAND LAND TRUST
Supreme Court of Columbia, 1997

The State of Columbia is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others.

In this case we address questions about the scope of Civil Code Section 846, which immunizes landowners from liability for injuries sustained by recreational users of their property. We conclude, under settled principles of statutory construction, that the Legislature defined "recreational purpose" so broadly as to apply to plaintiff's conduct here.

While driving along the coast, plaintiff stopped at Thunder Hole, a spectacular spot within Mount Desert Island Preserve. The Preserve is owned by the Mount Desert Island Land Trust, a private foundation, and is open to the public. Plaintiff parked her car at one of the lots maintained by the Preserve, and she followed the steps down to Sand Beach. She tripped, allegedly because of a defect in the steps, and brought this suit against the Preserve for her resulting injury.

Before entering the Preserve plaintiff had stopped for a cup of coffee and, rather than drink it there (wherever that was) or in the car, she saw a sign ("Sand Beach") and decided to go there to drink it. The Preserve, pleading the statute, sought and obtained summary judgment. Plaintiff appeals. We affirm.

On appeal, plaintiff makes two contentions. First, plaintiff contends that coffee drinking is not within the statutory list, and, second, that she intended none of the named activities. The short answer to the first is that the list does not purport to be complete, but is only illustrative. Any number of clearly recreational activities suggest themselves, from birdwatching to sunbathing, to playing ball on the beach. Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named.

Section 846 establishes limited liability on the part of a landowner for injuries sustained by another from recreational use of the land. The statute provides an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming

upon the land. Under Section 846, an owner of any estate or other interest in real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration. The landowner's duty to the nonpaying recreational user is, in essence, that owed a trespasser under the common law as it existed prior to Rowland v. Christian, Col. Sup. Ct., 1968; i.e., absent willful or malicious misconduct, the landowner is immune from liability for ordinary negligence.

Thus, the Legislature has established only two elements as a precondition to immunity: (1) the defendant must be the owner of an "estate or any other interest in real property, whether possessory or nonpossessory"; and (2) the plaintiff's injury must result from the "entry or use [of the 'premises'] for any recreational purpose."

Turning first to the "recreational" element of Section 846, we have little difficulty in upholding the trial court's implicit finding that plaintiff entered or used defendant's property for a recreational purpose within the meaning of the statute.

Plaintiff contends that the list of activities set forth in Section 846 is exhaustive. The plain language of the statute does not support such a claim. The statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. To be sure, the principle of *ejusdem generis* provides that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.]" The examples included in Section 846, however, do not appear to share any unifying trait which would serve to restrict the meaning of the phrase "recreational purpose." They range from risky activities enjoyed by the hardy few (e.g., spelunking, sport parachuting, hang gliding) to more sedentary pursuits amenable to almost anyone (e.g., rock collecting, sightseeing, picnicking). Some require a large tract of open space (e.g., hunting) while others can be performed in a more limited setting (e.g., recreational gardening, viewing historical, archaeological, scenic, natural and scientific sites). Moreover, the statute draws no distinction between natural and artificial conditions; it specifically mentions "structures," and it obviously encompasses improved streets. Thus,

it is not limited to activities which take place outdoors, and does not exclude recreational activities involving artificial structures.

Accordingly, because the list of examples provided by the Legislature does not effectively limit the meaning of "recreational purpose," we conclude that entering and using defendant's property whether to sightsee, drink coffee, or just relax invoked the immunity provisions of Section 846. Therefore, for our purposes here, walking down the beach steps is no different in kind from scaling a cliff or climbing a tree. Each is clearly recreational in nature.

Second, plaintiff contends that she raised a triable issue as to whether she entered the property for recreation. She claims that it could be found that she was not engaged in any recreational activity at all; that the weather was "cool, drizzly, overcast," and she was going "not to swim, sightsee or have a picnic lunch," and that only to drink coffee under such circumstances could be found not recreational. Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the "totality of the facts and circumstances, including . . . the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose." (Gerkin v. Saint Clara Valley Water Dist., Col. Ct App., 1982)

The consequences of plaintiff's approach would be absurd. The manifest purpose of the Preserve is recreational. Whether plaintiff entered the property to drink coffee or hike is immaterial. In either case, her presence was occasioned by the recreational use of the property, and her injury was the product thereof.

The judgment of trial court, accordingly, is affirmed.

JOHNSON v. UNOCOL CORPORATION,

Columbia Court of Appeal, 1998

Under Civil Code Section 846, landowners who permit others to use their property for recreational purposes are immune from liability for injuries suffered by such recreational use of their land. Defendant owns land which it allows the public to use without charge for recreational purposes. Groups or persons using the land must sign a form which, among other things, obligates the user of the land to hold the company harmless from damages for injuries arising out of the use of the land. We hold that under Section 846 the company enjoys immunity from liability for recreational use of its land, and that the hold harmless clause does not constitute consideration which would except the company from the immunity provisions of Section 846.

In this case, plaintiff's employer, Ubex Corporation (Ubex), executed an agreement with Unocol which, *inter alia*, contains a hold harmless clause. Ubex asked Unocol for permission to use Unocol's popular Orcutt Hill Picnic Grounds for its annual company picnic. Unocol agreed to allow Ubex to use its grounds and reserved a specific date for the picnic. Unocol did not charge Ubex for the use of its grounds. Ubex employees knew they could attend simply by purchasing a ticket from the "Aurora Club" to which all Ubex employees automatically belonged. The Aurora Club provided all the food, drink and games at the picnic. Johnson purchased a ticket and attended the picnic. He suffered injuries on the picnic grounds during a game of horseshoes when he leaned against a railing which collapsed and caused him to fall. Johnson sued Unocol for his injuries.

Plaintiff urges us to engraft onto the provisions of Section 846 an extremely broad view of the phrase "good consideration" found in Civil Code Section 1605. Section 1605 states:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Plaintiff argues that under Section 1605, the hold harmless paragraph constitutes consideration within the meaning of Section 846.

The hold harmless agreement here requires users to indemnify Unocol from costs and expenses it might incur in defense of claims. Plaintiff therefore argues that because attorney fees are costs of suit under Code of Civil Procedure Section 1033.5, which are not available in the absence of statute or contract, the agreement constitutes consideration. Plaintiff suggests that it is possible a trial court might award attorney fees in a lawsuit because of the agreement with its hold harmless clause. Perhaps, but it is not helpful here to speculate what a court might do if Ubex had filed an action against Unocol.

The purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. Courts should therefore construe the exceptions for consideration narrowly.

Such a remote, potential "benefit" to Unocol does not constitute consideration to plaintiff. Plaintiff urges that we so broaden the definition of consideration contained in Section 1605 so as to defeat the purpose of Section 846. However, the meaning of a concept for one purpose may be entirely different for another legislative purpose. Section 846 may preclude immunity "where permission to enter . . . was granted for a consideration . . . paid to . . . landowner . . . or where consideration has been received from others . . . ." The mere potential for reimbursement for defense costs incurred if a suit were filed is neither current payment for entry nor a benefit currently received for entry. Although the disjunctive language in Section 846, "where consideration has been received from others," suggests that consideration is not limited solely to direct payment of entrance fees, we hold that at minimum, consideration received must consist of a present, actual benefit bestowed or a detriment suffered.

Although in some cases the amount of consideration may be slight, Thompson v. United States, U.S. Dist. Ct., Col., 1979, it must be more substantial than what occurred here. A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under Section 846 comes into play.

Because the hold harmless clause in the agreement did not constitute consideration, the exception to immunity in Section 846 does not apply here. We therefore affirm the summary judgment granted Unocol.

JONES v. UNITED STATES

United States Court of Appeals, Fifteenth Circuit, 1982

Lisa Jones appeals from a judgment in favor of the United States in this suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b). We affirm.

I. Factual Background

Lisa, then 15 years of age, was severely injured in an accident on April 16, 1977, on a slope at Hurricane Ridge in Olympia National Park in the State of Columbia. She was on an outing sponsored by her church, the Bainbridge Bible Chapel, under the supervision of Joseph B. Barlow. Lisa and her friend, Beverly, each rented an inner tube from National Park Concessions, Inc. [NPC], for one dollar to use for snow sliding. They tubed with others in a "Snow Play Area", designated by a directional sign at the Park lodge. Beverly went down the slope first, mounted on her inner tube stomach down, and rolled off the tube at a level area near the bottom of the slope. Lisa, seated on her tube, was unable to stop, crossed the level area at a high rate of speed, and crashed into a tree, fracturing her spine, shoulder and several ribs.

The District Court granted the government's motion for partial summary judgment, holding the government's liability was controlled and limited by the Columbia Recreational Land Use Act, Col. Civil Code, Section 846, which requires proof that the government's conduct was willful and wanton. The trial judge found that the plaintiff had failed to establish willful and wanton conduct on the part of the government as required by the Columbia Recreational Land Use Act and entered judgment for the government.

II. Was the government a "Recreational Landowner"?

The issue on this appeal is whether the liability of the United States is controlled by the Columbia Recreational Land User Statute. Under the Federal Tort Claims Act the government is liable for negligent acts and omissions of its employees, "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Since the accident occurred on government land in Columbia, Columbia tort law is applicable.

This court has held that the principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners. Plaintiff contends that the statute applies only to "a landowner who gives up his right to keep out members of the public." She argues that the requisite element of "consent to public use" is not present, noting that Olympia National Park was "reserved and withdrawn from settlement, occupancy, or disposal and dedicated and set apart as a public park for the benefit and enjoyment of the people." Plaintiff argues that while the purpose of the statute is to "encourage" owners to "allow" someone to use their land, that purpose is not met when, as here, the public has a right and expectation to use the land that pre-exists the passage of the Act and the government has no right to bar entry.

Plaintiff's argument that the government should not be treated as a private party under the Columbia recreational user statute because it is somehow obligated to keep the national parks open to the public is unpersuasive. If liability were imposed upon the government in cases such as this one, the Park Service might well choose to close areas of Parks to public use or limit the scope, place, or manner of activities. For example, would a National Park superintendent allow snowtubing after a contrary ruling? This result is precisely what the Columbia statute was enacted to prevent. Thus, we hold that the government is entitled to the protection of the Columbia Recreational Land Use Statute and is therefore only liable "[f]or willful or malicious failure to guard or warn against a known dangerous condition."

III. Did Lisa Pay a "Fee" for the Use of the Land?

Plaintiff contends that the government received a "fee" for Lisa's use of the Park facilities. She paid the concessionaire, NPC, a dollar to rent an inner tube. NPC pays the government a fixed rental for its facilities (a sales and rental shop) and a percentage of its gross receipts. The District Court concluded that the fee was charged for the use of the inner tube and was not a fee charged for the use of the land. We agree.

The case upon which plaintiff relies, Thompson v. United States, U.S. Dist. Ct., Col., 1979, is distinguishable. There the plaintiff was a participant in a motorcycle race held on federal land in Columbia. The Bureau of Land Management [BLM] had charged the race promoter a $10.00 application service fee and a minimum rental charge of $10.00. The Court concluded that any charge for access was sufficient to preclude application of Columbia

Recreational Land Use Act:

> "If a rental charge is made for the use of the land, it is clear that permission to enter the government land would be 'granted for a consideration', and therefore Columbia Civil Code Section 846 would not apply so as to limit the liability of the landowner."

The Thompson court did not rule that payment for other than access by a land user was sufficient to invoke the exception, as indicated by its statement that:

> "The United States claims that these payments were trivial, inconsequential, and were not rental payments by the plaintiff; that the payments were merely for race permit and that entry to BLM land is free. Although this may turn out to be correct, on review of a motion for summary judgment, we cannot characterize the purpose of the payment."

Here, however, the fee was not charged to members of the public for entry onto the land or for use of the land. Lisa paid the dollar fee to rent the tube. She entered the Park without paying a fee. She could have used the Hurricane Ridge or any other area of the Park without making any payment if she had brought her own tube. No fee was charged which would deny the United States its immunity under the Columbia statute.

More on point, we believe, is the 1975 Columbia Court of Appeal case of Moore v. City of Torrance. There the plaintiff was injured while riding his bike in a city-owned unsupervised "motocross" track. Plaintiff argued that he had paid consideration for the use of the park by virtue of the fact that his parents pay taxes to support the municipal facilities. The Colombia court rejected the argument, stating:

> "We are certain that this is not the type of consideration that the Legislature had in mind when it included consideration as a factor in Section 846. Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended."

Lastly, we agree with the District Court that, "While it was negligence on the United States's part not to put up signs or ropes, its failure to do so does not rise to the status of willful and wanton conduct under the laws of Columbia." AFFIRMED.

GERKIN v. SAINT CLARA VALLEY WATER DISTRICT

Columbia Court of Appeal, First District, 1982

Jo Ann Gerkin through her guardian ad litem appeals from a summary judgment in her action against Saint Clara Valley Water District [“Water District”] and other defendants for personal injuries. Gerkin suffered personal injuries when she fell from a bridge located at Little Llagas Creek in the City of Morgan Creek. According to the complaint, Gerkin was injured because the Water District negligently permitted the bridge to remain in a dangerous condition.

In support of the motion for summary judgment, the Water District presented excerpts from the depositions of Gerkin and her younger sister showing that Gerkin was either walking or walking with her bicycle across the two planks which constituted the bridge when she slipped and fell into a dry creek below. In opposition to the motion, Gerkin submitted the declarations of herself, her mother and her sister averring that (1) on the date in question there was no telephone at the apartment where Gerkin was living, (2) Gerkin's mother gave Gerkin and her sister permission to cross the area in order to use the telephone at a market and to buy a candy bar there, (3) Gerkin's purpose in making the trip was to make a phone call and buy a candy bar, and (4) Gerkin walked across the bridge with her bicycle both to and from the store. The trial court granted the motion for summary judgment on the ground that Gerkin "was engaged in conduct specified by Civil Code Section 846.”

Section 846 provides that, in the absence of willful or malicious failure to guard or warn of a dangerous condition, an owner of “any estate in real property" owes no duty of care to keep the premises safe for entry by trespassers or licensees who engage in certain specified recreational activities. Included among these specified activities are "hiking", but not bicycle-riding. On summary judgment, Gerkin’s claim that she was walking over the bridge when the accident occurred must be accepted.

However, relying on dictionary definitions of "to hike" as "to walk or tramp" and "to go for a long walk," the Water District argues that Gerkin's activity was encompassed within the statute and that summary judgment was therefore proper. It is contended that any test which hinges upon the user's subjective "recreational" intent would read into Section 846 a requirement not stated by the Legislature and lead to "diverse, arbitrary and unjust results."

Section 846 must be construed in light of the legislative purpose behind it. It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the lawmakers. The purpose of Section 846 was to encourage landowners to keep their property open to the public for recreational activities by limiting their liability for injuries sustained in the course of those activities. The Water District is therefore incorrect when it contends that to walk across their property necessarily constitutes "hiking" within the meaning of the statute. Both the language and the historical background of Section 846 compel the conclusion that the Legislature did not intend to immunize landowners from liability for all permissive or nonpermissive use of their properties, but only those uses which could justifiably be characterized as "recreational" in nature.

The Water District's contention that "walking" falls within the scope of "hiking" under Section 846 is contrary to principles of statutory construction: First, a construction which implies that words used by the Legislature were superfluous is to be avoided wherever possible. If "hiking" were to be read as including the act of "walking," it would have been unnecessary for the Legislature thereafter to enumerate other types of activities which necessarily involve walking such as camping, rock collecting and hunting. Obviously, "hiking" was intended to denote more than just traveling on foot.

Second, a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation. This principle is vividly illustrated by that portion of Section 846 which, at the time of the events in question, extended a landowner's immunity to "all types of vehicular riding." Read literally, the statute would preclude anyone traveling in a car from suing the owner for injuries caused by a dangerous condition on his property. It is apparent from the purpose of the enactment, however, that the Legislature was intending to reach only recreational vehicular activity such as motorcycling for pleasure or dune buggying. Likewise, to equate the word "hiking" with mere "walking" or traveling on foot apart from any recreational context would be to ignore the legislative purpose of Section 846 and, in effect, broaden the statute in a manner not contemplated by the lawmakers.

And finally, this court has in past cases applied the rule that statutes in derogation of the common law must be strictly construed. This maxim of construction provides that where there exists a common law doctrine relevant to the issue presented by the parties and the statute which would change the common law, the legislative intent to change the common

law must be clearly expressed. In changing the common law rules applicable to the tort liability of the landowner to the entrant, the legislature has, in Section 846, made a new accommodation of the conflicting rights and interests of landowner and entrant. In Section 846, the legislature has shifted some of the risk from the landowner to the entrant, apparently having decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury. Section 846 is a statute in derogation of the common law, and should be narrowly interpreted.

We conclude that for an activity to fall within the term "hiking" as it is used in Section 846, it must be proved not merely that the user was "walking" across the property, but that the activity constituted recreational "hiking" within the commonly understood meaning of that word, i.e., to take a long walk for pleasure or exercise.

We agree with the Water District that the test should not be based on the plaintiff's state of mind. We believe, however, that such a determination must be made through a consideration of the totality of facts and circumstances, including the path taken, the length and purpose of the journey, the topography of the property in question, and the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.

There is no showing that Gerkin was "hiking" within the commonly understood recreational sense of the word. On the contrary, Gerkin and her sister crossed the Water District's property because it was the shortest route between their apartment and the supermarket and was a method regularly used by residents in the area. A triable issue of fact was raised as to whether Gerkin was engaged in "hiking" on the subject property such as to permit the Water District to invoke the immunity of landowners set forth in Section 846. It was error to grant summary judgment.

Reversed.

DANAHER v. PARTRIDGE CREEK COUNTRY CLUB,
Supreme Court of Michigan, 1981

Plaintiff Joseph O. Danaher went to the Partridge Creek Country Club to play golf with his son. Upon arrival he decided to walk over to a pond located on the golf course premises. He entered the golf course premises through an open delivery gate and went across a large field to get to the pond. When he arrived at the pond he tossed bread crumbs into the water to feed the fish and in general was viewing the pond to see if it offered any fishing potential. While engaged in this activity he was struck by a golf ball which originated from the fifth tee. The pond was not visible to golfers using the fifth tee. As a result of the accident, Danaher lost his right eye. The jury returned a verdict for Danaher and against the country club for $1,000,000.

Defendant sought an instruction based upon the Michigan Recreational Use Statute ("MRUS") which limits liability to one who is on the lands of another without paying to such other person a valuable consideration for certain purposes (such as, fishing, hunting, trapping, camping, hiking, sightseeing, and motorcycling) unless there is a showing of gross negligence or wilful and wanton misconduct. The trial court declined this request and instead instructed on ordinary negligence, ruling that MRUS was not intended to apply to private lands which are used for outdoor recreational uses, but which also constitute commercial enterprises.

In declining defendant's request, the trial court did not discuss the "valuable consideration" exception to the limitation of liability. The courts of appeals have held that it did apply where the consideration was in the form of an "entrance fee." Whether the "entrance fee" for entering the type of lands upon which the kinds of recreational activities described in the statute are carried out is the equivalent of the charge made to play golf need not be determined.

Our review of previous Michigan cases clearly shows that MRUS has been applied consistently to vacant but privately owned land. It has not been applied to circumstances such as those in the present case, where the land is held out for a recreational use to those who pay a fee. It is clear that the character of the land is important and in the present case, the trial court was correct in applying a standard or burden of proof that treated the plaintiff as a business invitee. Although plaintiff had not purchased the right to

play golf that day, he was a golfer who was viewing the premises prior to a decision to actually play golf.

An invitee is one who is on the owner's premises for a purpose mutually beneficial to both parties. The duty which an occupier of land owes an invitee is to exercise ordinary care and prudence to render the premises reasonably safe. A licensee is one who desires to be on the premises of another because of some personal unshared benefit and is merely tolerated on the premises by the owner.

A person who enters the land of another upon business which concerns the possessor of land and upon his invitation expressed or implied is considered an invitee. In some cases permission to enter upon the land was for a consideration. As to such a person the landowner owes a duty of ordinary care. There is a conflict of opinion on the exact definition of an invitee and the basis of the owner's liability. Two theories have developed, i.e., the "economic benefit" theory which embraces a business visitor and the "invitation theory." The economic benefit test imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The invitation theory imposes a duty based upon a holding out of the premises as suitable for the purpose for which the visitor entered. The Restatement of Torts 2d, Sections 332 and 343, adopts the economic-benefit theory and finds an invitee relationship and a duty to keep the premises safe if the landowner receives any economic benefit from the presence of the visitor or expects to derive any such benefit. Potential pecuniary profit to the possessor of the land is sufficient.

In other cases, we have adopted the invitational theory and find a basis for the liability to the invitee in a representation implied from the encouragement the landowner gives to others to enter to further one of his purposes. To this court, the terms "business invitee," "business visitor," and "invitee" are synonyms, and we have held that when a person enters upon the premises of another and there is a benefit to the other person by the entry or some mutuality of interest, the visitor is an invitee. We recognize a growing tendency of courts to enlarge the duty of landowners in respect to negligence and to minimize the distinction between licensees and invitees either by enlarging what constitutes an economic benefit or by adopting the broader test of the invitation theory.

The Michigan Recreational Use Statute must be considered as a special reversal or

exception to this tendency based upon a special public policy for a limited classification of users. The statute indicates that the landowner owes the ordinary duty of reasonable care to those entering upon his land for certain recreational purposes only if the permission to enter the land is granted for a valuable consideration. Therefore the statute is in derogation of the common law and requires a strict construction. In construing what is meant by "valuable consideration", it is appropriate to look to the legislative history of the section. When the section was enacted, the term "valuable consideration" could have been narrowly or broadly construed. If narrowly construed, only a monetary fee paid to the landowner would have constituted valuable consideration. If broadly construed, the term would have included non-monetary benefits and indirect economic benefits flowing to the owner from the recreational use of his land.

We think a reasonable interpretation of the term "valuable consideration" as used in the statute in light of its history and by its express language means such consideration which at common law could constitute the person entering upon the land as an invitee. Also, this section is in derogation of the common law and we must strictly construe it, which requires a broad construction of the term "valuable consideration." This consideration may be the conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant.

On the instant facts, we think the benefit the defendant expected to receive from increased sales from golfers and other prospective customers was sufficient "valuable consideration" for the general implied permission to the public to use the facilities.

Affirmed.

PRATT v. STATE OF LOUISIANA,
Court of Appeal of Louisiana, Third Circuit, 1981

This is a wrongful death and survival action growing out of the drowning of Mark S. Pratt and Darrell Ray Burgess at Indian Creek Reservoir and Recreation area. The trial court granted motions for summary judgment based on a state statute purporting to exempt or grant immunity from liability to owners of land used for recreational facilities. The statute does not apply to "an owner of commercial recreational developments or facilities." One of the principal issues is whether the recreational area at which the drowning occurred was a commercial development or facility. The trial court held it was not so, and thus that the defendants were exempt from liability from negligence.

The Indian Creek Reservoir and Recreational Area contains an artificial lake with adjacent recreational areas. The lake and facilities are located on land owned by the State through the Department of Natural Resources, Office of Forestry. That agency operates and maintains the facility under a contract entered into by the two public bodies.

The State contends that it is exempted from liability by the Louisiana Recreational User Statute, which reads in pertinent part:

> "Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby: 1) Extend any assurance that the premises are safe for any purposes; 2) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed; 3) Incur liability for any injury to person or property incurred by such person."

The State contends that the phrase "commercial recreational developments or facilities" should be read to equate a commercial recreational enterprise with an establishment run for profit. The State argues that the Indian Creek area is not run for profit and therefore is not to be considered a commercial recreational enterprise with an establishment run for profit.

In view of these conclusions, what factors render a recreational facility a commercial one?

The trial court worked the matter out on the basis of whether the enterprise contemplates the earning of a profit. In McCain v. Hackberry Recreation District, United States District Court, W.D. Louisiana, 1983, the federal district court, applying the Louisiana statute, reached a similar conclusion: "As to whether or not the pool is a commercial recreational development, this court is convinced that the pool does not meet the standards necessary to be so classified. As the Act indicates, the mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. The test of a facility's "commercial" nature is based on whether the facility was run primarily for profit. In this case, the District did not run the pool with the intention of generating a profit. In fact, an admission fee of only 25 cents to 50 cents was charged for use of the pool. The court is satisfied that these nominal charges do not indicate a managerial philosophy oriented toward profit maximization."

We too are convinced that in the context of the facts of the case before us, profit as a primary objective of the venture would be essential to render it commercial.

Plaintiffs place heavy reliance on the fact that fees are charged for use of the recreational facilities. Regarding this point some reasonable effect must be given to the use in the statute of the words "with or without charge." The critical words are: "an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes . . . does not thereby . . . (3) Incur liability for any injury to person or property incurred by such person." Clearly the use of the words "with or without charge" must be construed to mean that charging fees for use of recreational facilities does not in itself render the operation and maintenance of such facilities a commercial venture. Logically there would have been no reason to include these words in the statute unless it was for the purpose of providing that charging fees would not render an operation commercial. The provision becomes significant only when a fee is charged.

Thus we conclude that the Indian Creek Reservoir and Recreational Area is not a commercial enterprise. Under the circumstances it was the purpose and policy of the Legislature to provide non-liability of defendants for the acts of negligence alleged in plaintiffs' petition.

Answer 1 to PT - A

1)

1.

To: Tamara Scott
National Life and Casualty Insurance Company

Dear Ms. Scott:

We understand the concern you may have with regard to the high risk of a mountain biking path, given the potential for accidents. Given the research and the survey of relevant case law, we believe that the recreational use statute will apply to SKMR. We will address each of your concerns and explain how the the [sic] biking program will be operated.

Your first concern is that Columbia Civil Code Section 846, the recreational use statute, does not apply to mountain biking. Section 846 provides a landowner an exception from the general rule that a private landowner owes a duty of reasonable care to any person coming upon the land. Under Section 846, an owner owes no duty of care to keep the premises safe for entry or use by others for recreational purpose or to give recreational users warning of hazards unless there is willful or malicious conduct or there was consideration for the use of the land.

The Supreme Court of Columbia has stated with regard to Section 846 that "the list does not purport to be complete, but is only illustrative... Neither as a matter of grammatical construction, nor common sense, is the statute to be read as applying only to the recreational activities expressly named." Schneider v. Mount Desert. The Schneider cou[r]t found that the statutory definition of "recreational purpose" begins with the word "includes," ordinarily a term of enlargement rather than limitation. Thus, the statute encompasses all recreational activities. In Schneider, the plaintiff was on the premises to drink a cup of coffee, but the Supreme Court found that the manifest purpose of the preserve is recreational and whether the plaintiff entered to drink coffee or hike is immaterial.

The Schneider statutory construction may be inconsistent with the findings of the Columbia Court of Appeal which in 1982 found that Section 846 should be narrowly interpreted. Gerkin v. Saint Clara. However, the Gerkin court distinguished between walking across the property for some separate purpose from taking a long walk for pleasure or exercise. The latter would be considered recreational. The Gerkin plaintiff prevailed because she was walking across the defendant's land to get to a store and not for leisure or enjoyment. Thus, even when the statute is narrowly constructed, mountain biking would nonetheless be considered a recreational activity since there is little utilitarian purpose in taking a bike up to the mountain to ride it back down. Furthermore, Schneider is a

Columbia supreme court case decided 16 years after Gerkin, thus Schneider's holdings will be binding on any subsequent action.

Furthermore, the exceptions to Section 846, which takes away the owner's immunity, applies where the landowner gains "some immediate and reasonably direct advantage, usually in the form of an entrance fee." Johnson v. Unocol. In Jones v. U.S., the Fifteenth Circuit addressed the consideration issue under Section 846 and found that consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. Even though the plaintiff in Jones paid a fee to rent the equipment, the use of the land was without charge and the defendant was still entitled to the immunity.

Johnson court found that the purpose of Section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. "Courts should therefore construe the exceptions for consideration narrowly." A remote or potential benefit to the defendant does not constitute a benefit. SKMR may receive a remote benefit by having the mountain bike customers use their property since they will be using the nearby facilities owned or leased by SKMR. But this remote benefit will not be construed a "consideration" which requires "present, actual benefit bestowed or a detriment suffered." Even if other businesses gave a percentage of its gross receipts to SKMR, it would still not be a fee charged for the use of the land. See Jones.

You had mentioned Danaher v. Partridge, a Michigan case. Of course, the holding of a Michigan case is not binding in Columbia. Danaher recognized two tests the court may apply. The first is the economic benefit test which imposes an obligation upon the occupier of land when he receives some actual or potential benefit as a result of the entry. The second, the invitation theory[,] imposes a duty based upon a holding out of the premises as suitable for the purpose of which the visitor entered. Danahar applied the second theory finding liability where the plaintiff has paid no consideration so long as there was some benefit to the occupier. This case is inconsistent with the policies of the Columbia statute as explained in the cases cited above. The purpose of the Columbia statute was to encourage land owners to share with the public and the fact that the owner may receive some minute benefit as a result would have a chilling effect on the landowners. The Columbia courts have applied the economic benefit test and the Columbia supreme court specifically discussed actual benefit. "The landowner's duty to the nonpaying recreational user is, in essence that owed a trespasser under the common law as it existed before 1968." See Schneider. Thus the discussion as to invitee/licensee status of Danaher does not apply here.

Therefore, absent any willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity, SKMR would have no liability for injuries.

Your second concern is the possibility that the immunity does not apply to commercial settings. The cases aforementioned were not "commercial" in nature. They involved a land trust, a private foundation, open to the public, a picnic grounds in Johnson, and a national park. The Columbia Civil Code is silent as to its application in commercial

settings and does not exclude owners of commercial businesses within Section 846.

First, it does not appear that there is any exception to commercial businesses. The legislative intent in creating Section 846 was to encourage owners of land to open their property for use and enjoyment of the public. Here, SKMR has no duty or obligation to allow the general public to use its land without fee for their leisure. The legislation "decided that the social good of encouraging landowners to open their land to the public for recreational purposes outweighs the social cost of imposing the expense of injuries on the entrant to the land rather than on the landowner who may be in a position to prevent the injury." Gerkin. The legislation, if it had intended to exclude commercial businesses, would have done so as Louisiana has in a similar statute. No Columbia court has distinguished between a commercial and private owner. The statute has applied to private and public entities without making any distinction.

Second, even if Columbia were to distinguish commercial settings, SKMR may not be considered commercial in its activities with regard to the bike path. Louisiana has such a statute distinguishing commercial land owners. In Pratt v. Louisiana, the Louisiana Court of Appeals held that a commercial business is one that is run primarily for profit and a mere fact that some admission price is charged will not necessarily render a facility a commercial recreational development. "Profit must be a primary objective of the venture." Id.

Finally, I will outline how the mountain biking program will be operated at SKMR. The mountain is crisscrossed by snow-groomer access roads and beginner ski trials that would make excellent natural terrain for mountain biking. It is possible for SKMR to build single-track trials, which are very popular for mountain biking and would link up existing trails. SKMR currently charges no access fee to the trail. They have always allowed skier[s] to hike up the mountain without fee to enjoy the spring snow. Mountain bikers may access the trails by riding up or using the tram to get to the top and ride down. All visitors pay to ride the aerial tram. Visitors ride the tram to the summit where they can enjoy the view, lunch or dine at the summit restaurant and even hike down. SKMR would consider renting the bikes on the premises and the cyclists may also be able to rent them at the other shops in the village mall. The rentals would depend on whether it would expose SKMR to further liability under Section 846. The addition of the bike trails would allow SKMR to operate full-year, which is essential to retention and development of quality employees. The increase in revenue would allow SKMR to have commuter shuttles for their employees and on-site childcare.

Because the recreational use statute applies to SKMR, we believe the liability here would be minimal. Thank you for your attention to this matter[.]

Sincerely,

Applicant
To: Manuel Lopez

SKMR

Dear Mr. Lopez:

There are several ways that you can make the bike trail a huge success without incurring liabilities or paying exorbitant insurance premiums.

Access Fee

As noted by Kyle Mills, the marketing director, the income from increased parking, food service, and merchandise sales alone will exceed Operations' estimates of trail construction costs. Mr. Mills notes that even if you do not sell bikes, tram tickets or trail passes, SKMR would have substantial returns by attracting mountain bikers. The operations director, Sally Johnson, estimated a mere $35,000 of capital expenditures for the trail building and about $5,000 a year thereafter for maintenance. According to Ms. Johnson, a trail fee would require a construction fee of $144,000 for the kiosks and $172,000 per year to operate.

An access fee should not be charged to the mountain bike customers if you wish to receive the benefit of the recreational use statue. As discussed in the letter to Ms. Scott, if SKMR were to receive a "consideration" for the use of land, you would be exempted from the statute. The access fee would be a direct benefit for the use of the bike path and the little financial benefit you would gain would not be worth the high risk rating. Since according to Mr. Mills, trail access fees are not necessary for profitable operations and since charging such fees would greatly increase the cost of insurance, the access fees should not be charged. This is particularly true given the numbers provided by Ms. Johnson. Given the high insurance premium and potential liability coupled with high fees associated with the kiosks, SKMR would benefit greatly by foregoing the access fee.

Aerial Tram

If SKMR were to charge an extra fee for carrying the mountain bikes on the aerial tram, that may itself be considered a fee for the use of the land. Skiers pay for access to the land by buying lift tickets; the fee is not for the benefit of the lift but the fee gives them access to the land. Likewise, the surcharge to the mountain bikers may be considered an extra charge for the use of the land. Then we would face the same problem of receiving "consideration" for the use of the land. It would be considered a present actual benefit and SKMR may face the high insurance premiums.

Since SKMR charges a fee to everyone who wishes to get to the summit for any reason, the basic charge should not be considered a fee for the use of land. You had considered an all day pass for the bikers for $25.00, which may again be considered a fee for the use of the land, unless it can be established that the fee is a consideration for the tram, which has many other uses other than the use of the slopes. Furthermore, since people are free to walk, or hike up for free, it should not be a consideration to charge for

the tram.

However, given that SKMR receives [a] substantial amount of money by the bikers' spending, summer lodge gues[t] at $122 and nonguest at $37.00, it may be advisable not to charge more than any other person riding the tram, so as to avoid any future argument that the additional tram fee is a consideration for the bike trail.

Sale and rentals of bikes

Rental of the bikes would not take SKMR out of recreational use statute. A rental fee for equipment was not considered "consideration" for the use of the land by the Fifteenth Circuit. So long as the people are allowed equal free access to the trails when they bring their own mountain bikes, the rental fee cannot be a "consideration." No case has decided the issue on the sale of equipment, but so long as the sale of the bikes is separate from the use of the property, it cannot be consideration. Again, the important issue is that everyone be allowed equal free access regardless of where they get their bikes.

Thank you for your attention.

Sincerely,

Applicant

Answer 2 to PT - A

PERFORMANCE TEST

I. Letter to Insurance Carrier

Tamara Scott, Registered Agent
National Life and Casualty Ins. Co.

February 24, 2004

Dear Ms. Scott,

Our client, Mr. Manual [sic] Lopez, has requested we review your Rating Department's rating which found that Mountain Biking requires the highest risk rating. After doing extensive research, it is Snow King[']s position that the rating is incorrect.

As you know, Snow King would like to add Mountain Biking to its list of attractions without incurring skyrocketing insurance rates. Based on the set-up of the Mountain Biking attraction, it is our position that Mountain Biking will fall within Columbia's recreational use statute, which will significantly reduce the risk of liability, and according to your Rating Department, reduce the risk rating.

As you know, Columbia Civil Code Section 846 provides in part:

> "An owner... owes no duty of care to keep premises safe for entry or use by others for any recreational purpose... except this section does not limit liability... where consideration has been received."

We understand that it is the Rating [D]epartment's position that 1) Mountain biking does not fall within one of the specifically named activities, and 2) the statue[']s immunity does not apply to commercial operations. Based on our extensive research, we disagree.

I. §846 is not limited to specifically named activities

The Ratings Department has cited Gerkin in support of their theory that only specifically named recreational activities fall within protection of §846.

In Gerkin, the court held that §846 is in derogation of common law and should be narrowly construed. (At common law, a land owner owes its invitees a reasonable duty of care.) Gerkin held that a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislature, and that the legislature did not intend to immunize landowners from liability unless the use is "recreational".

Thus, Gerkin did not hold that only the named activities in §846 are recreational. Indeed,

a court must consider "the totality of the circumstances including the path taken and purpose of the journey[']. The plaintiff's subjective intent is not controlling but relevant. Therefore, Gerkin actually provides that the language is not controlling, only legislative intent and the purpose of the activity. See also Jones.

In fact, the Supreme Court of Columbia specifically held in a subsequent case that the list of named activities in §846 "does not purport to be complete, but is only illustrative." Schneider v. Mount Desert Island. Under the doctrine of ejusdem generis, when a statute contains a list or catalogue of items, the court should examine it in reference to each other. Schneider held that §846's list of activities have no connection since activities range from risky to sede[n]tary pursuits, and some require large tracts of open space, while others don't. Therefore, the Rating Department is incorrect in arguing that the statute only applies to named activities.

The relevant issue is whether Mountain Biking falls within §846 because it is recreational in character, regardless of whether it was named. Because the list encompas[s]es activities that are risky and done in open space, Mountain Biking is similar in nature to those on the list. See Schneider. Further, because the legislature wants landowners to invite people to use their premises, §846 recreational definition should be construed pursuant to legislative intent.

II. §846 does not encompass recreational activity where consideration has been paid

Our client intends to offer the Mountain Biking trails free of charge to the public. They do not intend to charge an admittance fee to use the trail. However, they do require a fee for all persons who use the aerial tram, but will not charge extra to mountain bikers. Those who wish to mountain bike will have to use the tram to access the bike trails. The fee is $10 for one ride and $25 for an all day tram ticket. Also, there is a general parking fee.

We understand it is your Rating Department's position that the statute's immunity does not apply to commercial operations. They rely on Danaher and Pratt in support of their position.

Your department incorrectly relies on Pratt. Pratt is a case from the C of A of Louisiana whose recreational user statue excludes from protection "commercial recreational facilities." Our Columbia statute does not. Therefore, reliance on Pratt is misplaced.

The Ratings Department relies on Danaher, which provides that the term "consideration" is bound where a landowner and the entrant have a mutual benefit, and that a landowner's expected increased sales constitute "consideration." However, Danaher was a case decided by the Michigan Supreme Court. Our Columbia Court has held that §846's consideration requirements should be narrowly construed.

In Johnson, the court held that a hold harmless clause does not constitute sufficient consideration as to take the defendant out of protection of §846. Indeed, consideration must consist of an actual present benefit.

In Moore, the Columbia court held paying taxes is not enough to constitute consideration as to exempt a govt. park from §846.

It is clear[,] based on these cases, that the mere fact that our client may receive some incidental benefits is not enough under Columbia Law.

Most significant, the C of A 15th Circuit held that a landowner was covered by a recreational use statute even though he rented inner-tubes to kids who used the park without paying an entrance fee. Thompson.

As you know, our client does not intend to charge an admittance fee to use the trails. Just as a landowner could rent an inner-tube, our client can charge for incidentals such as tram access and parking without risking exemption from §846. See Thompson.

In closing, because Mountain Biking falls within the statutorily protected activities of §846 and the park does not intend to make a profit from trail access, it is our position that our client is protected by §846. Therefore, our client's rating should be reduced.

As always, our client appreciates your efforts in resolving this matter. We look forward to your timely response.

X Applicant

II. Memo to Client

To: Manuel Lopez

From: Margaret Thompson, Esq.

Re: Advice on operating Mountain Bike program

Mr. Lopez,

Pursuant to your request, we have reviewed relevant case law and[,] based on our findings, suggest you design your mountain bike program according to our recommendations, in order to fall within Columbia's Recreational use statute.

Your mountain biking program sounds exciting and well thought out. I have reviewed your letter as well as letters you forwarded from Ms. Johnson and Kyle Mills on their ideas for the program. Although we can never guarantee that a statute will apply, I believe that we can maximize the likelihood that the statute will apply.

a. Access fee to Trails

You indicated that a trail fee would involve designing fee collection points and hiring personnel to collect such fees. Currently, bikers access the trails for free on their own. Sally Johnson indicates that a trail fee would require a minimum of 4 access kiosks which costs $144K in construction and $172K annually to operate, which includes a safety patrol officer. Kyle Mills indicates that even if no trail fee is charged, your park still stands to economically benefit.

Based on our legal research, it is probably a bad idea to charge a trail fee. Columbia courts have held that landowners are not covered under the statute when admittance fees are charged. Because your company still stands to benefit without charging a fee, you should not charge a trail fee. You will also save on insurance costs. It actually appears it is more profitable to not [sic] charge a fee.

b. Mountain Bikes on Tram

You have suggested imposing an additional fee for those who bring their bikes on the tram to access the trails. Because all people are charged a tram fee, it is safer to not [sic] charge extra to mountain bikers. This may be viewed as an admittance fee to enter the trails rather than a general fee for all persons. In fact, Kyle believes that there is no need for an additional fee and that bikes can be hooked on the a[e]riel tram. Again, your savings on insurance are far more beneficial than a simple slight increase in fee would be to a[e]riel tram bike riders.

c. Sell/Rent Bikes

I understand you would eventually like to sell bikes or rent them. There does not appear to be a problem with doing that. However, the park should still allow people to bring their own bikes. Requiring people to use or rent yours may be viewed as an admittance fee. By allowing people to bring their own, there does not appear to be a conflict with the statute.

In closing, I would like to thank you for your business. I enjoy our long standing relationship and look forward to further assisting you in implementing the program should my assistance be needed.

Very truly yours,

X Applicant

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

IN RE PROGRESSIVE BUILDERS, INC.

IN RE PROGRESSIVE BUILDERS, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States, and refers to the fictional State of Franklin, another one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the task you are to complete.
5. The **Library** contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your answer must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

COYLE & COOPER, LLP
6620 DWIGHT PROMENADE
SPRING VALLEY, COLUMBIA 55510

MEMORANDUM

To: Applicant
From: Vivian Coyle
Date: February 26, 2004
Subject: **In re Progressive Builders, Inc.**

We have been retained by John May, the owner of Progressive Builders, Inc. (PBI), a residential property construction company, to give ongoing legal advice.

In the course of my initial interview with Mr. May, a question arose about a form contract that PBI has used for the past several years outside of Columbia, and specifically about its provision for arbitration of disputes. Mr. May has tentatively agreed to build a house in Columbia for the restaurateur Pier Nittardi, and wants to use the arbitration provision here. I have made an appointment to discuss the matter with him tomorrow, and have told him that I will have a letter delivered to him beforehand to help guide our discussion.

Please prepare, for my signature, a pre-counseling letter for delivery to Mr. May, in which you do the following:

1. State your understanding of the goals that Mr. May seeks to achieve by using the arbitration provision.

2. In light of Mr. May's goals, discuss the likely consequences of keeping the arbitration provision as-is.

3. Identify and discuss possible steps that Mr. May might take when preparing to enter into any particular contractual relationship, such as that with Mr. Nittardi, in order to maximize the chances that the arbitration provision would be enforceable in Columbia as-is.

4. Identify and discuss possible changes Mr. May might make to the arbitration provision to most fully achieve his goals and to most likely render it enforceable in Columbia.

In preparing the pre-counseling letter, remember that Mr. May is a layperson. Although you must discuss the law, you should do so as clearly and concisely as possible, with a recognition that you are not writing to an attorney.

TRANSCRIPT OF INTERVIEW OF JOHN MAY AND FRANK MAY

VIVIAN COYLE: With your permission, I'll be tape-recording our conversation today?

JOHN MAY: Yes.

FRANK MAY: Of course.

COYLE: Let's back up and summarize how we got to where we are now. John, you were referred to our firm by Peter Padilla, of Padilla Construction Company, one of our clients.

JOHN MAY: That's right. I wanted to establish an ongoing relationship with a law firm in Columbia that had experience with the residential property construction industry. To avoid any legal problems in the first place, you understand, and then to avoid wasting time and money in educating some lawyer on an emergency basis in the event that some such problem should in fact arise.

COYLE: Prior to turning on the tape recorder, John, you and I executed the standard written retainer agreement provided by the Columbia State Bar.

JOHN MAY: Yes, we did.

COYLE: Why don't you state the gist of what you told me about PBI?

JOHN MAY: Sure. Frank and I started PBI here in Spring Valley in Columbia in the mid-1970's. We incorporated it here; we'd always been its sole shareholders, 50-50; I'd always been the President and he'd always been the Vice-President.

COYLE: And what does PBI do?

JOHN MAY: We're a construction company that does residential property. Earlier on, we did small repairs, a bit more complex than handyman work, but then we started to do remodels and eventually construction of new houses.

FRANK MAY: By the early 1980's, we had concentrated on major remodels and new construction. That's all we've done ever since.

COYLE: Just to clarify, you work only on residential property?

FRANK MAY: That's right. When we first started out, we took any job we could get, doing anything we could do, or thought we could do, whether it was residential or commercial or even industrial. But not since the early '80's.

COYLE: More clarification: You work on single-family residences or duplexes or apartments . . . ?

FRANK MAY: No, just single-family residences. Again, in the early days we did anything and everything. But since the early '80's, only residential, and only single-family.

COYLE: By the '90's, what had happened?

JOHN MAY: Politics were heating up here in Columbia and so were property values. Each of us was married by then and had children. With the cost of housing, the only way we could move up was to move out. And there was the State of Franklin right next door. It was somewhat backward. But you could buy land for a song.

COYLE: And the politics?

JOHN MAY: Right. With the tightening of building requirements and environmental regulations and assorted red tape, it took more time and money to get anything built. And that meant that the business was becoming less profitable.

FRANK MAY: So, we both moved to Franklin with our families and moved the business there too. Our first major jobs were building our own houses.

COYLE: Let me return to the politics. Didn't one of you mention something about what you called the "litigation climate"?

JOHN MAY: I did. The "litigation atmosphere." When we started out in the mid-'70's, there was relatively little suing and being sued. I'm not saying there were no disputes. In construction, there're always disputes, especially when you're remodeling someone's house or building him a new one. But we just worked things out, working with each other, the builder and the owner. As the '90's rolled around, that had begun to change. At job sites you'd hear, "See you in court," more often, I'll bet, than you hear it here at your law firm.

COYLE: Well . . .

FRANK MAY: John's exaggerating somewhat, but not much.

COYLE: But did you two have any bad experiences?

JOHN MAY: We didn't, but our friends in the business did, including Pete Padilla, who recommended you to me. Look, our business is construction and not law. From what I've heard, legal problems don't simply cost you a lot of money for lawyers. What's worse, they can pull you away from work for a huge amount of time, and then distract you when you finally get back to work and make you much less efficient.

COYLE: And so . . .

JOHN MAY: And so, we went to Franklin, where the atmosphere wasn't so sue-crazy, at least not then.

COYLE: You went there in the early '90's?

FRANK MAY: That's right. Since then, we continued our concentration on major remodels and new construction, but moved to the higher end as more and more wealthy people from around the country have looked to Franklin for their second or third homes.

COYLE: What do you mean by "higher end"?

JOHN MAY: Contract prices of between $450,000 and $850,000 and up.

COYLE: Okay. Your work has been in Franklin exclusively?

JOHN MAY: Yes, except for a job or two now and again in Columbia, as a favor for a friend, like the house we built two years ago for Pete Padilla's daughter Sophia, who is Frank's goddaughter.

COYLE: What about your subcontractors, have you drawn them exclusively from Franklin?

JOHN MAY: Just about. We've always subcontracted as little work as possible. It's sometimes been a pain to do a lot ourselves, but it's more of a pain to lose control of quality. Of course, we still had to subcontract, particularly the specialty trades, like plasterers and ornamental metal workers. Also foundation work, which demands heavy equipment and lots of concrete and rebar. But all that's mostly local.

COYLE: But here you are in Columbia.

JOHN MAY: Right. Demand for our kind of high-end residential construction has been heating up in this area in Columbia for quite some time. The rich folks who were flocking to Franklin from around the country for their second or third homes have started flocking here as well. Demand hasn't cooled down much in Franklin — but this business is cyclical. So I decided to move back into the Columbia market.

FRANK MAY: Not me, though. John's moved back with his family. He's already set up an office here in Spring Valley. I sold him my interest in PBI. With the money, I've started my own business in Franklin, Frank May Construction, Inc.; I'm working out of our old office there. Now PBI is all John's.

COYLE: That's about all of the background, isn't it? John, your move back led you to talk to Pete Padilla, and Pete Padilla led you to our firm.

JOHN MAY: Right.

COYLE: And in the course of our conversation, you told me about some of your general concerns.

JOHN MAY: Right again. I'm a builder, not a lawyer, and I need to avoid litigation and its costs if I want to stay profitable. Even Franklin's become more sue-crazy. I just want to make sure I don't make any missteps as I come back here.

COYLE: It was in this connection that you happened to mention your form contract and to give me this copy of it. Right?

JOHN MAY: Yes. We've been lucky over the years. The contract's been part of our luck. You might not believe it, but we've never been sued. The main reason is that we've done very good work, and done it on time and within budget. We've also made sure that we fix our own mistakes on our own initiative. We provide old-fashioned honest value, and that's

our reputation. Our contract is simple and uncluttered, and communicates the message of honest value: It specifies what you pay and what we do. That's just about it.

COYLE: Plus arbitration.

JOHN MAY: Plus arbitration. That's important to me. I've just got to avoid the costs of litigation, both the money costs and the time costs. I've seen how they've eaten up friends of ours, builders whose businesses were more profitable than ours, until one or two big lawsuits hit. What I also worry about are punitive damages. All the time I read about some business that screws up a few thousand dollars' worth, and then has to pay a few million in punitive damages. I couldn't survive that. You can't run a business with an open-ended risk like that. You know I can't get insurance to cover that, don't you?

COYLE: Yes, I do. But let me ask you this question: Why do you specify arbitration by the National Arbitration Organization ("NAO")?

JOHN MAY: Two reasons. One is that the NAO was founded in Columbia around the time we started out in the mid-'70's, and we wanted to support a local business. The other is that it focused on construction disputes.

COYLE: How much does the NAO charge for arbitration?

JOHN MAY: You know, I really don't know. Years ago, the first time I tinkered with the arbitration provision and inserted the NAO clause, I think I had a list of charges. But we never became involved in any arbitration with our clients. Whatever disputes arose, we settled them ourselves, by give and take.

COYLE: Let me back up for a moment. You said you "tinkered" with the arbitration provision. Did you actually draft the arbitration provision or any other part of the contract?

JOHN MAY: I wouldn't use the word "draft." Over the years, I've seen lots of contracts. I just took shreds and patches and tried to sew them together to make a whole contract. And I'd mend those pieces from time to time. Basically, over the years, I took out as many words as I could, and simplified the ones that were left.

COYLE: Did you, or do you, negotiate with clients about the terms of the contract?

JOHN MAY: Well, there are all those blanks — you have to come to some agreement with the client on the work to be done, the cost, the schedule, you know.

COYLE: I know. But in addition to filling in the blanks, do you negotiate with clients about the terms of the contract?

JOHN MAY: Well, I don't know how to answer that. I can't remember anybody wanting to change anything. If they get the work they want, at the price they want, on the schedule they want, well, that's about it.

COYLE: What about the arbitration provision? It requires the client to arbitrate but not you.

JOHN MAY: No, I can't remember anybody wanting to change that either. I'd never thought about whether I'd be required to arbitrate if I had a claim. The arbitration provision doesn't say so, but I'd never thought about it.

COYLE: Before I forget, let me add that it's my understanding that your concerns about the contract have not arisen in the abstract.

JOHN MAY: Sorry. That's right. I'm finalizing an agreement which I hope to wrap up in a week or two, to build a house for Pier Nittardi in Bradfield, which is only a few miles away from Spring Valley, here in Columbia.

COYLE: Nittardi is the chef and owner of *Il Pavone*, a restaurant there, isn't he?

FRANK MAY: Yes. John and I have known him for quite some time. He's remarrying his ex-wife Jean.

JOHN MAY: This project will be bigger than any of the jobs Frank and I did together. It couldn't be more important.

COYLE: And before you reduce it to contract, you want to know what contract to reduce it to?

JOHN MAY: That's right.

COYLE: Fine. Before we conclude, let's sum up what you want to do, and what you want me to do, with respect to the contract.

JOHN MAY: Basically, I want to use the contract in Columbia, just as we used it in Franklin, and of course I want to use it for Pier's house.

COYLE: Without modification?

JOHN MAY: Yes, without modification, if possible. I want the contract to change only as necessary. The important thing is for the contract to be understandable and to get the job done.

COYLE: I understand. But Columbia's law is different from Franklin's. So even if it didn't need any fixing there, it might need some fixing here. That will depend on all sorts of things. For instance, will your subcontractors come from Columbia? What about your suppliers?

JOHN MAY: Who knows? As I said, in Franklin we used mostly Franklin subs. Also mostly Franklin suppliers. It's conceivable I could use some of those Franklin folks in Columbia, but it's 200 miles away, so I don't know how likely it is.

COYLE: Give me some time to research the issues. Can you come by again perhaps on February 27th so that we can discuss the matter?

JOHN MAY: Sure. How about 2 o'clock?

FRANK MAY: There's no need for me to return. I'm the fifth wheel, since PBI is all John's now. I just came today because John asked me, to help him with any background you might need to know. Also, I've got to get back to a job in Franklin.

COYLE: Frank, that's fine with me. Thanks for coming. John, two o'clock is good for me too. By noon on February 27th, I'll have a letter delivered to you to assist in focusing the discussion.

JOHN MAY: That'll be fine. Thanks so much.

COYLE: You're welcome. Good-bye.

FRANK MAY: Good-bye.

JOHN MAY: 'Bye.

PROGRESSIVE BUILDERS, INC., CONTRACT

1. Parties to this Contract:

    A. Contractor:

        Progressive Builders, Inc.
        4333 Skillman Avenue, Woodhaven, Franklin 65377
        (656) 425–7900, (656) 425–7905 (fax)

    B. Property Owner:

        _____

(Name)

_____ (Address)

_____ (Telephone and Fax Numbers)

2. Location of Work:

_____

3. Completion Dates:

    A. Estimated date of commencement: _____

    B. Estimated date of completion: _____

4. Contract Price: $_____

5. Method and Schedule of Payment:

_____ Note: The initial down payment must equal at least one-third of the contract price.

6. Description of the Work:

_____

7. Warranty: Contractor provides the following warranty to Property Owner, to the exclusion of all other warranties, express or implied: Contractor warrants that the work will be free from faulty materials; constructed according to the standards of the building code applicable to this location; and constructed in a skillful manner and fit for habitation.

8. Arbitration of Disputes: If a dispute arises concerning the provisions of this contract or its performance, Property Owner agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages. Contractor and Property Owner agree to bear the costs of arbitration equally.

9. Additional Provisions:

A.

_____

B.

_____

C.

_____

10. Contract Acceptance:

Signature of Contractor:

_____

Date: _____

Signature of Property Owner:

_____

Date: _____

THURSDAY AFTERNOON
FEBRUARY 26, 2004

California
Bar
Examination

Performance Test B
LIBRARY

IN RE PROGRESSIVE BUILDERS, INC.

LIBRARY

SELECTED PROVISIONS OF THE FEDERAL ARBITRATION ACT

Section 1. ***Definitions*****.**

* * *

"Commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * *

Section 2. ***Policy in Favor of Arbitration*****.**

A written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* *

SELECTED PROVISIONS OF THE COLUMBIA CODES

Section 3282 of the Columbia Civil Code. *Compensatory Damages*.

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called compensatory damages.

* * * * * * *

Section 3294 of the Columbia Civil Code. *Punitive Damages*.

In an action sounding in tort, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to compensatory damages, may recover punitive damages for the sake of example and by way of punishing the defendant.

* * * * * * *

Section 1281 of the Columbia Code of Civil Procedure. *Policy in Favor of Arbitration*.

A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

* * * * * * *

Section 7191 of the Columbia Business and Professions Code. *Arbitration and Residential Property Work and Construction*.

(a) If a contract for construction of, or work on, residential property with four or fewer units contains a provision for arbitration of a dispute between the parties, the provision shall be clearly titled “ARBITRATION OF DISPUTES,” and shall be set out in capital letters.

(b) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a), and immediately following that arbitration provision, the following shall appear, and shall be set out in capital letters:

“NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE ‘ARBITRATION OF

DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."

(c) Notwithstanding any law to the contrary, a provision for arbitration of a dispute between parties to a contract for construction of, or work on, any residential property with four or fewer units that does not comply with this section is not enforceable against any party other than the party performing the construction or work.

*** * * * * * ***

Section 7195 of the Columbia Business and Professions Code. *Residential Property Work and Construction and Treble Damages as Punitive Damages*.

In an action sounding in tort arising from construction of, or work on, residential property with four or fewer units, where it is proven by clear and convincing evidence that the person or entity performing the construction or work has been guilty of oppression, fraud, or malice, the person or entity for which the construction or work is performed, in addition to compensatory damages, may recover an additional amount up to three times the amount of compensatory damages as punitive damages for the sake of example and by way of punishing the person or entity performing the construction or work.

Doctor's Associates, Inc. v. Casarotto

United States Supreme Court (1996)

We granted certiorari in this case to settle an important issue relating to the Federal Arbitration Act.

A dispute arose between parties to a standard franchise contract for the operation of a Subway sandwich shop in Montana.

Paul Casarotto, the franchisee, sued Doctor's Associates, Inc. (DAI), the franchisor, in Montana state court.

The Montana trial court stayed the lawsuit pending arbitration pursuant to an arbitration provision set out in ordinary type on page nine of the franchise contract.

The Montana Supreme Court reversed, holding that the arbitration provision was unenforceable because it did not meet a requirement under section 27-5-114(4) of the Montana Code that "[n]otice that a contract is subject to arbitration" must be "set out in underlined capital letters on the first page of the contract." DAI argued, unpersuasively, that section 27-5-114(4) of the Montana Code was preempted by section 2 of the Federal Arbitration Act pursuant to the Supremacy Clause of Article VI of the United States Constitution, inasmuch as section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Although DAI's argument failed to persuade the Montana Supreme Court, it succeeds in persuading us. Section 27-5-114(4) of the Montana Code with its special notice requirement, which governs not "any contract," but specifically and solely contracts "subject to arbitration," conflicts with, and is therefore displaced by, section 2 of the Federal Arbitration Act. Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration provisions without contravening section 2 of the Federal Arbitration Act. But courts may not invalidate arbitration provisions under state laws applicable *only* to arbitration provisions — whether such laws cover arbitration provisions in *all* contracts *generally*, or merely touch arbitration provisions in *some* contracts or classes of contracts *specifically*. By enacting section 2 of the Federal Arbitration Act, Congress precluded states from singling out arbitration provisions for suspect status. Section 27-5-114(4) of the Montana Code directly conflicts with section 2 of the Federal Arbitration Act because the state law conditions the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally. In concluding to the contrary, the Montana Supreme Court erred prejudicially.

Reversed and remanded.

Sisters Of The Visitation v. Cochran Plastering Company

Columbia Court of Appeal (1997)

The Sisters of the Visitation ("The Sisters") appeal from a judgment of the Superior Court of Mosswood County enjoining an arbitration proceeding initiated by them in a dispute with Cochran Plastering Company, Inc. ("Cochran"). The Sisters are a Roman Catholic religious order that owns and operates a monastery that is a registered landmark under the Columbia Registered Landmarks Act. The Sisters began a restoration project to repair and restore the monastery's chapel. The Sisters engaged the services of Hall Baumhauer Architects, P.C., a Columbia company, and entered into contracts directly with contractors, from Columbia and several other states, within specific trades included in the scope of work for the project.

The Sisters entered into a contract with Cochran, a Columbia company, for Cochran to repair cracks in the plaster in the ceilings and wall of the chapel, to cast and install plaster moldings, and to pin up all loose moldings with screws and washers. This contract included an arbitration provision, pursuant to which the Sisters filed a demand for arbitration; in the demand for arbitration, the Sisters claimed that Cochran had negligently damaged decorative paintings on the surface of the chapel ceiling and walls and that Cochran had failed to complete its work. The Sisters claimed a total of $525,000 for restoration of paintings they claimed Cochran had damaged and $50,000 for the completion of the repair work.

Cochran filed an action in the Superior Court for an injunction to stop the arbitration proceeding. Cochran claimed as follows: The arbitration provision of its contract with the Sisters is unenforceable under the terms of the Columbia Registered Landmarks Act; Section 2 of the Federal Arbitration Act does not displace the Columbia Registered Landmarks Act through operation of the Supremacy Clause of Article VI of the United States Constitution because Section 2 of the Federal Arbitration Act is inapplicable inasmuch as the contract does not evidence a transaction involving interstate commerce. Accepting Cochran's claim after a bench trial, the Superior Court rendered judgment in its favor. The Sisters appealed. We now affirm.

Section 2 of the Federal Arbitration Act states that "[a] written provision in a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

There is no dispute that, under the Columbia Registered Landmarks Act, the arbitration provision of the contract between the Sisters and Cochran would be unenforceable because the act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Neither is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, the arbitration provision of the contract between the Sisters and Cochran would in fact be enforceable because there is no reason to refuse enforcement, such as unconscionability, based on contract law generally. Nor is there any dispute that if Section 2 of the Federal Arbitration Act is applicable, it would displace the Columbia Registered Landmarks Act, which is a state law that "touch[es] arbitration provisions in *some* . . . classes of contracts *specifically*" (*Doctor's Associates, Inc. v. Casarotto* (U.S. Supreme Ct. 1996), italics in original).

As we shall explain, we believe that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce.

At the outset, we state what is now settled: A contract evidences a transaction involving interstate commerce only if it affects such commerce substantially. The presence or absence of substantial effect on interstate commerce depends on the totality of the circumstances — to which we now turn.

First, the Sisters and Cochran are both Columbia residents, and the contract was to be performed in Columbia. The only affiliation of either of the parties with any out-of-state person or entity is found in the relationship between the Sisters and the Roman Catholic Church. We are simply not prepared to recognize that relationship as involving interstate *commerce*. Hence, we discern no substantial effect on interstate commerce on that basis.

Second, although Cochran brought tools and equipment to the project site, it obtained them within Columbia. In connection with the project, a substantial contract for the rental of scaffolding was placed with an out-of-state party; *that* contract, however, did not involve Cochran but was let directly by the Sisters. No substantial effect on *interstate* commerce can be developed based on Cochran's acquiring in *intrastate* commerce any tools and equipment to be used in the performance of its contract.

Third, Cochran employed only Columbia residents as workers. The contract apparently specified the use of plaster and washers that were required to be obtained from a materials company in Ohio, and it called for insurance, which was obtained from an

insurance company in New York. However, the record shows that little of the amount the Sisters paid Cochran is allocable to the cost of these materials and services. Hence, Cochran's contract does not substantially affect interstate commerce by reason of a dependence upon materials and services moving in interstate commerce.

Fourth, the object of the services provided by Cochran is incapable of subsequent movement across state lines. The Sisters contracted with Cochran to perform plaster work in the monastery chapel in Mosswood County, Columbia. Cochran's work becomes a part of the chapel's structure, and cannot be detached and moved across state lines. The fact that people from out of state might visit the site is too tenuous a connection with interstate commerce. Therefore, we conclude that Cochran's work will not have a substantial effect on interstate commerce on this basis.

Fifth and final, we note that the Sisters entered into a series of contracts for the restoration of the monastery chapel related to their contract with Cochran. But the fact that several of the related contracts might have a substantial effect on interstate commerce does not mean that the contract between the Sisters and Cochran itself has any such effect.

Therefore, we conclude that Section 2 of the Federal Arbitration Act is, in fact, inapplicable because the contract between the Sisters and Cochran does not evidence a transaction involving interstate commerce for, under the totality of the circumstances, it does not affect such commerce substantially.

It follows that under the Columbia Registered Landmarks Act — which is *not* displaced by Section 2 of the Federal Arbitration Act — the arbitration provision of the contract between the Sisters and Cochran is unenforceable because the Act expressly declares that all arbitration provisions of all contracts involving registered landmarks are unenforceable.

Affirmed.

Stirlen v. Supercuts, Inc.

Columbia Court of Appeal (1997)

The Superior Court of Santa Fe County denied a motion to compel arbitration pursuant to the arbitration provision of an employment contract on the ground that that provision was unenforceable because it was unconscionable. We find its order correct and affirm.

Defendant Supercuts, Inc. ("Supercuts"), a Delaware corporation that conducts a national hair care franchise business, appeals from an order, which is statutorily appealable in advance of judgment, by which the Superior Court denied its motion to compel arbitration of a dispute relating to its termination from employment of plaintiff William N. Stirlen, its Vice-President and Chief Financial Officer.

Stirlen commenced this action with a complaint that alleged causes of action based on various contract and tort theories, and that sought compensatory damages in contract and punitive as well as compensatory damages in tort.

Supercuts moved to compel arbitration under the arbitration provision of its employment contract with Stirlen. The Superior Court denied the motion, as we have said, on the ground that the arbitration provision was unenforceable as unconscionable. Supercuts timely appealed.

We shall assume, as have Stirlen and Supercuts, that the arbitration provision of Stirlen's employment contract with Supercuts is subject to the Federal Arbitration Act inasmuch as the employment contract itself evidences a transaction involving interstate commerce within the meaning of Section 2 of the Act.

But we note that, under the Federal Arbitration Act, the question whether, in the words of Section 2, a particular arbitration provision is "valid, irrevocable, and enforceable," or instead presents "grounds . . . for [its] revocation," is answered not by the act itself, but in the first instance by the law of the forum — which in the present case is Columbia.

The arbitration provision of Stirlen's employment contract with Supercuts — which Supercuts itself drafted in its entirety — states, in pertinent part, as follows: "In the event there is any dispute arising out of Executive's [i.e., Stirlen's] employment with Company [i.e., Supercuts], the termination of that employment, or the employment contract itself, whether such dispute gives rise or may give rise to a cause of action in contract or tort or based on any other theory or statute, Company and Executive agree that exclusive recourse for Executive shall be to submit any such dispute to final and binding arbitration and to obtain, if Executive prevails, compensatory damages only."

Under the law of Columbia, a contract, or a provision of a contract, is unenforceable if it is unconscionable. Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present.

The Superior Court determined that the arbitration provision of Stirlen's employment contract with Supercuts was procedurally unconscionable because the contract itself evidenced lack of freedom of assent because it was a contract of adhesion. We agree.

A contract of adhesion is a contract, usually with standard terms, that is drafted and imposed by a party of superior bargaining strength, and that allows a party of lesser bargaining strength only to take it or leave it.

Supercuts maintains that its employment contract with Stirlen is not a contract of adhesion because it did not have superior bargaining strength. Supercuts emphasizes that Stirlen was not a person desperately seeking employment, but a successful and sophisticated corporate executive. Supercuts sought him out and "hired" him "away" from a highly paid position with a major corporation "by offering him an annual salary of $150,000, and then agreeing to remunerative 'extras' not included in the standard executive employment contract," such as generous stock options, a bonus plan, a supplemental retirement plan, and a $10,000 "signing bonus."

We are not persuaded. Stirlen appears to have had no realistic ability to modify the terms of his employment contract with Supercuts. Undisputed evidence shows that the terms of the contract, which were cast in generic and gender-neutral language, were presented to him after he accepted employment and were described as standard provisions that were not negotiable. The only negotiating between Supercuts and Stirlen regarding the conditions of Stirlen's employment related to the stock options, bonus and retirement plans, and other "extras," but these matters were the subject of a separate letter agreement Stirlen executed more than a month before he signed the employment contract. Moreover, the letter agreement adverted to the "standard employment contract" Stirlen would be required to sign, noting that the terms of the letter agreement did not supplant but were "in addition to the standard provisions of the contract." Supercuts does not dispute Stirlen's assertions that the employment contract was presented to him on a "take-it-or-leave-it basis," and that every other corporate officer was required to sign, and did in fact sign, an identical agreement.

The Superior Court also determined that the arbitration provision of Stirlen's employment contract with Supercuts was substantively unconscionable because the provision itself was harsh and oppressive because it was unduly one-sided. Here too, we agree.

The arbitration provision of Stirlen's employment contract with Supercuts cannot be characterized other than as unduly one-sided. We shall overlook the fact that the provision expressly requires Stirlen to arbitrate any dispute that he may have with Supercuts, but impliedly allows Supercuts either to arbitrate or to litigate any dispute that it may have with Stirlen, as it chooses. Instead, we shall focus on this fact alone: The provision allows Supercuts — in effect, if not in terms — to engage in any and all "oppression" and "fraud" and "malice" against Stirlen, without running the risk of any award of even the most minimal punitive damages under Section 3294 of the Columbia Civil Code. Such a provision is unduly one-sided as a matter of law. It is settled in Columbia that any and all contracts or contractual provisions that exempt a contracting party from responsibility for its own oppressive, fraudulent, or malicious conduct are against the policy of the law.

In arguing to the contrary, Supercuts relies on several decisions of courts of sister states. Its reliance is misplaced. Each of those decisions involves the law of a state other than Columbia. More importantly, each deals with an arbitration provision that contains a mechanism for the award of treble damages, which are a species of punitive damages, inasmuch as by definition they amount to three times the compensatory damages in question, and are apparently given "for the sake of example and by way of punishing the defendant" (Colum. Civ. Code, § 3294). No such mechanism, however, is present here.

Lastly, we note that the Superior Court was not obligated to attempt to salvage any part of the arbitration provision of Stirlen's employment contract with Supercuts that might itself *not* be unconscionable. It has long been established that a court need not aid a party who has drafted an unconscionable contract, or contractual provision, by effectively redrafting what is objectionable into something unobjectionable. Indeed, we believe that a court *should* not provide any such aid even if it were otherwise minded to do so. A party who seeks the unmerited benefit of unconscionability must not be allowed to avoid its deserved burden.

For the reasons stated above, we conclude that the Superior Court correctly denied Supercuts' motion to compel arbitration because the arbitration provision of Supercuts' employment contract with Stirlen was unenforceable as unconscionable.

Affirmed.

Myers v. Scamardo Termite Control

Columbia Court of Appeal (1998)

In this action under the Columbia Consumer Sales Act, the Superior Court of Lucas County issued an order (1) granting a motion by the plaintiff for partial summary judgment declaring that an arbitration provision of a contract was unenforceable on the ground of unconscionability, and (2) denying a motion by the defendant to stay the action pending arbitration pursuant to that provision.

Under the Columbia Consumer Sales Act, an order determining the enforceability of an arbitration provision of a contract against a claim of unconscionability is appealable.

The defendant timely appealed the Superior Court's order.

For the reasons set out below, we shall affirm.

The plaintiff, Judith Myers, an elderly woman with limited resources, and defendant, Scamardo Termite Control (STC), entered into a contract: STC agreed to eradicate termites that had infested Myers' house; and, in exchange, Myers agreed to pay STC $1,300. The contract contained an arbitration provision, which reads as follows: "The Consumer and STC agree that any controversy or claim between them arising out of or relating to this contract shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the rules and procedures of the National Arbitration Organization then in force."

Having become dissatisfied with STC's service when termites reinfested her house, Myers brought this action under the Columbia Consumer Sales Act seeking, among other relief, (1) an award of $41,000 in compensatory damages, an award of $123,000 in treble damages as authorized by the act itself, and an award of $2,000,000 in punitive damages; and (2) a declaration that the arbitration provision of her contract with STC was unenforceable on the ground of unconscionability.

Thereupon, STC moved to stay the action pending arbitration pursuant to the arbitration provision of its contract with Myers, and Myers moved for partial summary judgment declaring that the provision was unenforceable on the ground of unconscionability. As noted, the Superior Court issued an order granting Myers' motion and denying STC's. It did so because it concluded that the arbitration provision was indeed unenforceable as unconscionable.

On appeal, both Myers and STC agree that the soundness of the Superior Court's order depends on the correctness of its conclusion on the unconscionability of the arbitration provision of their contract. To that question, we now turn.

The following facts are undisputed for present purposes: The arbitration provision of Myers' contract with STC requires that arbitration must be "conducted in accordance with the rules and procedures of the National Arbitration Organization [now] in force." A party seeking arbitration with the National Arbitration Organization must pay a filing fee — for example, $2,000 for a claim between $100,000 and $250,000, and $7,000 for a claim between $1,000,000 and $2,500,000. Because Myers is asserting a punitive damages claim in the amount of $2,000,000, she would have to pay a $7,000 filing fee. Even if Myers should choose to forgo her perhaps overly optimistic punitive damages claim, she still has a not unreasonable claim for treble damages under the Columbia Consumer Sales Act itself, in the amount of $123,000 — for which she would have to pay a $2,000 filing fee. A filing fee paid by Myers in the amount of $2,000 would exceed the sum of $1,300 that she paid on her contract with STC by a large percentage. Myers did not know at the time of contracting that she would be required to pay any filing fee whatsoever, less still one that would be so high. Although the National Arbitration Organization had, and still has, a published schedule of filing fees, none was attached to the contract or otherwise disclosed to Myers.

Under the law of Columbia, which Myers and STC agree applies here, a contract, or a provision of a contract, is unenforceable if it is unconscionable. As the court in *Stirlen v. Supercuts, Inc.* (Colum. Ct. App. 1997) recently held: "Unconscionability has both procedural and substantive aspects. The procedural aspect has to do with lack of freedom of assent, whereas the substantive aspect has to do with the imposition of harsh or oppressive terms. The view that prevails in Columbia is that both procedural and substantive aspects must be present, each at least in some degree, for unconscionability to be present."

In our judgment, unconscionability taints the arbitration provision of the contract between STC and Myers in both its procedural and substantive aspects.

As for procedural unconscionability, the contract between STC and Myers as a whole is plainly a contract of adhesion — that is to say, an instrument, usually with standard terms, drafted and imposed by a party of superior bargaining strength, allowing a party of lesser bargaining strength only to take it or leave it. Perhaps more significantly, the arbitration provision contains an unfair surprise — the undisclosed requirement that Myers would have to pay what must be characterized as arbitration fees that are exorbitant as to her. Such an unfair surprise could have been avoided by disclosure on the part of STC. But STC made no such disclosure.

As for substantive unconscionability, the arbitration provision of the contract between STC and Myers is harsh and oppressive because it effectively requires Myers to pay arbitration fees that are themselves harsh and oppressive because, as stated, they are

exorbitant as to her. We do not dwell in a fool's paradise, thinking that the National Arbitration Organization should provide arbitration without cost. Nor do we mean to suggest that its arbitration fees are out of line with the value of the services it provides. Rather, we conclude only that requiring a consumer in Myers' situation to pay such fees is harsh and oppressive. Harshness and oppressiveness could have been avoided by STC's agreement fee to pay such fees on Myers' behalf. But STC made no such agreement.

In sum, because the Superior Court was correct in its conclusion that the arbitration provision of the contract between STC and Myers is unconscionable, its order denying STC's motion to stay the action pending arbitration pursuant to that provision, and granting Myers' motion for partial summary judgment declaring that that provision was unenforceable on the ground of unconscionability, was altogether sound.

In this court, however, Myers seeks to obtain more than she received below, asking us to enjoin STC from attempting to enforce the arbitration provision here at issue against any consumer in the future. Her request comes too late. But even had it been timely, we would have rejected it. We would be reluctant to find the arbitration provision unconscionable, always and everywhere, and in the abstract, with respect to any and all consumers, no matter what their resources, with whom STC has contracted or may contract. First, and manifestly, unconscionability is in large part a judgment that arises from the unique facts of each individual case. Second, many, or at least some, consumers might in fact prefer arbitration over litigation — and might also prefer to avoid the premium that STC would presumably build into the contract price if it had to cover the risk of litigation and its costs.

For present purposes, however, all that we need do, and shall do, is to uphold the Superior Court's order denying STC's motion to stay the action pending arbitration and granting Myers' motion for partial summary judgment.

Affirmed.

Answer 1 to PT - B

1)

Letter to Mr. May

To: John May, Progressive Builders, Inc.

From: Vivian Coyle, Coyle & Cooper, LLP

Re: Arbitration Clause

Dear Mr. May:

Enclosed please find my preliminary opinion regarding Progressive Builders, Inc.'s (PBI) goals in using an arbitration clause, the potential consequences of leaving the clause as is, what steps PBI could take to maximize the likelihood that the arbitration clause would be enforceable as is, and potential changes PBI could make to the clause [to] achieve your goals and most likely render the clause enforceable in Columbia.

1. Goals Sought Through The Arbitration Clause

Based upon our meeting the other day it seems to me there are three primary goals PBI wishes the arbitration clause to achieve. First it seems PBI wishes to reduce any likelihood of litigation and prefer that all disputes be resolved through arbitration. Second, to limit any costs that arise might [sic] from any damages, particularly the possibility of punitive damages. Third, to limit any time lost to any disputes to a minimum. If you have any additional goals that I have not addressed please contact me regarding these goals.

2. Consequences of Leaving Arbitration Agreement As Is

The primary risk that PBI may suffer from leaving the arbitration clause as is, is that a court may refuse to enforce the clause and PBI would be forced to litigate in court. A lesser risk is that an arbitrator may refuse to limit damages to compensatory damages and may apply punitive damages.

A. Risk Arbitration Clause Will Be Unenforceable

There are two general basis [sic] on which a court may find the present arbitration clause unenforceable. The first risk is that a clause is in the wrong format. The second risk is that the clause is unconscionable.

Form of the Clause

As an initial matter, Columbia Business and Professions Code Section 7191 requires that all arbitration clauses regarding contracts for construction of residential property of 4 or fewer units be clearly title[d] "ARBITRATION OF DISPUTES" and be set out in capital letters. Furthermore, there is specific language that must be used and must be entirely in capital letters. And immediately following this language there must be a line or space provided for the parties to indicate their assent or non-assent. Where a builder does not follow this format the arbitration agreement is only enforceable against the builder. It is possible that under certain circumstances section 7191 does not apply, in which case the format of your arbitration clause would be acceptable. These circumstances are discussed in more detail below in section 3 of this letter.

Unconscionable

Even if a court accepts the form of the arbitration clause it is possible that it will the clause unconscionable [sic] and therefore refuse to enforce the clause. In Columbia, contracts must be both procedurally unconscionable and substantively unconscionable before a court will find them unenforceable. The current arbitration clause risks being found both procedurally and substantively unconscionable.

Contracts of Adhesion

Columbia courts have found arbitration clauses in contracts of adhesion procedurally unconscionable. A contract of adhesion is a contract, usually containing standard terms that is drafted and imposed on by a party of superior bargaining strength, and allows a party of lessor [sic] bargaining strength only to take it or leave it. [Stirlen v. Supercuts.] It is not clear if your contract is a contract of adhesion. While your current form contract contains some standard terms, on the whole your customers are able to negotiate significant portions of the contract including the location of work, completion dates, contract price, method and schedule of payment[,] the description of work[,] and may include additional provisions.

However, if a court were to find your contract a contract of adhesion, there is a strong likelihood the court would find the arbitration clause substantively unconscionable and therefore unenforceable. In the case of Stirlen v. Supercuts a Columbia court refused to enforce an arbitration clause that limited all relief to punitive damages and only required one party to submit to arbitration. In Columbia, punitive damages may be awarded where a defendant engages in an act of fraud, malice or oppression. Contracts that limit liability for fraud, malice or oppression or [sic] considered against public policy. Thus, an arbitration clause that limits recovery to compensatory damages despite the occurrence of fraud, oppression or malice is against public policy and will not be enforced.

Unfair Surprise

Furthermore, even if your contract is not a contract of adhesion it may be found to be procedurally unconscionable because it contains undisclosed fees for the arbitration. In the case of Myers v. Scamardo Termite Control, the plaintiff, an elderly lady, signed a contract that contained an arbitration clause which required arbitration in compliance with the rules and procedures of the National Arbitration Organization. The National Arbitration Organization requires people filing for arbitration to pay a filing fee based upon the amount of damages sought. In the Myers case, the filing fee was $7000 even though the original contract was only for $1300. Because the fees charged were undisclosed and exorbitant for the elderly lady to pay, the court decided that the fees constituted an unfair surprise that rendered the clause unconscionable. Again it is not clear if your failure to disclose the fees would constitute unfair surprise to your clients. The work you perform is unlikely to result in filing fees above $7000 and your construction contracts are likely to exceed this filing fee by a large amount. Furthermore, your contract offers to split the costs of arbitration, and presumably filing fees[,] equally. However, it is still possible for a court to determine that the arbitration clause is an unfair surprise and therefore unenforceable.

B. Risk An Arbitrator Will Award Punitive Damages

As described above, contracts that remove punitive damages are against public policy. Accordingly, it is possible an arbitrator may refuse to deny punitive damages. However, it may be possible to limit punitive damages to no more than 3 times compensatory damages. In that case you would not need to worry about causing $10K in damages and being sued for millions. This will be discussed in more detail in section 4 below.

3. Maximizing Enforceability of Arbitration Agreement As Is

As mentioned above, under certain circumstances the formal requirements of section 7191 may not be applicable to a construction contract for residential property of 4 unit[s] or less. This section details how those circumstances may apply to PBI.

Interstate Commerce vs. Intrastate Commerce

Section 7191 only applies to contracts that are not part of interstate commerce. Thus, the more you can make your construction contracts an activity of interstate commerce the more likely you will not be subject to the requirements of section 7191.

In the case of Sisters of the Visitation v. Cochran Plastering Company, a [sic] Columbia courts have applied several factors to determine that the construction contract at issue did not substantially involve interstate commerce. The Cochran court looked to the resident of the parties and the place where the contract was to be performed, whether the tools and equipment used were from in-state suppliers, the residency of the workers, and whether what was being built could be moved out-of-state. In the Cochran case both the plaintiff and the plastering company were residents of Columbia and the contract was to plaster a chapel in Columbia. Here, your clients would be residents of Columbia and you be [sic]

constructing homes in Columbia but your company is a resident of Franklin (if you incorporated or make Columbia your primary place of business your company will become a resident of Columbia). In the Cochran case almost all tools and equipment at the project site were obtained in Columbia. Currently almost all your tools are obtained outside of Columbia. The Cochran defendant employed only Columbia workers. While you stated that you were more likely to use Columbia workers you might use current workers from Franklin. Finally, the chapel was unlikely to be moved out of Columbia. Although houses may be moved out of the state, it is very unlikely that one of the larger more expensive homes that PBI builds would be moved out of the state.

Based on these factors PBI can maximize the likelihood of a Columbia court enforcing its arbitration clause by remaining a resident of Franklin (i.e. remaining incorporated in Franklin, keeping its headquarters in Franklin and doing most of its business in Franklin), and importing its tools, equipment and most of its workers from Franklin. However, whether these steps will be enough to assure enforceability is uncertain and these steps will have no effect on whether the clause is considered unconscionable.

4. Possible Changes to Arbitration Clause to Achieve Goals

There are several possible changes that PBI could make to its arbitration clause to achieve its goals. These include changing the form of the clause to comply with Section 7191 and making substantive changes to make certain the clause is not unconscionable.

Compliance With Section 7191

PBI could change the clause to comply with section 7191. To comply with section 7191, the clause should be clearly titled "ARBITRATION OF DISPUTES" and be set out in capital letters. Furthermore, the specific language indicated in the statute must be used and must be entirely in capital letters. And immediately following this language there must be a line or space provided for the parties to indicate their assent or non-assent. These changes would probably be much less expensive than the steps outlined in section 3 of this letter to avoid the imposition of section 7191 but may create more questions from clients when entering the contract.

Substantive Changes

It is unlikely that PBI can do much more to make the contract less of a contract of adhesion since there are currently very few standard clauses. However, PBI can take steps to assure that the contract is not substantively unconscionable.

Make Arbitration Binding on Both Parties

As an initial matter, PBI can make the requirement to enter binding arbitration mandatory on itself as well as the client. Since PBI wishes to enter arbitration as a matter of course then this change should have no real impact on PBI.

Include a Provision for Treble Damages

Although Columbia courts are unclear on this issue, PBI might be able to limit punitive damages to 3 times compensatory damages. If valid this provision would make PBI liable to more than purely compensatory but would insulate PBI against a runaway judgment. As stated Columbia courts have not ruled on the validity of this particular clause but inclusion of the clause is unlikely to leave PBI in any worse provision than currently since Columbia courts have clearly stated that punitive damages cannot be completely contracted away.

Include a Schedule of Fees

PBI may also wish to include a schedule of arbitration fees. However, this is probably less likely to be an issue since, as discussed above, PBI already agrees to pay half the fees and fees are likely to be a small percentage of the initial contract price. Another way to avoid posting fees in the clause would be for PBI to indicate that it will pay all fees. Including the fees in the clause may lead to tension during initial contract negotiations. Therefore you should probably decide whether you wish to include the fees, accept the costs of providing the fees yourself or take the small (but present) risk of giving no information about the fees at all. Alternatively, PBI could use a different arbitrator organization but this may not change anything since other organizations may charge similar fees.

Thank you for coming to see me. I look forward to discussing these issues in the near future.

Sincerely,

Vivian Coyle

Answer 2 to PT - B

PERFORMANCE TEST

[Letterhead of Coyle & Cooper, LLP]

February 27, 2004

Progressive Buildings, Inc.
4333 Skillman Avenue
Woodhaven, Franklin 65377

Attention: John May

Dear Mr. May:

You have requested our advice in connection with a standard form construction contract you wish to use with your clients in the State of Columbia. In connection with our general review of the agreement, you have specifically requested we review the arbitration provision set forth in Section 8 of the contract. Our review of the arbitration provision and applicable Columbia law will focus on: (i) the consequences of keeping the arbitration provision in its current form; (ii) what steps you may wish to take when executing your contracts to maximize the enforceability of the arbitration provision and (iii) some suggested changes you may wish to make to the arbitration provision to achieve your goals and increase the lik[e]lihood your arbitration provision will be deemed enforceable in Columbia.

Our general understanding of your goals is as follows. Your overarching goal is to enter the Columbia construction market for higher end homes with contract values of between approximately $450,00 and $850,000, and up. Prior to commencing any work, you envision entering into a form contract with each property owner. Included in the contract is an arbitration provision. The arbitration provision is included for several reasons. The first is to avoid the direct costs associated with protracted litigation. The second is to avoid certain indirect costs associated with litigation including time you and your employees will need to spend defending or engaging in litigation rather than on the business itself and the loss of efficiency following litigation when you must ramp-up again. Finally, you seek to avoid punitive damages, for which you cannot receive insurance coverage.

You have expressed the desire to use the contract without modification, if possible. Section 7191 of the Columbia Business and Professions Code contains a specific provision relating to the form of arbitration provisions contained in construction contracts for work performed on residential property with four or fewer units. Based on your business plan as described to us and as set forth above, we believe this provision will generally apply to your contracts. Section 7191 specially requires a prominent notice provision to be set forth in the contract in all capital letters. In addition, such provision must be specifically initialed

by the parties. Any provision for arbitration which fails to comply with the requirements of Section 7191 is not enforceable against any party other than the builder. Thus, Section 8 of the contract as currently drafted is only enforceable against you and not the counterparty.

One way to avoid this unintended and rather harsh result is set forth in a recent U.S. Supreme Court case Doctor's Associates, Inc. In that case, the Supreme Court held that a Montana statute with language similar to the Columbia statute was preempted by Section 2 of the Federal Arbitration Act.[1] The broader language of the federal statute precluded the Montana state law conditioning the enforceability of arbitration provisions on compliance with a special notice requirement not applicable to contracts generally.

In interpreting the Supreme Court case, the Columbia courts have concluded that preemption occurs when a contract evidences a transaction involving interstate commerce. This concept is set forth in the Columbia Court of Appeal case Sisters of the Visitation. Accordingly, in order to not modify Section 8 of the contract containing the arbitration provision, and to fall within the preemption concept set forth in Doctor's Associates, you should take steps to ensure that the contract evidences a transaction involving interstate commerce and that such concept is evident from the contract.

Whether a contract "evidences" a transaction involving interstate commerce is a facts and circumstances test. In Sisters of the Visitation, (1) the parties to the contract were both Columbia residents, (2) the builder's tools and equipment were purchased in Columbia, (3) the builder only employed Columbia residents, (4) the services provided by the builder were to be done on a physical building in Columbia and therefore incapable of movement across state lines, and (5) while several ancillary contracts were with out-of-state party's [sic], because the builder was not a party to these contracts, the contract with the builder itself was deemed to not effect [sic] interstate commerce. The court also noted that while certain items and services purchased by the builder were from out-of-state, because the amount allocable to such items and services was small, it did not have a substantial effect on interstate commerce.

Following the court's reasoning in Sisters of the Visitation, we recommend you take the following steps in order to be more likely to be deemed to engage in interstate commerce (and thereby, by extension, falling within the scope of the federal statute rather than the state statute):

(1) Consider maintaining an office in Franklin by subletting space from Frank May Construction. Progressive Builders ("PBI") is incorporated in Columbia. If it enters into

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[1]Section 2 of the Federal Arbitration Act declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

contracts with Columbia residents, the contracts will probably be deemed to have been entered into by Columbia residents. An out-of-state office, however, will bolster the argument that PBI is a Franklin Resident.

(2) Purchase supplies, tools and equipment from outside Columbia. Although Franklin is more than 200 miles away, a closer state may be available for you to purchase supplies from periodically during a project.

(3) Employ personnel from outside Columbia. Again, if Franklin is too far, perhaps a closer state is available.

Although taking the foregoing steps may help you fall within the scope of the Federal Arbitration Act, the Federal Arbitration Act is not a guarantee of enforc[e]ability. An arbitration provision governed by the Federal Arbitration Act may still be deemed unenforceable on the same grounds that any other contract or provision may be deemed unenforceable.

The Columbia courts have determined that when a contract is unenforceable is a question of Columbia law as opposed to a question answered by the Federal Arbitration Act itself. Under Columbia law, "a contract or a provision of a contract, is unenforceable if it is unconscionable."[2] The Columbia courts have determined the test for unconscionability is twofold, requiring both procedural and substantive aspects. In Stirlen, the court determined the procedural aspect required a "lack of assent" whereas the substantive aspect required the imposition of "harsh or oppressive" terms. The court determined that a contract of adhesion, one with standard terms and drafted by a party with superior bargaining strength, and that allowed a party of lesser bargaining strength to take it or leave it, was procedurally unconscionable. Some of the factors the court considered in reaching this conclusion was [sic] that the contract was in generic and gender neutral language, that the contract was presented as nonnegotiable, and that other matters were executed in a side letter more than a month after the main agreement.

In a separate Columbia case, Myers, the court also found a contract unconscionable. In that case, the court determined that unfair surprise, namely that the plaintiff would have to bear the filing fees to arbitrate with the National Arbitration Organization ("NAO") and that neither the existence or amount of the fee was disclosed in the contract, the court specifically held that disclosure would have avoided this result [sic].

In order to avoid any claim of procedural unconscionability, BPI [sic] might want to take the following steps when entering into a contractual relationship.

(1) You may wish to give the counterparty the contract in advance so that the counterparty has the opportunity to compare your contract with potential competitors in advance of

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[2] Stirlen

execution;
(2) You may wish to specifically orally advise the counterparty that the terms of the contract are subject to negotiation;
(3) You may wish to orally advise the counterparty to seek the advice of counsel prior to execution;
(4) You should consult with the NAO on a periodic (perhaps quarterly) basis and obtain a current list of charges. These charges should be provided in advance to the counterparty;
(5) Finally, you should specifically draw the counterparty's attention to Section 8 of the contract and explain the effects of the arbitration provision.

In the event you are amenable to modifying the arbitration provision, some changes may increase the lik[e]lihood the provision will be held enforceable in Columbia.

(1) The first suggestion would be to conform the arbitration provision to the requirements of Section 7191 of the Columbia Business and Professions Code for the reasons discussed earlier. In connection with this change, we would suggest adding a sentence immediately following the notice provision:

> "To the extent Section 7191 of the Columbia Business and Professions Code is deemed inapplicable to this Section 8, it shall be interpreted pursuant to Section 2 of the Federal Arbitration Act."

This will ensure that either Section 7191 of the Columbia Business and Professions Code or Section 2 of the Federal Arbitration Act will apply for certainty of interpretation.

(2) The Columbia Court in Stirlen indicated it would not redraft an objectionable arbitration provision into something unobjectionable. To help alleviate this issue we would suggest the following language be added to the end of Section 8:

> "To the extent any provision of this Section 8 shall be deemed unenforceable, such provision shall be stricken from this section, and the remaining provisions shall be interpreted as if such objectionable provision had not been included."

(3) The Columbia courts have also articulated a test for substantive unconscionability. As discussed earlier, unconscionability requires both procedural unconscionability and substantive unconscionability. In the event the procedural suggestions set forth above are insufficient for the court, the following changes to the agreement may obviate any substantive unconscionability.

First, Columbia courts have held that arbitration provisions requiring one party to arbitrate but not the other are unduly one-sided. We would recommend making the arbitration provision a mutual obligation.

Secondly, the Columbia courts have held that the elimination of absolutely all

punitive damages to be [sic] unduly one-sided. Punitive damages should be available in the event that the defendant has engaged in oppressive, fraudulent or malicious conduct. Accordingly, we would recommend carving out such conduct from the limit to compensatory damages. Although such change may seem to expose you to punitive damages, we believe it will increase the lik[e]lihood the arbitration provision will be enforced. From what you have advised us of your business practices, it seems highly unlikely your conduct will fall within the scope of the carve-out. We see little practical risk from your standpoint by including this provision.

Finally, in Myers, the court held that requiring plaintiff to actually pay the NAO fees was harsh and oppressive because they were exorbitant to her. We would suggest BPI [sic] agree to pay such fees in the event the counterparty demonstrates an inability to pay. Alternatively, BPI [sic] may just want to contractually agree to pay these fees. As it has never yet proceeded to arbitration, it may conclude the odds it will need to actually pay such amounts is low.

As redrafted, the provision would read as follows:

ARBITRATION OF DISPUTES: If a dispute arises concerning the provisions of this contract or its performances, each party agrees: (1) to submit any such dispute to binding and final arbitration under the rules of the National Arbitration Organization (NAO); and (2) to limit any relief that may be awarded by the NAO to compensatory damages, except in an action sounding in tort, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, in which case, the plaintiff may recover punitive damages up to [three] times the contract price. [Note to Mr. May: Discuss if three times is appropriate.] Contractor agrees to bear the costs of arbitration.

To the extent Section 7191 of the Columbia Business and Professions Code is deemed inapplicable to this Section 8, it shall be interpreted pursuant to Section 2 of the Federal Arbitration Act.

To the extent any provision of this Section 8 shall be deemed unenforceable, such provision shall be stricken from this section, and the remaining provisions shall be interpreted as if such objectionable provision had not been included.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY COLUMBIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR A JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS

VOLUNTARY.

_____CONTRACTOR _____PROPERTY OWNER

We look forward to discussing this letter with you in further detail.

Sincerely,

Vivian Coyle

California
Bar
Examination

Performance Tests
and
Selected Answers

July 2004

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the two performance tests from the July 2004 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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TUESDAY AFTERNOON
JULY 27, 2004

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

DONOVAN v. BARGAIN MART, INC.

DONOVAN V. BARGAIN MART, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Ervin, Knight and Paulson
2469 East Angelo Rd., Suite 900
River City, Columbia 55551

MEMORANDUM

To: Applicant

From: Annabelle Lee

Date: July 27, 2004

RE: **Jake Donovan and Bargain Mart, Inc.**

As you know, I participate on a monthly basis at the River City Bar Association Ask-A-Lawyer night. At the last session two weeks ago, I met with Jake Donovan. He feels that he has been a victim of a scam involving a "check deferment" service provided by Bargain Mart, Inc., a local appliance store.

I need you to do some preliminary work on any potential statutory claims Mr. Donovan may have against Bargain Mart, Inc. Please prepare a memorandum that identifies the potential claims Mr. Donovan might bring against Bargain Mart, Inc.

Separately for each potential claim:

1. Set forth the statutory requirements to establish the claim;
2. Analyze whether the facts that we know establish the statutory requirements; and,
3. Identify what additional facts, if any, we must seek through investigation or discovery, and how the additional facts might help establish the particular statutory requirements.

At this point, do not discuss what remedies, such as damages or injunctive relief, might be available. We will figure out the remedies aspect at a later time.

TRANSCRIPT OF INTERVIEW BY ANNABELLE LEE OF JAKE DONOVAN

Annabelle Lee (Q): Nice to meet you, Mr. Donovan.

Jake Donovan (A): Likewise. Thanks for seeing me.

Q: Before we get started, I just want to make sure that tape-recording this conversation is okay with you.

A: It's fine.

Q: I find note taking to be distracting, so this way I just have to jot down a few notes to myself.

A: That's okay by me.

Q: A few words about myself before I turn things over to you. I am here as part of the River City Pro Bono Ask-a-Lawyer night. I am here to give you whatever advice I can about your situation, and sometimes may be able to do some further work for you, if I get permission from my firm to do so.

A: Sounds great. Thanks.

Q: So, why don't you tell me what brings you to the clinic tonight?

A: I'm embarrassed to admit it, but I think I got taken by a scam.

Q: I hope it wasn't one of those pyramid schemes.

A: No, but I should have known better. It was a rip-off. I should have trusted my instincts.

Q: Why don't you start at the very beginning?

A: I'm on a fixed income. I receive Social Security and a small pension from my years working for the State Department of Agriculture as an inspector. I had to pay a lot one month to take care of some dental bills. It left me short for the month. I get this Penny Saver weekly paper that has ads and lists sales and such. Inside was a flyer for a place called Bargain Mart. Here's a copy of the flyer if you want.

Q: Thanks, I'll take a close look at that after we're finished talking.

A: Anyway, they sell small appliances. The flyer said something about, "Come and see us if you're short on cash." I was in the neighborhood, so I stopped in. It looked like a regular store – toaster ovens, microwaves, blenders, and food processors. I asked the guy behind the counter about the flyer. He said, "You mean about being short on cash?" I said,

"Yeah." And he said that the store offered a deal where you could postdate a check, and they would give you cash that day.

Q: That sounds a little shady. Tell me more.

A: Well, it sounded shady to me, too. So I asked him how it worked. He whipped out a chart which listed amounts down the side, and number of days across the top, you know, 7, 14, 21, 28, etc. He asked me how much I needed. I told him $300. He asked how long I would need it for. I said 14 days – until I got my next checks the first of the month. He looks it up on the chart and says, "All you have to do is write us a check for $375, and show us copies of your pension checks, and fill out a form and sign it."

Q: So did you go ahead?

A: Yeah, I did. I was pretty desperate. I had to go home first to get my checkbook and a statement showing my pension amounts. I went back to Bargain Mart, wrote the check for $375, filled out the form – and they handed me $300 in cash just like that.

Q: Did you get copies of anything that you signed?

A: Yeah, I did. Here's the first agreement that I signed. And I forgot to tell you. They also gave me $75 in gift certificates to use at the store.

Q: So let me make sure I have this straight. You wrote a postdated check for $375, and in exchange they gave you $300 in cash plus $75 in gift certificates?

A: Right.

Q: What did they say about cashing the check?

A: They said that since I needed the money for 14 days, they'd wait that long to cash the check. They couldn't have cashed it anyway since it was postdated, and there wasn't enough in my account to cover it until the first of the next month.

Q: When did this happen, by the way?

A: The first time I went in was about a year ago. I've gone back a couple of times since then.

Q: When's the last time you went to Bargain Mart?

A: Well, it was actually a few days ago. I just wrote them another postdated check for $375. It'll get cashed in about 10 days.

Q: Okay. Let me take a look at the flyer and the agreement. . . . Did you ever hear anyone call this a loan?

A: Nope. In fact they specifically said it wasn't a loan since I was getting back exactly what I was giving them. But it just doesn't seem right, you know what I mean?

Q: I know. Did you ever try to use the gift certificates?

A: No. But the stuff in the store was really expensive – even the used stuff.

Q: You said that the person behind the counter showed you a chart – did he give you a copy?

A: No, he didn't.

Q: What would've happened if your check had bounced?

A: Well, that actually happened once. I had to pay a $25 returned check fee, then had to write another postdated check – this time for $500 -- $400 to cover the amount I owed, and I got $100 in additional gift certificates.

Q: So let me get this straight. For that last transaction, you'd originally written a check for $375 and gotten back $300 cash and $75 in gift certificates?

A: That's right.

Q: And then when they tried to cash the check a couple of weeks later, it bounced. You went back to Bargain Mart and now you owed them $375 plus a $25 returned check fee. So that totals $400. On their handy chart, in order to get $400 to pay off the debt, you had to postdate another check for $500 and got another $100 gift certificate?

A: You've got it. That's exactly what happened.

Q: Let me do a quick calculation here. . . . Putting aside the gift certificates, if this was a straight loan, that's a 650% annual percentage rate!

A: How did you figure that?

Q: Well, $75 is 25% of the $300 that you borrowed. The term was two weeks, which is 1/26 of a 52-week year. And 25% times 26 is 650%. I'd call that pretty high interest. And it's 650% interest for the second transaction, too.

A: I told you I thought something wasn't right.

Q: Well, Mr. Donovan, this sounds very interesting. I'd like to do some further investigation of how Bargain Mart operates. Do you have any idea who else I might talk to?

A: Funny you should ask. I met this kid not too long ago who said he used to work there. His name is Larry Walker. I see him around all the time. Shall I just have him give you a call?

Q: That would be great. Here's my card. Just have him ask for me. And here's a card for you. I'll let you know what we come up with, Mr. Donovan. You should feel free to call me if you think of anything else. I'll get back to you before that last check will get cashed, okay?

A: Thanks a lot. I really appreciate your time.

*** * END OF INTERVIEW * ***

EXCERPTS FROM INTERVIEW BY ANNABELLE LEE OF LARRY WALKER

Annabelle Lee (Q): Mr. Walker, we got your name from Jake Donovan.

Larry Walker (A): Yes, I know. Jake told me that you wanted to talk to me about Bargain Mart.

Q: That's right, and if you could just confirm for me that you are agreeing to this tape recording, that'd be great.

A: It's fine. I agree to the tape recording.

Q: So, Mr. Walker, when did you work at Bargain Mart?

A: I worked there about 3 years ago for about 8 months.

Q: What did you do there?

A: I worked behind the counter.

Q: What did your job consist of?

A: I would help customers who wanted to use either our "cash-plus" service or buy an appliance.

Q: Tell me about the cash-plus service.

A: The idea was that people would get cash from us in exchange for writing a check for a higher amount. I had a chart at the counter that would tell me how much more the check had to be. Oh, and the check was postdated. So let's say the customer needed $500. My chart said $125. So, the customer would write a check for $625 and get cash of $500 that day. In addition, they'd get gift certificates for the $125 premium.

Q: Did people ever use their gift certificates?

A: I never saw it. I mean, why would you? You can get the same stuff across the street at Smitty's for a lot less. The appliances were really overpriced and pretty junky.

Q: Can you give me an example?

A: Well, I can't remember exactly, but say, a toaster oven was for sale for $150, and you could only pay for half of it with gift certificates.

Q: So, to buy the $150 toaster oven you would have to pay with a $75 gift certificate, plus another $75 in cash?

A: Yeah, and even $75 was more than you'd pay for the same thing at other places like Smitty's.

Q: Did you receive any sort of training for the cash-plus service?

A: Yeah, my boss told me never to use the word "loan," because the customers were getting full value in the form of gift certificates.

Q: Did you have the customers fill out any forms?

A: Yeah, there was a standard agreement that everyone signed.

Q: Did you do any credit checks on anyone?

A: Nope. All they had to show us was proof of regular monthly income – a job, pension, Social Security, whatever.

Q: So, you said the appliances were overpriced. Did anyone come in just to buy appliances?

A: I never saw any, but I wasn't the only one who worked there and that was three years ago.

* * *

BARGAIN MART, INC.

AGREEMENT

NATURE OF SERVICES PROVIDED. I understand that Bargain Mart, Inc. (BMI) provides "cash-plus" services only. BMI is not in the loan business. In exchange for BMI's giving me cash of $ 300.00 and gift certificates worth $ 75.00, I will write a postdated check in the amount of $ 375.00 which BMI will not cash until 14 days from the date I sign this agreement.

RETURNED TRANSACTIONS. In the event that any check that I have signed is returned unpaid to BMI: (1) I agree to pay a returned check charge of $25.00; (2) in the event that BMI initiates collection activity on my account, I agree to be responsible for collection fees, court costs and fees, and all reasonable attorney fees; (3) I authorize BMI to initiate debits to my bank account in amounts up to the amount I owe, until the amount I owe is paid in full; and, (4) I understand and agree that I may be subject to criminal prosecution and civil penalties for writing "bad" checks under applicable laws.

GOVERNING LAW. I agree that the laws of the State of Columbia will apply to this and any transactions I enter into with BMI.

I have read the foregoing agreement, understand its terms, and am voluntarily entering into this arrangement.

Date: July 25, 2003

Jake Donovan
Customer

112 2nd St., River City, Col.
Address

BARGAIN MART – YOUR ONE-STOP BARGAIN CENTER

IF YOU'RE IN THE MARKET FOR GOOD DEALS ON SMALL APPLIANCES, COME SEE US AT BARGAIN MART. WE MAY BE ABLE TO HELP.

WE STOCK A LARGE SUPPLY OF SMALL APPLIANCES. CHECK OUT OUR PRICES– THEY CAN'T BE BEAT.

IF YOU'RE SHORT ON CASH OR DON'T HAVE GOOD CREDIT, WE ALSO OFFER CASH-PLUS SERVICES.

IF YOU NEED CASH BEFORE YOUR NEXT PAYDAY, YOU CAN WRITE US A CHECK FOR THE AMOUNT YOU NEED AND WALK AWAY WITH IMMEDIATE CASH. COME SEE US FOR DETAILS.

WE LOOK FORWARD TO WORKING WITH YOU!!!

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SELECTED COLUMBIA CODE PROVISIONS

INTEREST AND USURY STATUTES

Civil Code § 3601. Legal Interest Rate—Agreement for Higher Rate

(a) The legal rate of interest shall be 10 percent per year (or 10% annual percentage rate or APR) where the rate of interest is not established by written contract. Notwithstanding the provisions of other laws to the contrary, the parties may establish by written contract any rate of interest, expressed in annual percentage rate or APR terms as of the date of the evidence of the indebtedness, and charges and any manner of repayment, prepayment, or acceleration.

(b) Where the principal amount involved is $3,000.00 or less, the legal rate of interest shall not exceed 20 percent per year (or 20% annual percentage rate or APR) on any loan, advance, or forbearance to enforce the collection of any sum of money unless the loan, advance, or forbearance to enforce the collection of any sum of money is made pursuant to another law.

Civil Code § 3602. Civil Penalty for Charging Excessive Interest-- Usury

The taking, receiving, reserving, or charging a rate of interest greater than the amount allowed by § 3601, when knowingly done, shall be unlawful. The creditor is prohibited from recovering any interest on loans when an interest rate greater than is allowed by § 3601 is charged. Where a rate of interest greater than is allowed by § 3601 has been paid, the person by whom it has been paid, or his legal representatives, may recover all of the interest thus paid from the creditors taking or receiving the same. In addition, the person or legal representatives may recover an additional amount equal to all of the interest paid as a penalty.

* * *

CHECK-CASHING AND DEFERRED-DEPOSIT SERVICES

Civil Code § 3701. Definitions

As used in this chapter:

(1) "Check" means any check, draft, money order, personal money order, travelers' check, or other demand instrument for the transmission or payment of money.

(2) "Consideration" includes any premium charged for the sale of goods or services in excess of the cash price of the goods or services.

(3) "Deferred deposit transaction" means, for consideration, accepting a check and holding the check for a period of time prior to deposit or presentment in accordance to an agreement with or any representation made to the maker of the check, whether express or implied.

(4) "Deferred deposit service business" means a person who engages in deferred deposit transactions.

(5) "Department" means the Department of Financial Institutions.

(6) "Licensee" means a person duly licensed by the Department to conduct the business of cashing checks or accepting deferred deposit transactions.

(7) "Person" means any individual, partnership, association, joint stock association, trust, corporation, or other entity, but shall not include the United States government or the government of this State.

Civil Code § 3702. Requirement of License

Except as provided in § 3703, no person shall engage in the business of cashing checks or accepting deferred deposit transactions for a fee or other consideration without having first obtained a license.

Civil Code § 3703. Exemptions from Applicability of §§ 3701 to 3712

The provisions of §§ 3701 to 3712 shall not apply to:

(1) Any bank, trust company, savings and loan association, savings bank, credit union, consumer loan company, or industrial loan corporation which is chartered, licensed, or organized under the laws of this State or under federal law and authorized to do business in this State;

(2) Any person who cashes checks without receiving, directly or indirectly, any consideration or fee therefor; and

(3) Any person principally engaged in the retail sale of goods or services who, either as an incident to or independently of a retail sale, may from time to time cash checks for a fee or other consideration.

Civil Code § 3705. Procedures to be Followed by Licensees

* * *

(2) Any fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest. A licensee shall not charge a service fee in excess of fifteen dollars ($15) per one hundred dollars ($100) on the face amount of the deferred deposit check. A licensee shall prorate any fee, based upon the maximum fee of fifteen dollars ($15). This service fee shall be for a period of fourteen (14) days.

* * *

(8) No licensee shall engage in unfair or deceptive acts, practices, or advertising in the conduct of the licensed business.

(9) No licensee who enters into a deferred deposit transaction with an individual shall prosecute or threaten to prosecute an individual for writing a bad check.

(10) Each licensee shall conspicuously display in every deferred deposit business location a sign that gives the following notice: "No person who enters into a postdated check or deferred deposit check transaction with this business establishment will be prosecuted for or convicted of writing bad checks."

Civil Code § 3708. Requirements of Disclosure by Licensees -- Fees and Service Charges -- Acceptance, Payment, and Deposit of Checks

(1) Each licensee who engages in deferred deposit transactions shall give the customer the disclosures required by the Consumer Credit Protection Act (15 U.S.C. § 1601). Proof of this disclosure shall be made available to the department upon request.

(2) Each licensee shall conspicuously display a schedule of all fees, and charges for all services provided by the licensee that are authorized by §§ 3701 to 3712. The notice shall be posted at the office and every branch office of the licensee.

(3) A licensee may charge, collect, and receive check collection charges made by a financial institution for each check returned or dishonored for any reason, provided that the terms and conditions upon which check collection charges will be charged to the customer are set forth in the written disclosure.

(4) Any personal check accepted from a customer must be payable to the licensee.

(5) Before a licensee shall present for payment or deposit a check accepted by the licensee, the check shall be endorsed with the actual name under which the licensee is doing business.

Civil Code § 3720. Enforcement by Department of Financial Institutions and Attorney General

The provisions of §§ 3702 through 3708 shall be enforced exclusively by the Department of Financial Institutions. Actions for any violations of these provisions shall be prosecuted exclusively by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia.

* * *

UNFAIR BUSINESS PRACTICES ACT

Business and Professions Code § 17200. Definition

As used in this chapter, “unfair competition” shall mean and include any unlawful,

unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.

* * *

Business and Professions Code § 17203. Remedies and Jurisdiction

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Business and Professions Code § 17204. Actions for Relief; Prosecutors

Actions for any relief pursuant to § 17203 shall be prosecuted by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia; or upon the complaint of any person acting for the interests of him or herself, or the general public.

SELECTED FEDERAL CODE PROVISIONS

THE CONSUMER CREDIT PROTECTION ACT

15 U.S.C. § 1601 Congressional Findings and Declaration of Purpose

(a) It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

* * *

15 U.S.C. § 1602 Definitions and Rules of Construction

*** * ***

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

*** * ***

15 U.S.C. § 1605 Determination of Finance Charge

(a) "Finance charge" shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges;

(2) Service or carrying charge;

(3) Loan fee, finder's fee, or similar charge; and

(4) Fee for an investigation or credit report.

Hamilton v. HLT Check Exchange, LLP

Columbia Court of Appeal (1997)

Defendant HLT Check Exchange, LLP ("HLT"), has appealed an order denying its motion to dismiss plaintiffs' claims.

The following are the pertinent facts. On August 22, 1996, the Hamiltons began doing business with HLT, a licensed check cashing company, in Pikeville, Columbia. The Hamiltons engaged in two types of transactions with HLT: (1) "check cashing" transactions, and (2) "deferral" transactions.

The following is how the "check cashing" transactions worked. The Hamiltons would give HLT a document in the form of a check in exchange for cash. HLT agreed to hold the "check" for two weeks before presenting it for payment or before requiring the Hamiltons to "pick up" the check by paying the face amount. HLT's charge for cashing and holding the check for two weeks was 20% of the sum advanced. The Hamiltons incurred the 20% charge for the use of HLT's money and the ability to delay the payment of the check.

In the "deferral" transactions, upon the expiration of two weeks, HLT would allow the Hamiltons to defer presentment of their check in exchange for an additional 10% of the sum originally advanced for each week of deferral. The "deferral" fees were incurred by the Hamiltons in order to have more time to pay off their original "check." The Hamiltons allege that HLT knew or reasonably should have known that at the time of the "check cashing" and "deferral" transactions that they did not have sufficient funds in the bank to cover the checks given to HLT. Based on the above facts, the Hamiltons have made numerous claims against HLT, and HLT moved to dismiss all of them. The trial court denied the motion.

The applicable law on motions to dismiss is as follows: (1) A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief; and, (2) A complaint need only give 'fair notice' of what the plaintiff's claim is and the grounds upon which it rests.

One of the Hamiltons' first claims involves Columbia's Interest and Usury Statutes, Civil Code §§ 3601, et seq. In order to state a claim under Civil Code § 3602, a person must knowingly take, receive, reserve, or charge a rate of interest greater than is allowed in CC § 3601. Based on the above facts, the Hamiltons claim that HLT charged a 520% annual simple interest rate (10% per week times 52 weeks per year), which more than exceeds the rate allowed in Civil Code § 3601.

HLT, relying heavily on the check cashing statutes, argues that it was not charging interest but only service fees for cashing checks. The pertinent check cashing provision, Civil Code § 3705(2), states that "[a]ny fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest."

The Hamiltons, however, argue that their "check cashing" and "deferral" charges were incurred in exchange for extra time to pay back their original check, not fees for cashing a check.

In analyzing this issue, we note that the greed of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible

rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence; and, if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings.

In looking at the substance of the transactions between the Hamiltons and HLT, as opposed to the form, the Court finds that the transactions were nothing more than interest bearing loans. HLT was not cashing the Hamiltons' checks, but rather it was giving them short-term loans that could be deferred for an additional 10% per week.

It also seems clear that Civil Code § 3705(2) was written so there would be no confusion that if a person walked into a check cashing establishment with a government check for $1,000 and the business gave him $900 for the check that the business would not be subject to usury statutes because the $100 payment would be a service fee, not discounted interest. The above $100 charge is considered a service fee because the business is not receiving the $100 for the use of its money, but rather the service of processing and providing instant cash to people who don't have access to bank services.

Moreover, a well-known legal dictionary defines "loan" as "delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest." *Black's Law Dictionary* 844 (5th ed. 1979). It goes on to define "interest" as "the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Id. at 729. Based on the above definitions, it is clear that the charges incurred by the Hamiltons were interest from short-term loans, not service fees.

The Hamiltons also assert claims under the Columbia's Unfair Business Practices Act (UBPA). The UBPA is a broad, remedial act which confers a right of action, in equity, to enjoin unfair, deceptive and/or fraudulent business acts or practices. The goal of the UBPA is intended to address the general societal harm that results when business enterprises act illegally or unethically. In order to state a claim under the UBPA, plaintiff must allege that defendant engaged in unlawful, unfair, or fraudulent business acts or practices; or unfair, deceptive, untrue or misleading advertising. Business and Professions Code section 17200. The factors which the courts consider in determining whether a practice is unfair are: whether the practice violates or offends public policy as it has been established by statutes, the common law, or otherwise; whether it is immoral, unethical, oppressive, or unscrupulous; and whether it causes substantial injury to consumers. Here, the Hamiltons allege that HLT disguised their consumer loan business as a check cashing operation, failed to disclose their interest rates and finance charges, threatened criminal prosecution for writing bad checks when HLT had to have known that the Hamiltons could not have been prosecuted for failing to pay usurious loans, and violated Civil Code provisions pertaining to check-cashing businesses. If proved, these practices constitute actionable unfair business practices under the UBPA.

HLT asserts that a UBPA claim cannot be based upon violations of licensing requirements under Civil Code §§ 3702-3708. HLT argues that the Hamiltons have no standing to seek relief for violations of licensing statutes, that being the exclusive purview of the State. Therefore, the Hamiltons lack standing to raise these statutory violations as a basis for a UBPA claim. This argument lacks merit as it ignores the broad mandate of the UBPA. The courts will look to the underlying conduct engaged in by the business. If that conduct is unlawful, unfair, deceptive, or fraudulent, a UBPA claim can be based upon that conduct notwithstanding the plaintiff's lack of standing to seek direct relief for violations of the law.

In regard to the claims under the federal Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601, et seq., it is clear that the Hamiltons have alleged sufficient facts to state a claim. CCPA is a comprehensive regulatory scheme intended to deter the predatory extension of credit which can disrupt the national economy and increase the personal bankruptcy rate. Its provisions are intended to aid the unsophisticated consumer in determining the total costs of financing. One of its primary mechanisms for accomplishing this is the requirement of "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). The consumer must receive, in writing, the finance charge (a dollar amount) and the annual percentage rate or APR (the cost of credit on a yearly basis). Because CCPA is a remedial act designed to protect consumers, courts construe it liberally in favor of consumers. They focus on the substance, not the form, of credit-extending transactions.

The Hamiltons allege that the defendant failed to disclose the terms of their transactions, such as the 520% annual rate, in the manner required by CCPA. The defendant argues that it did not have to conform to CCPA because the transactions were not covered by the statute. This argument ignores the nature of the deferred-repayment transactions and does not reflect the broad wording of CCPA or its underlying policy.

For example, 15 U.S.C. § 1602 states that:

> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> (f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise,

> consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

Furthermore, 15 U.S.C. § 1605(a) broadly defines "finance charge" as:

> the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:
>
> (1) Interest, time price deferential, and any amount payable under a point, discount, or other system of additional charges;
>
> (2) Service or carrying charge;
>
> (3) Loan fee, finder's fee, or similar charge; and
>
> (4) Fee for an investigation or credit report.

The deferred-repayment transactions between the Hamiltons and HLT involved payments by the Hamiltons of substantial sums of money over time for the privilege of obtaining cash from HLT today. Thus, since the Hamiltons were incurring debt and deferring its payments, these transactions would fall under the language in 15 U.S.C. § 1602(e) and (f). Additionally, the alleged fees paid by the Hamiltons to the defendant would be considered finance charges under the broad definition in 15 U.S.C. § 1605(a).

Affirmed.

Pilot Life Insurance Company v. Sledd

Columbia Court of Appeal (1975)

This is an appeal from a judgment finding that certain charges appellant Robert Sledd (Sledd) was required to incur in connection with a loan were not interest payments and therefore not subject to Columbia's usury statute.

Sledd borrowed money from Pilot Life Insurance Company (Pilot). As a condition of the loan, Pilot required Sledd to purchase credit-life insurance. Sledd purchased the insurance from Pilot, but he could have met the requirement by purchasing insurance from any reputable insurer doing business in this State. When Pilot sued Sledd to enforce the loan, Sledd interposed a defense alleging that the loan was unenforceable because it provided for payment of a usurious interest rate. Sledd alleged that by requiring him to purchase credit-life insurance as a condition of receiving the loan, the payment of the insurance premium amounted to a demand for excessive interest in violation of the state's usury laws.

Usury is the excess over the legal interest charged by a lender to a borrower for the use of the lender's money. It is the reserving and taking or contracting to reserve and take, either directly or indirectly, by commission, discount, exchange, advances, or by any contract or contrivance whatever, a greater sum for the use of money than the lawful interest, the legal rate being 10 percent, and it being usury to charge more than 10 percent. Civil Code § 3601.

However, where an excess over the legal interest is paid for other good and valuable considerations beyond the mere use of money, it is not usury. The substance of Sledd's claim was that the usury consisted of Pilot requiring that he procure a credit-life insurance policy, on his life or on the life of some other person, offered by some reputable life insurance company doing business in this State, and assign it as collateral security for the loan. Sledd purchased the policy, which was issued by Pilot, a reputable

life insurance company doing business in this State. Sledd asserts that the premium charged for the insurance by Pilot as a life-insurance company in connection with the interest charged, which was 6 percent per annum, was in excess of the legal rate of interest, and made the contract usurious. The premium charged did not inure to the benefit of Pilot, as such, but was the consideration charged and earned by it as a life insurance company. There was therefore no violation of the principle that anything given in excess of legal interest which inures to the benefit of the lender will be considered usury.

Sledd contends that the premium should be included as interest because the credit-life insurance was of no value to him. The beneficiary of the policy was Pilot, and the amount of the policy covered only the amount of the loan. Thus, Sledd argues that he received nothing of value, and that the policy was, in effect, a payment to protect the interest of the lender. It is to be noted that Sledd was not required to take out the insurance with Pilot, but only with some reputable insurance company doing business in this State; that less than the maximum rate of 10% interest was charged on the loan; and that the premium charged was not alleged to be more than was customarily charged non-borrowers for similar insurance coverage.

Judgment affirmed.

ANSWER 1 TO PERFORMANCE TEST-A

1)

MEMORANDUM

To: Annabelle Lee

From: Applicant

Date: July 27, 2004

RE: Potential Claims Jack [sic] Donovan has against Bargain Mart, Inc.

The following is a list of potential claims Jack [sic] has against Bargain Mart, Inc. as you requested. Additionally, I have included information on how Jack [sic] will be able to establish his claim, or if he can't, what information we need in order for him to do so.

Claim that the gift certificates operated as a[n] interest rate that violate Civil Code Sections 3601 & 3602 of the Interest & Usury Statutes (U&I).

Civil code sections 3601 & 3602 allows [sic] legal interest to be stipulated by parties, however, makes [sic] it unlawful for such interest rate to exceed 20% per year if the principal is $3,000.00 or less.

First, Jack [sic] will have to establish that the Bargain Mart (BM) gift certificates operated as a charge for the immediate use of its up-front money by those who did not have sufficient funds. Jack [sic] can argue that since BM overpriced it[s] products, the gift certificates were intended to effectively operate as a service or interest charge since BM knew that such certificates would not be used on its overpriced products by people who had received certificates, i.e.[,] those on a pension. BM had such knowledge because it mandated proof of a pension payment prior to disbursing funds to customers like Jack [sic]. Additionally, a reasonable person, especially one on a limited fixed income, would not spend frivolously on overpriced products that they could get across the street for much lower [sic]. Further, the fact that Larry Walker, a former employee[,] never actually saw anyone use a gift certificate in the store is a good indication that the certificates were merely covering up what was truly a service or interest charge. We will need to get more information on whether gift certificates are ever used in the store, and whether people buy their products from this store and to what extent to strengthen our claim that these gift certificates operated as a charge on the loan of money. If we can't establish this first fact, we will not have a case under the U&I statute; however, based on the preceding, it [is] likely we can establish this fact even without further information.

Secondly, Jack [sic] must establish that the gift certificates operated as an interest charge

as opposed to a service charge in order to have a claim under U&I statute because a service charge will not fall within the purview of the U&I statute. Courts look to the substance of the transaction as opposed to the form in determining whether a charge is interest or mere service charge (Hamilton). A service charge is a charge on processing a check and providing instant cash as opposed to merely lending money to a customer who did not have sufficient funds so that he could immediately use money he didn't have. (See Hamilton). Interest is defined as the compensation allowed by law or fixed by the parties for use or forbearance of money. Therefore, it appears as though Jack [sic] can establish this point without further information. (However, in the unlikely even[t] this is considered a service charge as opposed to interest, we still have a UBPA claim based on a section 3705 violation discussed below.)

Thirdly, Jack [sic] will have to show that the interest rate was usury, namely that it is greater than what is allowable and the excess was not paid for other good and valuable consideratio[n]s beyond the use of money (Hamilton & Sledd). This can easily be done since the original loan amount was $300 and the gift certificates (assuming they operated as an interest charge) were $75, which is 25% of the principal, thereby exceeding the allowable interest rate. Additionally, the excess of interest was in exchange for gift certificates in a store that overpriced its products than [sic] its competitor across the street. We will have to establish that such gift certificates did not constitute good or valuable consideration since they effectively couldn't and wouldn't be used. Furthermore the fact that the consumer's only option was to give its business to the provider of the money may be additional support for our argument (see Sledd).

Fourthly, Jack [sic] will have to show that BM knowingly accepted an interest rate that was greater than what was allowed. We will have to establish that BM knew it was charging in excess of an allowable amount. It may be helpful to know why BM instituted this deferral system, its purpose, motivation and rationale for such deferral system. If it had conducted research or had itself been involved in anything that would have revealed the maximum allowable interest rate, Jack [sic] will be able to establish this claim. Additionally, if we can establish BM is a [sic] licensed by the Department of Financial Systems, it is likely that it would have known of such ceiling on the allowable interest rates.

<u>Claim that the Bargain Mart, Inc. has violated the Unfair Business Practices Act (UBPA)</u>

The UBPA attempts to prevent harm caused by business acting illegally or unethically by prohibiting unfair competition by using fraudulent, misleading, or unlawful business practices. Unfair business practices are determined by considering a variety of factors, including whether the practice violates public policy as evidenced by such practice being prohibited by statute. Therefore, Jack [sic] must prove that BM is a business and has violated a statute. Jack [sic] can rely on the section 3601 & 3602 violations of the U&I or he can rely on additional U&I sections even though direct actio[n]s based on such sections may only be brought by the state (See Hamilton which explains that a UBPA claim can be based on conduct despite plaintiff's lack of standing to seek direct relief for violation based

on that statute).

Therefore in addition to relying on sections 3601 & 3602 violations for unlawful interest rate charged, Jack [sic] can rely on sections 3705 (2) (9) & (10) to ground his UBPA claim, even though he could not bring such direct actions as a private individual since there [sic] are expressly limited to the state by civil code section 3720.

Jack [sic] will have to establish that BM [is] in the deferred deposit service business and is a licensee, i.e.[,] that BM has been licensed by the Department of Financial Institutions to conduct cash checking or accepting deferred deposit transactions. We have support that BM is in the deferred deposit service business since it did engage in a deferred deposit transaction with Jack by accepting a post-dated check for a higher value than the cash BM gave in exchange and BM probably regularly partakes in such transactions as evidenced by its ad stating "Come and see us if you're short on cash" and its extensive chart regarding the check amount required for the relevant cash advance. We will need the additional fact of whether BM is licensed to partake in such activity. If so, then Jack [sic] can proceed with his reliance on section 3705 to establish his UBPA violation claim.

Assuming that BM is a licensee, we will have to ensure that BM doesn't fall within one of the exemptions to the applicability of section 3705, namely that he is not a person principally engaged in retail sales who incidentally or independently may from time to time cash checks for a fee. Although we know BM is a retailer, we need to discover the extent of its retail business and whether the operation is merely a coverup of what is truly a loan service. Also, we will have to establish that the gift certificates operate as a fee since BM has priced products so high they effectively will not be used and therefore no consideration is received in exchange for the excess of the customer's check beyond the cash given by BM. Further, we will have to establish that the deferral system is the core of BM's business and that the retail store is incidental as opposed to it being the other way around. Assuming we can establish that BM has effectively charged a fee through its gift certificates and that BM's retail business isn't as booming as its check cashing business, we will be able to overcome section 3703(3)'s exemption and[,] consequently, rely on section 3705 for establishing Jack's [sic] claim.

Civil Code section 3705 specifies that a licensee can't charge a service fee exceeding fifteen dollars for every hundred dollars loaned. Therefore, if we can't establish the gift certificates operate as an interest charge under our sections 3601 & 3602 claims, we can alternatively seek to establish they are a service charge, in which case they would be invalid since the maximum allowable service charge amount on three hundred dollars is forty-five dollars, yet BM charged seventy-five. Therefore a UBPA violation can be grounded in the service charge that exceeds the allowable amount.

Additionally, the UBPA claim can be grounded in section 3705(9). Although a licensee can collect a return check c[h]arge pursuant to civil code section 3708(3), it cannot enter into a deferred deposit transaction with the threat of prosecution for writing a bad check

pursuant to civil code section 3705(9). In this case, assuming we establish BM is a licensee, we must establish that this was a deferred deposit transaction & that BM threatened Jack [sic] with prosecution for writing a bad check. A deferred deposit transaction is defined as holding a check for a period prior to deposit in accordance with an agreement made to the maker of the check in exchange for consideration, which includes a premium charged for the sale of service in excess of the goods or service. In this case, we can clearly establish such transaction because BM holds the check for a specified periods [sic] pursuant to the agreement made with Jack[sic], namely 14 days. Additionally, in exchange for this agreement to hold the check, Jack [sic] writes a check for seventy-five dollars over the amount of immediate cash given to BM. Therefore, this can qualify as a deferred deposit transaction. Additionally, the agreement between BM and Jack [sic] expressly stated in paragraph 4 that Jack [sic] agrees that he may be subject to criminal prosecution and civil penalties for writing bad checks, thus violating section 3705(9). Therefore, liability under UBPA can be grounded in this section, assuming the preceding is met.

Furthermore, the UBPA claim may be grounded in section 3705(10) if we can discover additional facts that BM, as a licensee, failed to conspicuously display a sign giving notice to Jack [sic] that customers who enter into a deferred deposit transaction will not be prosecuted or convicted for writing bad checks.

Claim that the Bargain Mart, Inc. has violated the Consumer Credit Protection Act (CCPA)

CCPA requires that a creditor give meaningful disclosure of credit terms to enable the consumer to compare various credit terms and avoid uninformed use of credit. It is read liberally to protect the consumer from predatory extension of credit which can have the tendency to increase personal bankruptcy. The consumer must receive the finance charge in writing.

First we will have to establish that BM falls within the purview of this Act, namely that it is a creditor. This requires us to establish that BM regularly extends consumer credit or loans for which there is a finance charge. If we can establish the gift certificates effectively and were intended to operate as a service charge or interest, we will likely have a claim under this Act. We need the information discussed above regarding the gift certificates, i.e.[,] their purpose and extent of business. Additionally, it is likely we can establish that BM is a creditor since he did advertise for such deferments & had what appears to be an easy and accessible deferral chart payment system, but will need further facts as to how much he actually utilized the deferred payment system. Even if we don't get the information that will be helpful, Jack [sic] still has a claim under this action per Hamilton. Hamilton has stated the incurring of debt and deferring of payments falls within CCPA, and charges on such transactions constitute finance charges falls under the Act.

Second we will have to establish that BM as a creditor did not give meaningful disclosure of the credit terms to enable the consumer to compare various credit terms. We will argue

that because the terms of extending credit, namely char[g]ing an interest or service charge, was hidden since Jack thought he was obtaining a gift certificate that had real value but was unusable. The fact that Jack [sic] was living on a limited income and BM knew such a fact due to its requirement that Jack [sic] supply a copy of his pension payment prior to BM disbursing the funds, establishes that BM knew Jack [sic] would not use such gift certificates on its overpriced products and therefore, payment for such gift certificates would certainly operate as a service charge or interest. Additionally, because BM knew this essentially constituted a loan with a service or interest charge, such terms were not adequately disclosed. Rather Jack [sic] was lead [sic] to believe that he was getting gift certificates, when in actuality he was getting a service charge or interest rate. Therefore, he could not meaningfully appreciate the terms of the loan due to BM's nondisclosures, and consequently, could not make an informed credit decision which the CCPA is aimed at preventing. Thus, Jack [sic] has a claim under CCPA.

ANSWER 2 TO PERFORMANCE TEST-A

1)

MEMORANDUM

To: Annabelle Lee

From: Applicant

Date: July 27, 2004

RE: Jack [sic] Donovan and Bargain Mart, Inc.

Per your request, I have done some preliminary work on Dr. [sic] Donovan's potential statutory claims against Bargain Mart, Inc.

I. Donovan may assert that Bargain Mart has violated Columbia's Interest and Usury Statutes

A. Statutory requirements:

1. The usury statutes apply to interest charges, not service charges.

The Hamilton court explained that Columbia's interest and usury statutes only apply to interest charged for loans (usury) and do not apply to service fees for cashing checks. Thus, we must first determine whether Donovan was charged interest on a short term loan or, alternatively, a service fee for cashing the check. In Hamilton, the court of appeals explained that whether a fee is interest or a service fee is determined by the whole of the evidence. Citing Civil Code section 3705(2), the court explained that service fees are found when a fee is charged at the time the check is cashed for the service of processing the check and providing instant cash for people without access to bank services. Section 3705 explains that "any fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest." In Hamilton, the court found that HLT's deferment of check cashing was not a fee for cashing the Hamilton's [sic] checks, but rather giving them short-term loans subject to the usury statutes.

In Pilot Life Insurance Co., the court of appeals again attempted to define what constitute interest payments subject to the usury statutes. There, Sledd borrowed money from Pilot in exchange for a promise to purchase credit-life insurance. Sledd alleged that requiring him to purchase life insurance as a condition of receiving the loan amounted to a demand for excessive interest in violation of the usury laws. The Pilot court explained that anything given in excess of legal interest which inures to the benefit of the lender will

generally be considered usury. However, Pilot explained, where an excess over the legal interest is paid for other goods and valuable considerations beyond the mere use of money, it is not usury. Moreover, the court explained that a payment is not usury simply because the borrower received nothing of value. For example, in Pilot, the court rejected Sledd's argument that the requirement that he take out credit-life insurance was no benefit to him and thus constitutes usury. Thus, the court found the life-insurance policy was not interest payments subject to the usury laws.

In Pilot Life Ins. Co., the court explained that usury is the "excess over the legal interest charged by a lender to borrower for the use of the lender's money." The elements include "the reserving and taking or contracting to reserve and take, either directly or indirectly, by commission, discount, exchange, advance, or by any contract or contrivance whatever, a greater sum for the use of money than the lawful interest, the legal rate being 10 percent, and it being usury to charge more than 10 percent." Civil Code section 3601.

2. If Bargain Mart charged an interest, the Usury statutes impose statutory limits of 10% on the amount of interest that can be charged.

In Hamilton, the court of appeals explained that to state a claim under Civil Code section 3602, a person must knowingly take, reserve, or charge a rate of interest greater than is allowed in CC section 3601. Section 3601 provides that the legal rate of interest shall be 10 percent per year unless established by contract. Where the principal amount involves under $3,000, the statute states that the legal rate shall not exceed 20 percent per year on any loan, advance, or forbearance to enforce the collection of any sum unless pursuant to another law.

B. Facts as applied

For Donovan to assert a claim that Bargain Mart violated the statutory usury laws, he will have to establish (1) that the fees Donovan paid were not simply service fees, but rather interest or usury and (2) that the usury charged exceeded the 10% annual statutory limit. As to the first element, we know that Donovan gave Bargain Mart a postdated check for $375 in exchange for $300 cash, $75 in gift certificates, and a promise not to cash the check for 14 days. Although Larry Walker told us that Bargain Mart told him never to refer to these transactions as loans, and although Bargain Mart's agreement with Donovan specifically said this was not a loan since Donovan was getting back exactly what he was giving them, we know from Hamilton that we look at the totality of circumstances to determine whether a loan or service fee has occurred.

In exchange for Donovan's $375, we know that Donovan received $75 in gift certificates and that the gift certificates were never used. As Larry Walker, Bargain Mart's former employee, explained[,] the appliances were simply too expensive and of poor quality. Moreover, the gift certificates could only be used for half of the purchase of the appliance, and as Walker explained, the goods weren't even worth the half that would have

to be paid in cash. As the court in Pilot explained, anything that inures to the benefit of the lender is generally considered usury. Here, the gift certificates, if used, clearly benefit the lender. However, although not dispositive, it is clear that Donovan never used the gift certificates and apparent from Walker's statement that the gift certificates were illusory and of no value considering the excessive prices at Bargain Mart. Indeed, a toaster over [sic] sold for $150, $75 of which would have to be paid for in cash, and the toaster was worth less than the $75 in cash. Considering the totality of the circumstances, it looks like the $75 interest charged to Donovan in exchange for gift certificates of seemingly no value constitute usury and are subject to the interest limitations.

Turning to the second element, an interest rate limit of 10%, Donovan told us that the man behind the counter looked at a chart to determine how much Donovan would have to pay to get the cash. Donovan signed an agreement promising to pay $25 for a bounced check, which he was forced to pay when his check bounced. In fact, when Donovan's check bounced, he had to pay the [sic] $500, the $375 he owed, a $25 fee for the check bouncing, and another $100 gift certificate. As you explained to Donovan in your interview, this adds up to a 650% if this was a straight loan without the gift certificates: specifically, $75 is 25% of the $300 he borrowed, the term was two weeks, which is 1/26 of a 52 week year, and 25% times 26 is 650%. Moreover, this was for the second transaction.

C. Facts we need

Based on the facts presently available to us, it appears that Donovan will be able to establish the statutory requirements supporting a claim under Columbia's interest and usury statutes. Thus, any other facts discovered through investigation and disclosure will simply bolster the claim.

II. Donovan may assert that Bargain Mart has violated Columbia's Unfair Business Practices Act (UBPA)

A. Statutory requirements

Columbia's Unfair Business Practices Act is a "broad, remedial act which confers a right of action, in equity, to enjoin unfair, deceptive and/or fraudulent business acts or practices." Hamilton. To state a claim, Hamilton explains that Donovan must allege that defendant Bargain Mart engaged in (1) unlawful, unfair, or fraudulent business acts or practices; or (2) unfair, deceptive, untrue or misleading advertising. See Hamilton.

B. Facts as applied

Unlawful, unfair, or fraudulent business acts and practices

In considering whether a practice is unfair, Hamilton explains that courts will consider: whether (a) the practice violates or offends public policy as it has been

established by statutes, the common law, or otherwise; (b) whether it is immoral, unethical, oppressive, or unscrupulous; and (c) whether it causes substantial injury to consumers. In Hamilton, the court recognized that the following business acts and practices by HLT, if proven, could be found to violate the Unfair Business Practices Act:

(1) disguising consumer loan business as a check cashing operation

(2) failing to disclose interest rates and financial charges

(3) threatening criminal prosecution for writing bad checks when HLT had to have known that the Hamiltons could not have been prosecuted for failing to pay usurious loans; and

(4) violated Civil Code provisions pertaining to check-cashing businesses. As to this latter point, the Hamilton court rejected the argument that the plaintiff lacked standing to challenge violations of Civil Code sections 3702 - 3708 and permitted a challenge to these statutory violations under the UBPA. Civil Code sections 3702 - 3708 provide that it is unlawful for a person to engage in the business of cashing checks or accepting deferred deposit transactions for a fee or other consideration without having first obtained a license. However, these sections do not apply to (2) "any person who cashes checks without receiving, directly or indirectly, any consideration or fee therefor and (3) any person principally engaged in the retail sale of goods or services who, either as an incident to or independently of a retail sale, may from time to time cash checks for a fee or other consideration." Section 3703. If the sections apply, section 3708 provides among other things that the licensee shall (1) disclose conspicuously all fees and charges; (2) post fees and charges at every branch office.

Because of the similarity of the present case to the facts in Hamilton, Donovan can likely assert the same claims of UBPA violations as those asserted against HLT in Hamilton. Thus, I take each claim in turn:

1. First, Donovan may argue that Bargain Mart disguised its check cashing operation as an appliance business. Although Bargain Mart looked like a regular small appliance store with toaster ovens, microwaves, blenders, and food processors for sale, Bargain Mart's advertisement stated that "if you're short on cash or don't have good credit, we also offer cash-plus services. . . you can write us a check for the amount you need and walk away with immediate cash." Larry Walker, an employee of Bargain Mart for about 8 months three years ago, also stated that Bargain Mart offered a "cash-plus"service in addition to its appliances. However, it appears that Bargain Mart was not actually engaged in the sale of appliances, but only the cash-plus service. According to his interview, Walker never saw anyone come in only to buy appliances when he worked there. Rather, it appears, Bargain Mart was simply a cash-checking store disguised as an appliance store. This is likely a deceptive business act. However, we should determine through discovery and investigation whether Bargain Mart actually sold any appliances or simply acted as an appliance store as a disguise to its cash-plus service.

2. Next, Donovan can argue that Bargain Mart failed to disclose interest rates and financial charges. Walker explained the concept as one by which people would get cash in exchange for writing a check for a higher amount. Although salespersons consult a chart to determine the amount a customer must pay to receive immediate cash, Walker explained that customers were not given copies of the chart. Thus, it seems, Bargain Mart did not disclose to Donovan the fees to which he was subject.

3. Third, Donovan can argue that Bargain Mart improperly threatened criminal prosecution for writing bad checks when it knew or had to know that Donovan could not have been prosecuted for failing to pay usurious loans. Bargain Mart's agreement with Donovan stated that Donovan "may be subject to criminal prosecution and civil penalties for writing "bad" checks under applicable laws. However, as the court held in Hamilton, Bargain Mart should have known that Donovan could not be criminally prosecuted for failure to pay usurious laws and thus such threats violated the UBPA.

4. Finally, Donovan can argue that Bargain Mart violated the statutory requirements under Civil Code sections 3702 - 3708 and thus that the violation of the statutes constitutes an unfair practice under the UBPA. However, as explained below, we do not yet have enough facts to determine whether Bargain Mart in fact violated these statutory requirements and whether Bargain Mart is subject to such restrictions as a licensee.

Assuming that Bargain Mart is subject to the requirements of Sections 3702 - 3708, however[,] we know that Bargain Mart violated section 3705 by threatening Donovan with criminal and civil prosecution for writing bad checks. As 3705 states, Bargain Mart was not only precluded from making such threats, but apparently also failed in its affirmation duty to display a notice stating that no person entering into such transaction can be prosecuted or convicted of writing bad checks.

Unfair, deceptive, untrue or misleading advertising

In addition to the above described claims of unfair business acts or practices, Donovan can also argue that Bargain Mart engaged in unfair, deceptive, and untrue or misleading advertising in violation of the UBPA. As to this claim, we know that Donovan found the flyer for Bargain Mart in the Saver weekly paper, a paper which lists sales and ads. Bargain Mart's advertisement stated with regards to the appliances "if you're in the market for good deals on small appliances, come to us . . . we stock a large supply of small appliances. Check out our prices--they can't be beat." However, as Larry Walker explained, Bargain Mart's prices on appliances were nothing [sic] but bargains that couldn't be beat. Rather, Walker explained that the appliances found at Bargain Mart were priced over two times that of competitors and the quality of the goods was poor. Thus, Bargain Mart falsely advertised its good prices arguably in violation of the UBPA.

C. Facts we need

In summary, the facts currently available to establish the statutory requirements of a violation of the UBPA if we determine that sections 3702-3708 apply to Bargain Mart. In considering whether a practice or advertising is unfair in violation of the UBPA, Hamilton explains that courts will consider: whether (a) the practice violates or offends public policy as it has been established by statutes, the common law, or otherwise; (b) whether it is immoral, unethical, oppressive, or unscrupulous; and (c) whether it causes substantial injury to consumers.

Thus, if Bargain Mart's practices are said to violate sections 3702-3708, Bargain Mart will be subject to a claim under UBPA. However, we do not yet have enough facts to determine whether Bargain Mart is subject to the licensing and other requirements of sections 3702 - 3708. Thus, we will want to determine by investigation and discovery whether Bargain Mart has a license to cash checks or accept deferred deposit transactions for a fee as required under section 3702. It would also assist us to determine whether Bargain Mart actually ever sells appliances either incident to or independent of the cash advance sale. If so, it may be exempt from the license requirements under section 3703. Finally, we must determine whether Bargain Mart posts its fees at every branch office in compliance with section 3708 or whether Bargain Mart's failure to post such fees constitutes an additional violation of the UBPA.

III. Donovan may assert that Bargain Mart has violated the federal Consumer Credit Protection Act (CCPA)

A. Statutory requirements

1. To whom does the CCPA apply

The Hamilton court defined the Consumer Credit Protection Act (CCPA) as a "comprehensive regulatory scheme intended to deter the predatory extension of credit which can disrupt the national economy and increase the personal bankruptcy rate." Applying the CCPA to HLT, a licensed check cashing company in Pikeville[,] Columbia, the Hamilton court explained that the CCPA is intended to aid the unsophisticated consumer in determining the total costs of financing. HLT engaged in "check cashing" and "deferral" transactions. Pursuant to 15 U.S.C section 1602, the CCPA applies where a "credit" is granted by a creditor to debtor to defer payment of a debt or to incur debt and defer its payment. "Creditors," or persons who both (1) regularly extends [sic] consumer credit payable in more than four installments or for which the payment of a finance charge is or may be required and (2) is the person to whom the debt is initially payable. Section 1605 defines "finance charge" to include "interest, time price differential, and any amount payable under a point discount, or other system of additional charges."

2. Elements

The Hamilton court explained that the CCPA requires "a meaningful disclosure of

credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." To satisfy this element, the consumer must receive, in writing, the finance charge (a dollar amount) and the annual percentage rate or APR. The court further explained that courts construe the CCPA liberally in favor of consumers, focusing on the substance, not the form, of credit-extending transactions.

B. Facts as applied to the CCPA

Based on Donovan's interview, it is clear that Donovan qualifies as an unsophisticated consumer of the type the CCPA is intended to protect. Donovan receives Social Security and a small pension from his years working for State Department of Agriculture as an inspector. Donovan lives off a fixed income.

Whether the CCPA applies to Bargain Mart depends on whether Bargain Mart's transaction with Donovan constitutes the grant of a "credit" by Bargain Mart to Donovan to defer payment of a debt or to incur debt and defer its payment. Donovan agreed to pay Bargain Mart $375 in exchange for $300 in cash, $75 in gift certificates, and a promise by Bargain Mart not to cash the check for 14 days. Thus, Bargain Mart agreed to defer payment of a debt and thus granted Donovan a credit.

Thus, we must determine whether Bargain Mart is a creditor under the statutory provisions. Creditors include those who permit payment of a finance charge, including any interest, time price differential, or amount payable under any system of additional charges, and who is the person to whom the debt is initially payable. Bargain Mart permitted Donovan to pay a finance charge in the form of a gift certificate, and Donovan was responsible for payment directly to Bargain Mart. Thus, Bargain Mart is a creditor subject to the terms of the CCPA.

As a creditor subject to the CCPA, it is apparent from the facts at our disposal that Bargain Mart failed to fully disclose the credit terms to Donovan so that Donovan could compare the terms with other options in violation of the CCPA. For example, the salesperson consulted a chart to determine how much Donovan had to pay depending on how many days he wanted the loan. However, Donovan was not given a copy of the chart.

Although Donovan did enter into a written agreement with Bargain Mart, the agreement did not state the finance charge (a dollar amount) and the annual percentage rate or APR. Rather, the agreement stated that he would write a postdated check in the amount of $375 which BMI would not cash for 14 days in exchange for $300 in cash and $75 in gift certificates. The agreement stated that in the event a check is returned to BMI unpaid, Donovan would pay a returned check charge of $25.00. The agreement further explained that Donovan would be subject to criminal prosecution and civil penalties for writing "bad checks" under applicable laws.

Because the agreement Bargain Mart entered into with Donovan failed to meaningfully disclose the credit terms in a manner by which Donovan could compare more readily other terms available, the agreement violated the CCPA and Donovan may assert a claim alleging such violation.

C. Facts we need

Based on the facts presently available to us, it appears that Donovan will be able to establish the statutory requirements supporting a claim under the CCPA for failure to meaningfully disclose credit terms. Thus, any other facts discovered through investigation and disclosure will simply bolster the claim.

Conclusion

Based on the foregoing information, it appears that Donovan has a number of claims against Bargain Mart for violations of statutory requirements.

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

JAYNES v. PALM GARDENS GROUP

JAYNES V. PALM GARDENS GROUP

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

MEMORANDUM

To: Applicant

From: Daniel Spitz

Date: July 29, 2004

Re: **Jaynes v. Palm Gardens Group**

Our firm represents Lydia Jaynes, a tenant at Palm Gardens Apartments, in a negligence claim against Palm Gardens Group (Palm). Ms. Jaynes was assaulted and seriously injured by an unknown male assailant in the parking garage at Palm Gardens Apartments. She has filed a lawsuit against Palm for negligent failure to repair a broken security gate in the parking garage.

Palm has filed a Motion for Summary Judgment. Please draft plaintiff's responsive memorandum of points and authorities opposing the granting of that summary judgment motion. In discussing the facts, assume that the documents in the file will be presented to the court in the form of declarations and exhibits. At this point, simply identify the source of any facts to which you refer.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

To: Firm Associates

Re: Memoranda in Opposition to Motions for Summary Judgment

A Memorandum of Points and Authorities in Opposition to a Motion for Summary Judgment consists of three sections, as follows:

SECTION I. *Introduction.* Write a concise summary of the nature of the underlying case, the basis for the summary judgment motion and the basis for the opposition.

SECTION II. *Response to Moving Party's Arguments.* The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Given the nature of summary judgment, it is imperative that there be reference not only to the existence of relevant facts, but where those relevant facts can be found in the record. To the extent that factual material has yet to be reduced to a form appropriate for presentation to the court (e.g., a witness statement has not been converted to a declaration), you may simply identify the source of any factual material to which you refer.

The firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, *Improper:* PLAINTIFF HAS ESTABLISHED A TRIABLE ISSUE OF FACT AS TO DAMAGES. *Proper:* NOTES BY A

TREATING PHYSICIAN ARE SUFFICIENT TO ESTABLISH A TRIABLE ISSUE OF FACT AS TO PLAINTIFF'S DAMAGES.

SECTION III. *Conclusion.* This is a brief statement asking the court to find in our client's favor.

Paul Price
HIMMLER & MATZEN
1 West Union Plaza, 15th Floor
Garden City, Columbia
(555) 267-0001

Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF SCHYLER

LYDIA JAYNES,

Plaintiff,

vs.

PALM GARDENS GROUP,

Defendant.
_____/

Case No. 171757

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Palm Gardens Group owns apartment complexes including the Palm Gardens Apartments. Plaintiff Lydia Jaynes alleges she was assaulted and injured by an unknown assailant in the parking garage at Palm Gardens Apartments. She has sued defendant for negligent failure to repair a broken security gate in the parking garage and to provide adequate security measures.

II. PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO SHOW THERE IS A TRIABLE ISSUE OF MATERIAL FACT ON THE ELEMENT OF CAUSATION.

In *Putnam v. Winters Group*, the Columbia Supreme Court upheld a lower court's granting of a motion for summary judgment finding that the plaintiff had not established and could not reasonably expect to establish a *prima facie* case of causation. As in *Putnam*, plaintiff in the instant case has brought forth merely evidence of the "speculative possibility" that additional actions on the part of defendant "might have prevented the assault."

III. PLAINTIFF HAS NOT ESTABLISHED, AND CANNOT REASONABLY EXPECT TO ESTABLISH, A *PRIMA FACIE* CASE FOR CAUSATION.

Plaintiff has failed to present any evidence beyond mere speculation to support her claim for causation. Indeed, fundamental reasonable possibilities for causation have not been foreclosed. For example:

Plaintiff has offered no evidence showing the identity of her assailant;

Plaintiff has offered no evidence showing when the security gate was broken;

Plaintiff has offered no evidence that the assailant entered through the gate, much less when the gate was broken;

Plaintiff has offered no evidence that the assailant broke the gate himself;

Plaintiff has offered no evidence that defendant reasonably or effectively could have warned tenants of unspecified dangers from unknown assailants frequenting the garage.

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IV. CONCLUSION

For the above stated reasons, defendant respectfully requests this court grant summary judgment in favor of Palm Gardens Group.

Respectfully submitted,

HIMMLER & MATZEN

Dated: July 14, 2004

Paul Price

By: PAUL PRICE

MOLINA, SPITZ, and CARTER

MEMORANDUM

To: Applicant

From: Daniel Spitz

Below is the draft declaration of our client, Lydia Jaynes, prepared from the transcript of her initial interview. We will add the case caption and title, and have it signed before appending it to our response.

DECLARATION OF LYDIA JAYNES

I, Lydia Jaynes, declare as follows:

1. I rented my apartment at Palm Gardens Apartments in late 2001 because I wanted a secure building with controlled access.

2. I saw a newspaper advertisement for Palm Gardens Apartments which stated that it was a secure building.

3. The apartment building is small, with ten 2-bedroom apartment units over a parking garage with 12 parking spaces.

4. When I visited the apartment building I was shown the various security features of the building.

5. I was also assured by the building's managers that this particular apartment building had several security features, including underground parking secured by an automatic gate which required an access card for entry (the standard sort of iron gate that rises up from the ground to permit a car to enter, then closes after the car has entered).

6. In addition to the security gate, there were three other pedestrian gates or doors

leading from the parking garage. Two gates exited to a patio area of the apartment building. The third was a door leading to the elevator which ran between the garage and the apartment building.

7. These gates and the door require keys to unlock them, and the keys are provided only to current tenants.

8. Since the Fall of 2002, there has been a serious problem with the automatic gate to the parking garage. It would usually stick open, and it was often not repaired.

9. On at least three different occasions in late 2002 and early 2003, I complained to the manager that the security gate was not closing properly. Other tenants complained as well.

10. In approximately January or February 2003, a car ran into the gate and, from that time on, the gate never worked properly, and often left a three-foot space between the ground and the bottom of the gate.

11. I arrived home at about 2 a.m. on June 15, 2003, and used my security access card to enter the apartment building's underground garage. When I arrived, the gate was partially stuck open, with about a 2 to 3 foot gap between the bottom of the gate and the garage floor.

12. I drove down the ramp and pulled into my parking space. As I got out of my car, I was attacked by a man. He grabbed me by the throat, beat me, and sexually assaulted me. He fled out through the partially open security gate.

13. I did not recognize the man who attacked me. The man wore a mask and did not say or do anything that enabled me to identify him.

14. I am quite sure that the attacker was not any of the male tenants living in the apartment building. I know them all and would have been able to recognize any of the tenants if he had been the assailant.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on _____ in Phillipstown, Columbia.

_____
Lydia Jaynes

Ripka International Investigative Report

To: Molina, Spitz, and Carter

From: John Ripka, Ripka International

You have asked me to conduct an investigation as to the assault of Lydia Jaynes at Palm Gardens Apartments. In addition, you asked me to interview the other apartment tenants. I have also examined the incidence of crime at the Palm Gardens Apartments and its immediate surroundings.

First, I got a feel for the neighborhood. I drove around the area surrounding the apartment complex several times, both during the day and in the evening. Generally, the area is residential, about a mile or so from the downtown business district. The residents are diverse ethnically. It struck me as a lower-to-middle class area based on the relatively high percentage of multi-family housing; the type of cars parked on the street; relatively small single-family homes on smaller lots, etc.

I looked into crime demographics through reports done by the Brookminster Police Department. Palm Gardens is located in a moderate crime area. I say this because the district ranked 35th out of 59 districts in Brookminster in terms of overall crime rates. I also reviewed the police report; the repair logs kept by the apartment manager; the logs kept by the security gate service company; and building permit records.

I inspected the premises, specifically the parking lot and its immediate surrounding area. I did this both during the day and at night; also during the week and over a weekend. It seems clear to me that the building was designed to be a security building in that there were wrought iron security gates installed in the garage in or about 1987. The building was designed as a security complex to attract tenants to the building as opposed to some other building that didn't have those security amenities. I examined the security gates – both the

car gate and the pedestrian gates.

I interviewed police Captain Richard Snyder. He informed me that the Palm Gardens is located in a low to moderate crime area of the City of Brookminster. Over the last five years, there have been some, but not many, incidents of crimes of the person (assault, battery, robbery). Incidents of property crimes (burglary, theft, vandalism) are somewhat more frequent. Captain Snyder also said that there have been no reported incidents involving violent behavior by tenants of Palm Gardens or their guests.

According to Captain Snyder, in assault cases typically the assailant will have cased the location in advance, will know where the escape routes are and will wait for the victim to come to him or provide the opportunity for him to attack the victim. The fact that the assailant attacked Ms. Jaynes in the parking structure as she exited her vehicle suggested to Captain Snyder that the assailant knew, either from prior experience or prior time at this location, that he would be undisturbed during that period of time, that there was a very small chance of being observed by anyone, and that he would have an excellent ability to escape, if necessary. He may have selected this location because of the conditions that he found, such as an open gate providing him access, the isolated, remote nature of the structure, the opportunities to hide, and escape routes out of the building. Snyder thinks they all contributed to the selection of this particular building and the attack on Ms. Jaynes.

From the time Ms. Jaynes moved in until the time she was assaulted, there were no other assaults or violent crimes in the garage, but there were three auto break-ins in the garage reported to the police during that period, as well as a number of incidents of vandalism involving smashing of windshields and slashed tires. These incidents occurred when the security gate was broken.

The nature of the parking structure being underground or below the building, and being remote and isolated, provided a potentially hazardous environment for people that would have to drive in underground, essentially, and park there at night, unless the security gates

were properly functioning. The facts of this case seem to indicate that the security gate to the garage was defective on the evening of Ms. Jaynes' assault in that it would not fully close and allowed the assailant to gain access to the parking structure and lie in wait for Ms. Jaynes to pull into her parking space. For the months immediately preceding the assault, there was no one on site on a daily basis in a management capacity to inspect, test, receive tenant complaints or respond to any defects that might have existed in the security gates. I think that had someone been on the premises acting in that capacity, they would have become aware of the defective condition of the gate and had an opportunity to make the repair.

I have reviewed the repair logs maintained by Palm Gardens. The relevant excerpts are attached. These logs record complaints about items needing repair at the Palm Gardens. There are 7 reports of tenant complaints about the security gate not closing properly between November 2002 through May 2003. The log indicates that calls to the repair company were made in six out of seven times within 24 hours of the date and time of the complaint.

The last tenant complaint prior to Ms. Jaynes' assault occurred on May 27, 2003. However, there was a service call made by the repair company on June 5, 2003. The service call report indicates that the gate was stuck open, and that the repair person adjusted the gate and got it in proper working order. The gate should have been maintained on a regular basis by someone trained and skilled in repairing the gates.

I also interviewed all of the other tenants. There are nine other tenant families in the building besides Ms. Jaynes. Three of the tenants are women living alone; two are single women with children; two are married couples, one with a child, who claim to have been home with their families all evening; and the two other tenants are single males. All five of the teenage and adult males living in the complex claim to have been asleep in their apartments at the time of the attack. All of the tenants denied having male guests that evening.

One of the tenants, Kuryakin Burris, said that she came home around 4 p.m. on the afternoon before the assault, and the gate was again stuck open. She tried several times unsuccessfully to get it to close. She did not report it to the apartment manager because, she said, it always seemed to be broken.

The owners of the Palm Garden Apartments own and operate six similarly sized apartment buildings. The other five are within a mile of the Palm Gardens Apartments. This means that they could have employed a guard service, or individual guard, to patrol the buildings. Either the guard service or the individual guard might have prevented or stopped this assault, or at least deterred it from occurring in the first place.

Thank you for the opportunity to conduct this investigation for you.

RIPKA INTERNATIONAL

John Ripka

John Ripka

Narrative Section from Crime Scene Investigation Report Prepared by Brookminster Police Department

I responded to a call from the responding officer Petrillo at 0300 hours on June 15, 2003. Officer Petrillo requested that I conduct a crime scene investigation. I drove to the apartment complex known as Palm Gardens Apartments. I parked on the street and approached the parking garage. The security gate was open; the bottom of the gate was about 2 feet above the floor of the garage. I examined the security gate with my flashlight and did not observe any signs of forced entry to the gate. I examined the two pedestrian gates leading from the garage to the patio area of the complex. Both of these gates were securely closed, and appeared to be in good working order. I also examined the door leading from the garage to the apartment building. This door was also securely shut and appeared to be in good working order.

Supplemental Report dated June 19, 2003

After the incident, I submitted a list of names and dates of birth of the adult and teenage males living at Palm Gardens Apartments to State Records and Investigations. SR&I reported that none had a record of any arrests or convictions.

Elroi Samuels

Elroi Samuels

Maintenance and Repair Log

[redacted to show only reports pertaining to Palm Gardens Apartments]

Date	Repair request and response
November 15, 2002	Lydia Jaynes called to say that security gate would not close all the way
November 16, 2002	Call placed to Securite Company; will send repair person within 12 hours
November 17, 2002	Securite adjusted and repaired gate
December 10, 2002	Martha Taylor called to report security gate didn't close
December 10, 2002	Call placed to Securite Company; will send repair person within 12 hours
December 11, 2002	Securite adjusted and repaired gate
January 5, 2003	Lydia Jaynes called to say that security gate would not close all the way
January 6, 2003	Call placed to Securite Company; will send repair person within 12 hours
January 8, 2003	Securite adjusted and repaired gate
February 10, 2003	Floyd White reports that a car pulling out of the garage ran into the side support for the security gate. Door seems to be out of

	alignment
February 10, 2003	Call placed to Securite Company; will send repair person within 12 hours
February 10, 2003	Securite adjusted and repaired gate; no sign of permanent damage from car striking support
March 16, 2003	Lydia Jaynes called to say that security gate would not close all the way
March 20, 2003	Call placed to Securite Company; will send repair person within 12 hours
March 21, 2003	Securite adjusted and repaired gate
April 22, 2003	Mel Grant reported the security gate was sluggish; it had to be raised and lowered a couple of times before it would close all the way. Maintenance checked it out and reported there was no problem
May 15, 2003	Securite called to check on gate
May 18, 2003	Betty Miner called to say that security gate would not close all the way
May 27, 2003	Call placed to Securite Company; will send repair person within 12 hours

June 5, 2003	Securite adjusted and repaired gate
June 30, 2003	Called Securite to repair security gate. Stops before closing fully; will send repair person within 12 hours
July 2, 2003	Securite adjusted and repaired gate

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
LIBRARY

JAYNES v. PALM GARDENS GROUP

LIBRARY

Putnam v. Winters Group
Columbia Supreme Court (2000)

We granted review in this case to consider important issues concerning the liability of apartment owners and other business enterprises to persons injured on their premises by the criminal acts of others, a liability based solely on the business owners' negligent failure to provide adequate security measures to protect those who enter or reside on their property. The difficulty in resolving these issues is enhanced by the need to balance two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises.

We conclude that the trial court properly granted summary judgment to defendants based on plaintiff's failure adequately to demonstrate that defendants' negligence was an actual, legal cause of her injuries.

STANDARD OF REVIEW

Because plaintiff appeals from an order granting defendants' summary judgment, we must independently examine the record to determine whether there are triable issues of material fact and whether defendants are entitled to judgment as a matter of law. To prevail at trial on her action in negligence, plaintiff must prove each of the elements by a preponderance of the evidence – that is, that defendants owed her a legal duty, that they breached the duty, and that the breach was a legal or proximate cause of her injuries. Accordingly, to prevail on their summary judgment motion, the defendants need only establish that the plaintiff does not possess, and cannot reasonably expect to obtain, evidence that would allow a rational trier of fact to find all of the elements of negligence by a preponderance of the evidence.

Therefore, we must determine whether defendants in the present case have shown, through the evidence adduced in this case, including security records and deposition testimony, that plaintiff Putnam has not established, and cannot reasonably expect to establish, a *prima facie* case of causation, a showing that would forecast the inevitability of a nonsuit or

directed verdict in defendants' favor. If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.

In performing its *de novo* review, the trial court must view the evidence in a light favorable to plaintiff as the opposing party, liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.

FACTS

On March 15, 1996, plaintiff Linda Putnam was an employee of Postal Delivery Express. Defendants were owners of the Harwood Apartments, a 28-building, 300-unit apartment complex located on a several-acre site in the City of Coolidge. Plaintiff came to the complex in midafternoon to deliver a package to a resident. As she entered through one of the many gated entrances to the premises, she saw two young men loitering outside a security gate that had been propped open. While walking across the grounds she saw another young man already on the premises.

Plaintiff's attempt to deliver the package proved unsuccessful because the resident was not at home. When plaintiff returned down a walkway with the package in hand, the three men confronted her, and one of them asked, "Where do you think you're going?" When she failed to reply, another one said, "You're not going anywhere." Then the three of them beat her and attempted to rape her, inflicting serious injuries. After assaulting plaintiff, her assailants fled and were never apprehended.

Plaintiff's complaint alleged that defendants, knowing that dangerous persons frequented their premises, nonetheless failed to maintain the premises in a safe condition, failed to provide adequate security, and failed to warn others of the unsafe conditions. Defendants moved for summary judgment on the basis that plaintiff was unable to establish any substantial causal link between defendants' omissions and plaintiff's injury. Plaintiff offered no evidence showing the identity of her assailants, whether they were gang members,

whether they trespassed on defendants' property to assault her, or whether they were tenants of the building who were permitted to pass through the security gates. Similarly, plaintiff submitted no evidence showing that the propped-open security gate was actually broken or otherwise not functioning properly, or whether her assailants entered through the gate or themselves broke it and entered. Finally, plaintiff offered no evidence that defendants reasonably or effectively could have warned members of the public such as plaintiff of unspecified dangers from unknown assailants frequenting the area.

As the trial court found, plaintiff presented evidence that defendants knew of frequent recurring criminal activity on the premises of their 28-building apartment complex. Coolidge was a high-crime area, with considerable juvenile gang activity occurring both on and off defendants' premises. Plaintiff provided police reports and security logs showing that within the year prior to her assault, defendants received 41 reports of trespass, and 45 reports of occasions in which various perimeter fences and gate doors were broken or rendered inoperable. The list of criminal activity on the premises included incidents of gunshots, robberies, and sexual harassment of women, including sexual assaults and rapes.

Defendants' security manager acknowledged that during the year preceding the assault on plaintiff, several nighttime assaults, and actual or attempted rapes, occurred on the premises. Plaintiff produced evidence that a gang called the 706 Hustlers was reportedly "headquartered" in one of defendants' apartment buildings, conducting drug transactions, and hitting and intimidating other people on the premises. In the year prior to the incident involving plaintiff, sheriff's officers came to the Harwood Apartments approximately 50 times. Much of this criminal activity was reported to defendants' manager, either in daily incident reports from their nighttime security officers or in police reports. Some pizza parlors refused to deliver to apartments in the complex, insisting residents come to the sidewalk if they wanted delivery of pizzas ordered by phone. Defendants' apartment manager used security personnel to escort her to her vehicle whenever she left the premises.

On the other hand, defendants' security logs showed that they took some steps to control the situation, hiring security guards to patrol the premises *at night*, and making frequent and regular attempts to repair broken locks or nonfunctioning gates. The record indicates that these guards were on daily duty from approximately 5:00 p.m. to 5:00 a.m. Defendants' manager stated that the guards' starting times ranged from 3:00 p.m. to 5:00 p.m., to make their schedule less predictable, and that defendants occasionally, on a random basis, employed full-time 24-hour security patrols on the premises. Defendants imposed a nighttime curfew on juveniles, and posted notices threatening eviction of tenants involved with drugs or gang activities. Defendants' security logs indicated their manager and security guards regularly checked access gates for forced entry and broken locks, broke up fights, forced aggressive tenants or trespassers to leave the premises, and evicted tenants involved in criminal or gang activity.

Plaintiff observes that police officers advised both defendants' apartment manager and the head of the security firm they employed that they should hire *daytime* as well as nighttime security patrols. Plaintiff filed a lengthy declaration from a security expert, Robert Murphy, who had reviewed the security logs and depositions and had personally visited the Harwood Apartments complex. His qualifications included service as Director of Police and Safety for the Housing Authority of Dos Padres County, as well as advanced education in public safety and several years in law enforcement. At the time he made his declaration, he was a full-time instructor in criminal justice and police science at a community college. Murphy expressed the opinion "that this attack, assault and battery, and attempted rape on the plaintiff would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. ... It is my opinion that the premises were a haven for gangsters and hoodlums which further encouraged criminal activity as evidenced by the long history of criminal activity in the one year prior to this incident."

The trial court granted summary judgment for defendants, finding plaintiff had failed to show defendants' breach of duty to safeguard her was a proximate cause of her assault. Based

on the parties' submissions, the court found "overwhelming evidence" of prior incidents of trespass and broken or inoperable perimeter fences or gates, and a "long list" of criminal activity on the premises, including a juvenile gang possibly "headquartered" there. But despite establishing the "high foreseeability" that violent crime would occur on the premises, and defendants' resultant duty to provide increased security, the court found that plaintiff failed to establish a "reasonably probable causal connection" between defendants' breach of duty and plaintiff's injuries.

DISCUSSION

As indicated, in this case plaintiff, injured on defendants' premises by the criminal assault of unknown assailants, seeks to recover damages from defendants on the theory that they breached their duty of care toward her. In order to prevail in such a case, the plaintiff must prove that the defendant owed her a legal duty of care, the defendant breached that duty, *and the breach was a proximate or legal cause of her injury.* Although plaintiff devotes a substantial portion of her brief to the issue of defendants' *duty of care,* defendants do not contest, for purposes of their summary judgment motion, that they may have owed and breached a duty of care toward plaintiff. Here, we are solely concerned with the issue of *causation.* Was defendants' possible breach of duty a substantial factor in causing plaintiff's injuries?

The rule in Columbia is that the plaintiff must prove, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures. In the context of this case, the causation analysis is unaffected by the fact that the assailant's conduct was criminal and not merely negligent. Stated in traditional terms, the assailant's attack is not a superseding cause and it does not, in itself, relieve the defendant of liability. If the likelihood that a third person may act in a particular manner is one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused thereby.

In deciding whether the plaintiff has presented evidence of a triable issue of material fact, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the defendant. We will not, however, draw inferences from thin air. Where, as here, the plaintiff seeks to establish that there is a triable issue of fact by means of circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her.

Here, by reason of the prior criminal assaults and incidents on the premises, defendants may have owed a duty to provide a reasonable degree of security to persons entering them. For purposes of discussion, we assume defendants breached that duty by failing to: (1) keep all entrance gates locked and functioning, and (2) provide additional daytime security guards to protect persons such as plaintiff. But the evidence fails to show that either breach contributed to plaintiff's injuries in this case. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to grant summary judgment for the defendant.*

Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants' apartment complex, who were authorized and empowered to enter the locked security gates and remain on the premises. The primary reason for having functioning security gates and guards stationed at every entrance would be to exclude *unauthorized* persons and trespassers from entering. But plaintiff has not shown that her assailants were indeed unauthorized to enter. Given the substantial number of incidents and disturbances involving defendants' own tenants, and defendants' manager's statement that a juvenile gang was

"headquartered" in one of the buildings, the assault on plaintiff could well have been made by tenants having authority to enter and remain on the premises. That being so, and despite the speculative opinion of plaintiff's expert, she cannot show that defendants' failure to provide increased daytime security at each entrance gate or functioning locked gate was a substantial factor in causing her injuries. Put another way, she is unable to prove it was "more probable than not" that additional security precautions would have prevented the attack.

Plaintiff, citing her expert's declaration, opines that her injuries could have been avoided if defendants had hired roving security guards to patrol the entire premises during the day as well as at night. Aside from the inordinate expense of providing such security for a 28-building apartment complex, the argument is entirely speculative, as assaults and other crimes can occur despite the maintenance of the highest level of security. As previously noted, proof of causation cannot be based on an expert's opinion based on inferences, speculation and conjecture. Despite her expert's speculation, plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack. A 300-unit, 28-building apartment complex contains many rooms, halls, entries, garages, and other spaces where a rape could take place despite extensive security patrols.

Finally, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the “cause” of the victim's injuries is on these facts to make the landowner the insurer of the absolute safety of everyone who enters the premises. Moreover, the ultimate costs of imposing liability for failure to provide sufficient daytime security to prevent assaults would be passed on to the tenants of low-cost housing in the form of increased rents, adding to the financial burden on poor renters.

Thus, in a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant's lapse (such as a failure to keep a security gate in repair) in the

course of committing his attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, may show what likely transpired at the scene. In the present case no such evidence was presented, but the circumstances in other cases may well be different. We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented. As we have seen, most of the assaults and similar incidents of crime plaintiff has cited occurred during the night, and the record indicates defendants did provide extensive nighttime security. Moreover, plaintiff's own evidence showed that defendants at least attempted to keep all security gates in working order, performing regular inspections and repairs.

But again, even assuming a triable issue existed regarding the extent or reasonableness of defendants' security efforts, there was no triable issue with regard to causation. No matter how inexcusable a defendant's act or omission might appear, the plaintiff must nonetheless show the act or omission caused, or substantially contributed to, her injury. Otherwise, defendants might be held liable for conduct which actually caused no harm, contrary to the recognized policy against making landowners the *insurer* of the absolute safety of anyone entering their premises.

In short, plaintiff cannot prove that defendants' omissions were a substantial factor in causing her injuries. Plaintiff has had ample opportunity, through pretrial discovery, to marshal evidence showing that defendants' asserted breach of duty actually caused her injuries. However, the evidence merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault. Plaintiff's evidence is no less speculative because she offered a security expert's testimony.

Because he was equally unaware of the assailants' identities, his opinion regarding causation is simply too tenuous to create a triable issue whether the absence of security guards or functioning gates was a substantial factor in plaintiff's assault.

The judgment of the trial court is affirmed.

ANSWER 1 TO PERFORMANCE TEST-B

Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment

INTRODUCTION

Plaintiff in this case asserts a negligence claim against defendant, Palm Gardens Group, for failure to repair and maintain an access gate their [sic] secured apartment complex. As a result of the malfunctioning access gate Plaintiff was beaten and sexually assaulted in the parking garage of the Palm Gardens Complex.

Defendant has filed a motion for summary judgment on the grounds that plaintiff has not and cannot establish that defendant's negligence was the cause of her injury. Defendants do not contest in this motion for summary judgment that they owed a duty to plaintiff or that defendant breached that duty. Therefore, this opposition is limited to a discussion of the element of causation. As the following analysis will establish, plaintiff can meet her burden of going forward and will establish by a preponderance of the evidence that defendant's failure to maintain, inspect and repair the security gate at the entrance to the remote underground parking garage was both an actual and legal cause of plaintiff's injury. Defendants rely heavily on the Putnam case, which is clearly distinguishable, as will be established in the substance of this motion. For these reasons defendant's motion for summary judgment should be denied.

ARGUMENT

Standard of Review

In moving for summary judgment, the burden is on the defendant to establish that the plaintiff does not possess and cannot reasonably expect to obtain evidence that would allow a rational trier of fact to find all the elements of negligence by a preponderance of the evidence (Putnam). In concluding its analysis, the court should consider all direct and circumstantial evidence and draw all reasonable inferences from the evidence presented (Putnam). The plaintiff need only show the existence of a triable issue, not that the issue will definitely be found in her favor at trial. The plaintiff can meet this low threshold based on evidence currently in her possession or reasonably attainable.

THE EVIDENCE AVAILABLE SUPPORTS A REASONABLE INFERENCE THAT PLAINTIFF'S ASSAILANT WAS A TRESPASSER

In Putnam, which defendants cite their brief [sic], the court found that causation had not been established because the plaintiff could not identify her attacker, and thus was unable to prove that the attacker gained access through lax security rather than being authorized to enter. However, in the present case, plaintiff has sufficient evidence to

demonstrate that her assailant was an unauthorized trespasser who gained access to the complex through the open security gate.

Unlike in Putnam, where the complex was 300 units and 28 buildings, the complex plaintiff inhabits and defendants own is small, only 10 apartments. (According to Declaration of Lydia James[sic]). There are only 5 adult or teenage males in the complex (report of John Ripka.) Lydia Jaynes is certain that the assailant was not one of these five men, as she knows all of them and would have recognized the assailant if it had been one of these five men. (Declaration of Lydia Jaynes). Additionally, all of the other tenants deny having any authorized male guests on the evening in question (Report of John Ripka). The foregoing evidence makes it more likely than not in this case that the assailant was not one of the tenants in the building (unlike in Putnam).

This conclusion is further supported by the fact that none of the men living in the complex have any records of arrests or convictions (Police Report of Elroi Samuels) and police Captain Richard Sydner has stated that there have been no reported incidents involving violent behavior by tenants of Palm Gardens or their guests (report of John Ripka). This is in stark contrast to the fact pattern in Putnam, where police reported that there was a gang headquartered in the apartment building and that a substantial number of crimes were reportedly committed by tenants in the complex.

While the court in Putnam found it was not possible to rule out a tenant or guest as the perpetrator of the assault, that is not the situation in this case. Plaintiff need not demonstrate the identity of her attacker, only provide proof that he was not an authorized to be on the premises [sic]. With the foregoing evidence, the plaintiff can meet this burden.

PLAINTIFF[']S EVIDENCE DEMONSTRATES THAT THE GATE MALFUNCTIONED LONG BEFORE THE ATTACK

Defendant alleges that plaintiff cannot prove when the gate malfunctioned. The purpose of this argument is probably to show that even if the gate were malfunctioning, there was insufficient time for the dependant to have fixed the gate and remedied the problem. This appears somewhat analogous to the argument in Putnam that even 24 hour patrols by defendant might not have prevented the attack, or in this case, if defendant had not been negligent, the assault might still have occurred.

However, the plaintiff has evidence to show that the gate was stuck open as of 4 p.m. on the afternoon of the assault and that repeated efforts by her were unsuccessful in getting the gate to close. (Kuryakin Burris in Ripka report) A logical inference can be drawn that the gate remained open until 2 a.m. when plaintiff was assaulted. When plaintiff noticed the open gate [sic] (Dec Lydia Jaynes) This inference is further supported by the repair log, which indicates that once the gate malfunctioned, it did not close properly until fixed by the Securite Company (maintenance report and repair records). Therefore, the assailant had at least 10 hours of access to the garage. The defendants may argue that

they had no knowledge of the malfunction, and that, had Ms. Burris report [sic] the malfunctioning gate, it would have been repaired in time to prevent the accident. However, the past history of repairs refutes this claim. In the past, with the exception of February 10, 2003 where there was a collision with the gate, the complex has taken at least two days to repair the gate after a report of a malfunction. In fact, at the last reported incident prior to the attack, it took 17 days between a report that the gate had malfunctioned and the fixing of the gate. (Maintenance Report).

This evidence indicate [sic] that the gate was open for an assailant to enter on the night of the accident and that the defendant took no action to prevent such entry, either by keeping the gate in good repair through regular inspection and maintenance or through posting of security guards. This is enough evidence to meet plaintiff's burden of going forward by demonstrating that the assailant could have gotten into the garage through an open gate.

PLAINTIFF[']S TESTIMONY, POLICE REPORTS AND EXPERT EVIDENCE ESTABLISHES THAT THE ASSAILANT DID ENTER THROUGH THE BROKEN GATE

In Putnam, the court found that although there was evidence of broken gates and unlocked access to the apartment complex, there was no evidence that the assailant had actually utilized those forms of access (Putnam). There was no evidence that failure to have locked gates was a "substantial factor" in the attack. Defendant's [sic] attempt to make the same argument in this case, that there is no evidence the defendant entered through the broken gates. However, in contrast to Putnam, here there is a substantial body of evidence showing that the defendant ingressed and egressed from the broken gate. First, in Putnam there were a number or perimeter fences and gate doors that were broken and inoperable. In the defendant's complex there were only four access points - the security gate and three locked doors (Declaration of Lydia Jaynes). Access to the doors required a key, which only tenants possessed (Declaration of Lydia James [sic]). In contrast to the constant reports that the garage door was broken, in the 7 and a half months prior to the accident there was not one report that the other three access doors were broken or unlocked. (Maintenance Log). There is no evidence to support a finding that the assailant entered through one of these doors. In fact, on the night of the incident, a police check subsequent to the incident found all three doors were securely closed and in good working order (Elroi Samuels).

Additionally, there is empirical evidence to support a finding that the assailant gained access through the open security gate. Police reports indicate that during prior incidents when the security gate was open, criminals used it to gain access to the garage and commit break-ins and vandalism (Ripka Report). No such incidents occurred while the gate was functioning, suggesting the there were no other ways for criminals to access the building.

This conclusion that the assailant did enter through the open gate is further

supported [sic] the declaration of the plaintiff that the assailant left through the open gate. It is logical that the assailant would chose [sic] for his escape route the same path he used to enter.

This empirical evidence is further supported by the expert opinion of the police regarding how criminals select the location of their crimes (Ripka Report). Captain Snyder indicated that assailants normally "case" a location in advance to see if he [sic] would have access and would be undisturbed (Ripka Report). This suggests that the assailant probably noticed the open gate on one of the earlier occasions when it was broken and determined that it would be a good location for his criminal activities. He would have used the same entrance to perpetrate the crime itself. (In addition to showing that the assailant got into the garage through the open gate, this also illustrates that the repeated failure to repair the gate in a timely fashion led to the assault[])].

This evidence is sufficient to demonstrate that plaintiff can meet her burden of showing that the assailant gained access to the garage through the open gate particularly in the absence on any other explanation from the defendant on how the assailants gained access to the garage.

PLAINTIFF CAN DEMONSTRATE THAT THE GATE MALFUNCTIONED, AS IT HAS IN THE PAST, RATHER THAN BEING BROKEN BY THE ASSAILANT

In yet another badly drawn analogy to the Putnam case, defendants argue that there is no evidence that the assailant did not break the gate to gain entry.

On the contrary, the plaintiff has substantial evidence in this regard. First, there is a history of mechanical malfunction in the gate, with at least six mechanical malfunctions happening prior to the assault and one after it (maintenance log). This direct evidence gives rise to an inference that the gate malfunctioned on this occasion. This is unlike Putnam, where there were multiple reports of broken access gates and broken locks, but no mechanical failures. Defendant[']s argument is also undermined by the direct evidence of Kuryakin Burris that the gate was up when she arrived home at 4 p.m. (Ripka report.) While it is theoretically possible that the assailant had broken the gate prior to 4 p.m., this is not logically or empirically supportable. First, it is likely someone in the neighborhood (which has a low incidence of crimes) would have noticed and reported a stranger breaking open a gate. Also, it is unlikely that the assailant would have sat in the garage for 10 hours awaiting his victim. If he had, one of the tenants returning home from work would probably have noticed.

Additionally, the police report after the incident shows no sign of forced entry, thus negating any argument that the assailant broke the gate. Once again it is the defendant in this case who is offering the "speculative possibility" that the assailant broke the gate, while the plaintiff has firm evidence to the contrary, more than sufficient to show that the gate was open because of a malfunction when the assailant entered.

DEFENDANTS[‘] ARGUMENT THAT THEY COULD NOT HAVE WARNED OF THE DANGERS IS BOTH INCORRECT AND DESIGNED TO DISTRACT ATTENTION FROM THE STEPS THEY COULD HAVE TAKEN TO PREVENT THE ATTACK

Once again the defendants would have the court misapply language from the decision in Putnam, arguing that they could not have effectively warned the plaintiff to prevent the attack. First, this shows a misunderstanding of what the court said in Putnam[,] which is that the plaintiff did not prove that defendants could have warned “members of the public” about the possibility of criminal activity. The plaintiff in this case, unlike the postal delivery employee in Putnam[,] is a tenant of the building and not a member of the general public. Plaintiff in this case is not asserting a failure to warn the public at large, but failure to comply with their duties as landowners to paying tenants. Second, it is clear that the defendants could have effectively warned tenants of the danger created by the open security gate. There were only ten apartment[s] in the complex and, unlike the “open areas” in Putnam, this complex was not open to the general public. Therefore, defendants could easily have warned tenants. However, this argument is a distraction from the gravaman of plaintiff[‘]s complaint in this action, which is that adequate security measures would have prevented this attack. Unlike Putman, where the defendant had exercised care and diligence to attempt to make the building more secure, the defendants in this case took no actions to protect tenants against criminal activity, despite repeated malfunctioning of the security gate and several reported incidents of criminal activity. Here, unlike Putnam, there remain reasonable and affordable steps the defendant could have and should have taken to prevent this incident. As a security expert can testify, the defendant has several other apartment complexes in the vicinity and could have a roving security guard to monitor the complexes (Ripka report). On the same note, given that there are six complexes, it would be reasonable for the defendant to have a member of management regularly visit to look for problems and make repairs where needed. The defendant failed to take these steps (Ripka). Instead, the defendant relied upon the Securite Company to make repairs. They continued to use the company even after it took 8 days in late May to repair the broken gate (maintenance log). In fact, the evidence demonstrates that from the first reported incident of a malfunctioning gate, it took longer and longer for the defendant and the Securite Company to fix the door. The defendant ignored the fact that Securite rarely failed to fix the door within 24 hours as promised and continued to use the company (maintenance & repair log). The continued malfunctioning also suggests that Securite was not actually “repairing” the door but instead fixing it temporarily. The defendant could have used a different company who could have effectively repaired the gate in the seven months leading up to the assault. In contrast to the defendant in Putnam who took all reasonable steps when it became aware of a problem the defendant continued on the same course of action in spite of continued malfunctions and criminal activity.

THE POLICY ARGUMENTS ADVANCED IN PUTNAM ARE NOT APPLICABLE TO THIS CASE

The court in Putnam also declined to stretch the definition of causation because of

public policy arguments against make [sic] the defendant an "absolute insurer" against criminal activity on the premises. The same policy arguments are not applicable here, first because the defendant has done nothing to prevent criminal activity, so imposing liability here is not "unreasonable." Second, while the complex in Putnam was for the low-income and the court feared the cost burden of additional security measures, plaintiff is not asking for anything "additional" in this case. Instead the plaintiff is merely asking that the defendant maintain the security measures that are advertised as a feature of the building & that were critical to her decision to move to the building. The price of a security gate is built into the rent and plaintiff is merely arguing that the defendant failed to live up to the security that was promised to her and that that [sic] failure caused her injury.

CONCLUSION

In summary, plaintiff can meet the burden of showing that defendant caused her injury. She has sufficient evidence to prove that she was attacked by an unauthorized assailant who gained access to an open security door that was open due to defendant's negligence and that the defendant could and should have taken reasonable measures that would have prevented her injury. The law and good public policy call for a ruling against defendant's summary judgment motion in this case.

ANSWER 2 TO PERFORMANCE TEST-B

1)

Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment Lydia Jaynes v. Palm Gardens Group

I. INTRODUCTION

Plaintiff, Lydia Jaynes, a resident of the Palm Gardens Apartments owned by defendant, Palm Gardens Group, alleges that she was assaulted and seriously injured by an unknown male assailant on June 15, 2003 in the underground parking garage of the Palm Gardens Apartments. Ms. Jaynes has sued defendant for negligent failure to repair a broken security gate in the parking garage and for negligent failure to provide adequate security measures.

Defendant, Palm Gardens Group (Palm) has filed a motion for summary judgment. Defendant's motion for summary judgment asserts that the plaintiff has failed to make a prima facie for causation. Defendant bases its motion for summary judgment on a recent Columbia case[,] Putnam v. Winters Group. In Putnam, the Columbia Supreme Court upheld the trial court's granting of a motion for summary judgment for a defendant apartment management group finding that the plaintiff had not established the causal connection between the her [sic] injuries caused by a group of unknown male assailants inside the apartment complex and the defendant's failure to adequately maintain gates and locks and failure to provide security personnel during the daytime hours. Defendant alleges that Ms. Jaynes has failed to establish a prima facie cause [sic] of causation and addition [sic] has failed to present sufficient evidence that there is a triable issue regarding causation.

Plaintiff's opposition to the motion for summary judgment is based on the factual distinctions between the two cases that will distinguish Ms. Jaynes[‘] claim of negligence from that of the Putnam plaintiff. The factual circumstances surrounding the two attacks are sufficiently different that Putnam can be distinguished. Furthermore, Ms. Jaynes has collected enough direct and circumstantial evidence that she can prove the actual causal link between her injury and defendant's failure to provide adequate security measures.

II. RESPONSE TO MOVING PARTY'S ARGUMENTS

A. FACTS THAT A PROPERLY OPERATING SECURITY GATE ACROSS THE UNDERGROUND GARAGE ENTRANCE AND THAT LANDOWNER FAILED TO PROVIDE SUCH ARE SUFFICIENT TO ESTABLISH A TRIAL ISSUE OF FACT AS TO THE LEGAL CAUSE OF AN INJURY INFLICTED BY THE CRIMINAL ACT OF A THIRD PERSON

In order to present a triable issue of material fact, the plaintiff must present evidence that is more than a "speculative possibility" that the defendant "might have prevented the assault." In Putnam, the Columbia Supreme Court, while upholding the trial court's granting the defendant's motion for summary judgment, stated in dicta, "[w]hen an injury can be prevented by a lock or fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person." Putnam

The court should find that here plaintiff has presented evidence that her injury could have been prevented by a properly operating gate on the underground garage. Here the Palm Gardens Apartment complex is very small, with ten 2-bedroom apartment units over one parking garage containing twelve parking spaces. Draft Jaynes Declaration. The area within the garage and the apartment complex could be easily sealed off from outside intruders with properly operating gates. This is in sharp contrast to the apartment complex in Putnam, which was a 28-building, 300 unit complex located on several acres. Putnam. The Columbia Supreme Court stated that an open area that large could have been [sic] fully protected and that the owner could not have reasonably prevented an assault. Nonetheless, the stark difference in size of the two units supports plaintiff's argument that Palm could have effectively provided full protection for the Palm Gardens with the security gates it had in place, if only defendant had maintained them in a working order. Putnam.

In fact, the defendant has acknowledge[d] the feasibility of protecting its tenants by advertising the building as a secure building. Draft Jaynes Declaration. When potential tenants visit the building, they are shown the various security features of the building and are assured by management that about those features including the underground parking secured by an automatic gate requiring [sic] access cards. Draft Jaynes Declaration. The outward appearance of the building also indicates that it is meant to provide security because of the iron security gates installed on the garage. Therefore, defendant, Palm, admits by its own conduct that securing the complex is feasible and that defendant is able to reasonably prevent physical assaults of its tenants.

Furthermore, in contrast to Putnam, Ms. Jaynes has presented evidence that the only other reported crime incidents, three car break-ins, occurred while the gate was broken. Ripka International Report.

Here because evidence of defendant's actions prove that it could have secured the

complex effectively with a properly operating security gate on the underground garage, plaintiff has presented evidence sufficient to present a triable issue of fact on whether the Palm's failure to maintain the gate in proper working order substantially contributed to Ms. Jaynes' injury.

B. CIRCUMSTANTIAL EVIDENCE THAT THE TENANTS IN THE APARTMENT COMPLEX WERE NOT THE ASSAILANT IS SUFFICIENT TO SUPPORT A [SIC] THE PRIMA FACIE CASE FOR CAUSATION

Although plaintiff cannot prove the [sic] conclusively the identity or background of her assailant, she can disprove that her assailant was another tenant of the apartment complex, i.e., that the attack came from a person who was rightfully inside the security gates at the complex.

In Putnam, the victim was a mail delivery person who had entered the complex for the purpose of delivering a package. Putnam. When she entered she saw men both outside a propped open gate and one inside. Putnam. Ms. Putnam was attacked, beaten and seriously injured by three men who[m] she could not identify. Putnam. In Putnam, the apartment complex was known to be riddled with gang activity and drug trafficking. Putnam. There were many tenants who were involved in illegal activities. Putnam. Ms. Putnam offered no evidence that excluded her assailants from this group of tenants who were known to be involved in crime. Putnam. Therefore, Ms. Putnam was unable to prove that her assailants were not people who had a right to be within the security gates.

Here, plaintiff has presented circumstantial evidence that proves that her assailant was not a fellow co-tenant. Ms. Jaynes herself is quite certain that the attacker was not any of the male tenants living in the apartment building. Draft Jaynes Declaration. She is quite sure that she would have been able to recognize any of the male tenants. Draft Jaynes Declaration. Furthermore, all five of the teenage and adult males have stated that they were asleep at 2 AM on June 15, 2003, and all the other tenants denied having male guests that evening, and investigator Ripka found that there no report incidents involving violent behavior by tenants. Ripka International Report. Finally, the Brookmeister Police Department verified with the State Records and Investigation department that none of the adult and teenage males living at Palm Gardens had any record of any arrests or convictions. Brookmeister Police Report.

Additionally, the neighborhood surrounding Palm Gardens does have a low to moderate crime rate. Ripka International Report. Therefore, because the crime rate outside the complex is much lower [sic] than the crime rate within the complex, it makes it more likely that the assailant came from outside the complex. Contrast this with Putnam, where the crime both inside and outside the complex were very high, which made it virtually impossible for the plaintiff to prove by circumstantial evidence that her assailants came from outside the complex.

Finally, plaintiff's assailant fled out of the apartment complex through the open gate. Draft Jaynes Declaration. Had he been a resident and known his way around the complex, he might have fled through one of the pedestrian doors.

Because the primary reason for having functioning security gates at every entrance would be to exclude unauthorized persons from entering, plaintiff's showing that the person who attacked her was not a fellow tenant supports her claim for causation. Therefore, plaintiff's circumstantial evidence makes it more probable than not that a working gate would have prevented the attack. Because the court must construe the evidence in the light most favorable to the non-moving party, this circumstantial evidence is enough to rebut a motion for summary judgment. Putnam.

C. STATEMENT BY A TENANT OF THE APARTMENT THAT THE GARAGE GATE WAS BROKEN IS SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

In Putnam, the victim observed a gate that was propped open. Putnam. She presented no evidence that the gate was broken and that in a state of disrepair provided her assailants access to the complex. Putnam.

Plaintiff here has shown through the repair log that the gate being inoperable was an on-going problem. Five tenants called with problems in one year period.

Contrastingly, plaintiff has provided evidence that in January or February 2003, a car ran into the gate and damaged the gate causing it to not work properly. Draft Jaynes Declaration, Repair Log. Most importantly, she herself noticed that the gate was partially stuck open with about a 2 to 3 foot gap between the bottom of the gate and the garage floor when she arrived home at 2 AM on June 15, 2003. Draft Jaynes Declaration. Finally, she has presented direct evidence that tenant Kuryakin Burris came home around 4 PM on June 15, 2003 and found the gate stuck open. Ripka International Report. Ms. Burris has stated that she didn't report the broken gate because "it always seemed to be broken." Ripka International Report.

Most importantly, the Brookmeister Police Department discovered that the security gate was open, the bottom being about 2 feet above the floor of the garage, at 3 AM on June 15, 2003, following the attack on plaintiff. Brookmeister Police Department.

Plaintiff has also shown through the maintenance and repair log that Securite Company was called on June 30, 2003 to repair the security because it stops closing fully. Repair Log. On July 2, 2003, the gate was repaired. Repair Log.

Because plaintiff has presented direct and circumstantial evidence that the gate was not working and because the court must construe this evidence in a light most favorable to plaintiff, she has met her burden to overcome a motion for summary judgment.

D. CIRCUMSTANTIAL EVIDENCE THAT ASSAILANT ENTERED THROUGH THE BROKEN GARAGE GATE IS SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

Because the complex in Putnam was so large and so crime ridden, it was difficult to prove that the assailant could have entered through a broken gate or even which gate in the complex might have been broken. However, in the instant case, the Palm Gardens only has one security gate on the garage and three other pedestrian gates or doors. Draft Jaynes Declaration. Therefore the number of entrances through which an assailant could enter is very limited. Furthermore, only one other door ran between the garage and the apartment complex. Draft Jaynes Declaration.

Following the attack on plaintiff, the police observed that the two pedestrian gates leading from the garage to the patio area were securely closed and in good working order. Brookmeister Police Department. Furthermore, the door leading from the garage to the apartment building was also securely shut and in good working order. Brookmeister Police Department.

Plaintiff has also stated that her assailant fled out of the partially open security gate following the assault. Draft Jaynes Declaration. This makes it more likely that he entered through the gap under the door, because he was looking for a quick means of escape, one he knew existed.

Because plaintiff has presented circumstantial evidence that the garage door was broken on the date of her attack and no other doors in the complex were broken, she has presented enough evidence to overcome a motion for summary judgment on the issue of causation.

E. STATEMENT BY OTHER TENANTS AND RECORDS OF REPAIR ARE SUFFICIENT TO SUPPORT A PRIMA FACIE CASE FOR CAUSATION

There is no evidence that the assailant broke the gate himself, nor does plaintiff need to offer any evidence that he did. Plaintiff has offered enough circumstantial evidence to prove that the gate was broken on the day in question providing her assailant access to the complex.

F. EXPERT OPINIONS ARE SUFFICIENT TO PROVE THAT DEFENDANT COULD HAVE REASONABLY AND EFFECTIVELY WARNED TENANTS OF UNKNOWN ASSAILANTS AND SUPPORT PRIMA FACIE CASE FOR CAUSATION

In Putnam, the Columbia Supreme Court was unimpressed by the expert opinions plaintiff offered that additional security guards monitoring the Harwood apartments in the daytime would have prevented her attacks. Putnam. In fact the court chided that her argument was entirely speculative and that causation could not be based on an expert's opinion that

"more" security would have prevented her assault. However, the situation in Putnam was strikingly different from the instant case.

In Putnam, the complex was a 300-unit, 28 building complex with many rooms, halls, entries, garages, and other hiding spaces. Putnam. Ms. Putnam's expert, Robert Murphy, was well qualified and expressed an opinion that the attack would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. Additionally, the police advised that the defendant should have hired daytime as well as nighttime security patrols. Putnam. The court said this evidence was merely conjecture and speculation because it did not state how many guards would have been necessary or how much better the repair efforts should have been. Putnam.

However, here, Mr. Ripka has presented evidence that Palm owns six other apartment complexes all within close proximity to the Palm Gardens and that it could have easily employed an individual guard to patrol the building. Ripka International Report. Because the Columbia Supreme Court was concerned about an apartment owner becoming an insurer against all bad acts and being required to hire unlimited personnel to protect against those bad acts, the requirement for one security guard does not seem to offend this concern. Moreover, it proves that Palm could have reasonably warned tenants of unknown dangers and assailants.

III. Conclusion

On a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must resolve any evidentiary doubts or ambiguities in the plaintiff's favor. Putnam. The defendant has moved for summary judgment resting its entire basis for the motion on Putnam, which although similar in procedural and factual stance, can be readily distinguished from the instant case.

Putnam involved that assault and battery of non-resident mail carrier at an apartment complex that was located in a very high crime area and that housed many tenants who themselves were gang members and drug dealers. Putnam. The complex had a long history of criminal activity, and the residents were known to the police. Putnam. In addition, the Harwood complex was vast in size, housing 300 units in 28 buildings, and had many means of ingress and egress. Putnam. Ms. Putnam[,] the victim, was unable to prove that her three assailants were not a resident [sic] of Harwood, which was very problematic because the security measures she insisted should have been in place would not have kept her assailants out of the complex if they were residents. Putnam. Additionally, she could not mount any evidence of which door her assailants might have entered and if they gained access because the door was broken. Putnam.

In contrast, plaintiff has presented both direct and circumstantial evidence to support a prima facie case for negligence and to support that Palm's failure to maintain the garage door in working order was the legal cause of her injuries. Ms. Jaynes has presented

circumstantial evidence that tends to prove that her single assailant was not a tenant of the Palm Gardens. She has also presented a great deal of evidence that the one door that was in poor working order was the garage door, and that it was malfunctioning on the day of her attack, which makes it more likely that her assailant gained access to the garage through that door. Additionally, she has shown that Palm would only be required to hire one guard to patrol the complex, which is not overly burdensome on the landlord.

For the above stated reasons, the plaintiff respectfully requests this court deny defendant's motion for summary judgment in favor of Lydia Jaynes.

California
Bar
Examination

Performance Tests
and
Selected Answers

February 2005

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2005 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

SANDRA CASTRO v. TOM MILLER

SANDRA CASTRO v. TOM MILLER

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Mariah Malone

98 Prentiss Street, Suite A

Palo Verde, Columbia 83013

TO: Applicant
FROM: Mariah Malone
DATE: February 22, 2005
RE: **Castro v. Miller**

At the request of Columbia Insurance Company ("CIC"), we have undertaken the defense of this personal injury action. Our client, Tom Miller ("Miller"), is the owner, but not the driver, of the vehicle that struck plaintiff Sandra Castro's ("plaintiff" or "Castro") bicycle. The driver, Bryon Russell ("Russell"), an acquaintance of Miller, probably will not be served with the lawsuit since he has moved from the area, his whereabouts are unknown, and he's uninsured.

I have not included the form complaint and answer filed on behalf of Miller in this file. There are two causes of action in the complaint against Miller and Russell: one for permissive use of an automobile and another for negligent entrustment of the vehicle. The answer denies that Russell and Miller were negligent. It also asserts affirmatively that the plaintiff was comparatively negligent and that Russell's use was beyond the scope and the permission granted. Plaintiff's complaint asks for damages in the amount of $15,000.

I have attached the documents collected by the CIC claims adjustor who investigated the case. There are no lost wages, since plaintiff is a student, nor are there any permanent or disabling injuries. This case should settle without the expense of discovery, let alone trial, if only plaintiff Castro can be persuaded to take a more reasonable view of the worth of her case. In my opinion, a jury would likely apportion

fault between the driver and plaintiff. Since plaintiff has a copy of the Columbia Department of Motor Vehicles Driver License Search Report, it's probable that she thinks a jury may be enraged because of Russell's drunk driving conviction. The plaintiff does not have the CIC confidential Memorandum from the claim adjuster, Mark Hoffman.

We want to determine if we can settle this case before any additional expenses are incurred. We have been authorized to settle the case at this stage for $5,000 for all of plaintiff Castro's damages, including pain and suffering. Please draft a letter to plaintiff's counsel for my signature offering to settle the matter for $5,000. Remember that this letter is being written to an attorney who needs to understand the strength of our position and be persuaded to settle. Using the materials and authorities I've attached, you must draft the letter to state the facts in a light that supports our position, articulates the legal and factual arguments in our favor, and emphasizes the weaknesses of the other side's position on both liability and damages.

Palo Verde Police Report

CASE NO.: 2004-97531

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(1) REPORT TYPE:

Hate Crime_____ Gang-related_____ Accident xxxx

Cited & Released_____ In Custody_____

(2) LOCATION OF EVENT/CROSS STREET:

Intersection of Willow & Oak

(3) SUSPECT:

Name Russell, Bryon Address_____

M/F M Race W Birth Date____ Height____ Weight____

Phone # 733-3497 Col. Drivers License # 267-75-983

Hair Color____ Facial Hair____ Complexion____ Appearance____

(4) VICTIM:

Name_____ Address_____

M/F____ Race____ Birth Date____ Height____ Weight____

Sexual Assault____ Domestic Violence____

Phone #_____ Col. Drivers License #_____

Hair Color____ Facial Hair____ Complexion____ Appearance____

(5) REPORTING PARTY:

Name Sandra Castro Address 285 College Ave., Apt. E., Palo Verde, 83014

M/F F Race H Birth Date 3/2/85 Height 5-4 Weight 110

Phone # 734-2685 Col. Drivers License # N/A

Hair Color____ Facial Hair____ Complexion____ Appearance____

Palo Verde Police Report CASE NO. 2004-97531 Supplemental xx

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

February 3, 2004, 1500 hours. Reporting Party (RP) called, identifying herself as Sandra Castro, to ask if a bicycle belonging to her had been turned in. When I asked what happened, RP said that while bicycling the previous night she had been struck by a car on Willow Road and that her bicycle had been left at the accident scene while she was taken to the emergency room of PV Medical Center. Since this was a possible hit-and-run or theft, the writer asked RP to come in for report.

February 3, 2004, 1600 hours. RP informed writer that yesterday, February 2, 2004, at between 1715 and 1720 hours RP was struck by a vehicle at the intersection of Willow Road and Oak Avenue as RP bicycled along crosswalk to cross Willow Road. RP stated that impact caused her to fall to pavement, causing injuries to left leg and right arm. RP stated that a white male identified himself as the driver and assisted her to a car and transported her a few blocks to PV Medical Center emergency room, where she was treated for lacerations and released. When RP left the emergency room, a nurse said the driver had left. RP gave writer a note identifying Suspect as a Bryon Russell, telephone number 733-3497, Columbia Driver's License number 267-75-983, Columbia Vehicle License number 4 638 754. On interrogation, RP explained that she was en route to Bud's Ice Cream, heading north along the bike path on Oak Avenue. Near the intersection with Willow Road, the bike path splits off from the right side of the road and goes onto the sidewalk. It is then separated from the road by a guardrail that is 18 inches in height. At Willow Road, she was going to cross Willow to the north side in the crosswalk. As she entered the crosswalk, RP looked left and immediately saw the vehicle that hit her. RP said that she was in the crosswalk and the vehicle did not stop before impact. RP did not observe slurred speech or other indications of alcohol/drug impaired behavior. Suspect was calm, polite, well groomed, and had no distinguishing features. RP said that on her way home from the hospital she went by the accident scene but was unable to locate her bike.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

Oak Avenue and Willow Road are both 2 lane roads. Oak runs North/South. Willow runs East/West. The accident occurred at the Southeast corner of the intersection. That corner is rounded and set back from the actual intersection of Oak and Willow. Where the 2 roads meet there is a triangular pedestrian island approximately 12' from the Southeast corner. The accident occurred in the crosswalk that connects the Southeast corner to the pedestrian island. RP said that she was completely in the crosswalk when the car struck her. RP said that there is a large yield sign at the spot where the crosswalk enters the roadway.

Writer is familiar with the intersection. Because of the configuration, vehicles can turn right from Oak to Willow without coming to a full stop. There are no buildings at the intersection. The sidewalk is directly adjacent to the Oak Avenue roadway. Between the roadway and sidewalk there is a low guardrail.

Writer informed RP that he would contact her if her bike was turned in or charges pressed against Suspect. Writer sent requests for search to Columbia Department of Motor Vehicles.

February 3, 2004, 1700 hours. Writer received call from a Fran Lally, 2011 Bowdoin St., PV, 739-7191 (Witness), who reported that she had witnessed a car-bicycle accident on February 2, 2004 at the intersection of Willow Avenue and Oak Road. Writer determined that it was the same accident reported by Sandra Castro. Witness reported that at the time of the accident she was jogging along the west side of Oak Avenue, approaching intersection with Willow Road. Witness was heading south and the accident happened ahead and across the street from

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

her direction of travel. Witness stated that the vehicle struck the cyclist as the cyclist was riding her bike in the crosswalk in the turnoff area from Oak Avenue to Willow Road. Witness was unable to identify vehicle because of poor visibility. Witness thinks she could identify victim. Witness stopped, running in place, to see what would happen. Witness observed driver exit and run back to victim. Driver was a white male, medium height and weight. Driver assisted victim into his vehicle and proceeded west on Willow. Witness stated that she then crossed street, retrieved the bike (which appeared badly damaged) and placed it next to the sidewalk adjacent to Willow. Witness stated that vehicle did not stop at crosswalk but continued to approach it at about 20 mph prior to striking cyclist. Witness stated that she thought driver braked but was unable to stop in time to avoid accident. Witness estimated time of accident to be almost 1800 hours. Witness stated that she had not seen cyclist before accident, because she was paying more attention to where she was running and not necessarily looking across the street. Witness also said that bicyclist would have been behind guardrail until she entered the crosswalk. She was fairly certain that the cyclist did not stop before she entered the crosswalk. Witness may have seen the vehicle brake lights illuminate, and she thinks its other lights were on. Writer informed Witness that she would be contacted if further information was needed.

February 3, 2004, 1730 hours. Writer attempted to contact suspect Bryon Russell at number provided by RP. No answer.

February 4, 2004, 0900 hours. Attempted to contact Suspect by phone. No answer.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

February 6, 2004, 1400 hours. Made phone contact with Suspect. Confirmed that he was the driver in Castro accident. Suspect agreed to come into station.

February 8, 2004, 1600. White male in late 20s identifying himself as Bryon Russell, 1145 Lincoln Drive, PV, arrived at Palo Verde Police Station for interview. Russell possessed a valid Columbia driver's license. Russell did not have vehicle registration because vehicle belonged to Tom Miller. Russell could not provide an address or phone number for Miller. Russell admitted that he struck RP as he proceeded to make a right turn from Oak Avenue to Willow Road. Russell stated that he approached the intersection at the speed limit, 25 mph, and he saw no one in crosswalk as he proceeded to make a right turn from Oak Avenue onto Willow Road, so he continued to proceed around the corner. Russell stated that as he approached the crosswalk a cyclist suddenly darted in front of his car and that he was unable to stop in time to avoid the collision. He advised that he helped the cyclist to his car and transported her to PV Medical Center emergency room. Russell stated that RP, whom he confirmed was Sandra Castro, seemed OK. Russell stated that he did not recall if the vehicle lights were on because it was still daylight and lights were not needed. Russell stated that the cyclist was dressed in dark clothing and did not have lights or any reflectors on her bicycle or person. Writer questioned Russell about whether there were any vehicles approaching on Willow Road from his left as he approached the intersection. Russell stated no, that he had looked to his left and there was no traffic from that direction. Russell was then asked if that meant that he had been looking left as he proceeded to cross the crosswalk, and he said no, that he was looking forward just as he approached crosswalk.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

Russell stated that he applied the brakes when he saw the cyclist, but was unable to stop in time. Russell stated that he never saw the cyclist before she entered the crosswalk. The cyclist was struck with the front of the vehicle and the force of the impact pushed her away from the front of the car.

February 8, 2004, 1400 hours. No outstanding warrants on Russell. Drivers License Search Report from Columbia Department of Motor Vehicles attached. Writer concluded evidence was insufficient to issue a citation. Writer sent report to Columbia Department of Motor Vehicles. Investigation closed.

COLUMBIA DEPARTMENT OF MOTOR VEHICLES
CAPITOL CITY, COLUMBIA

DRIVER LICENSE SEARCH REPORT

DATE: February 5, 2004 TIME: 10:35

REQUESTING AGENCY: Palo Verde Police Department

INFORMATION PROVIDED:

NAME: Russell, Bryon DRIVER LICENSE NUMBER: 267-75-983
DOB: 09-22-70

ADDRESS: P.O. BOX 414, Wilson, Columbia 86602

IDENTIFYING INFO:

SEX: Male HT: 6-00 WT: 175 EYES: Blue HAIR: Red

LICENSE STATUS: Valid

RESTRICTIONS: None

CONVICTIONS:

VIOL/DATE	CONV/DT	SEC/VIOL	DKT/NO	FINE	DISP	COURT
09-17-2002	09-30-2002	22350VC (Speeding)	C11321	165	PG	650
12-14-2002	12-31-2002	22350VC (Speeding)	J3567	135	PG	703
01-06-2003	01-15-2003	22350VC (Speeding)	K1001	198	PG	650
01-20-2003	01-29-2003	23152(A)VC (Driving Under the Influence Of Alcohol)	K2003	30 SERVED/ 6 MO/SUS		650

FAILURES TO APPEAR: None

ACCIDENTS: None

Columbia Insurance Company

Peninsula Office

Claims and Adjustment Department

MEMORANDUM

This Report Contains Information That Is Confidential and May Be Protected By the Attorney-Client or Other Applicable Privileges. It Is Intended to Be Conveyed to the Designated Recipient(s).

Insured: MILLER, TOM
Policy No. **A-874 743 88**
Accident/Incident Date: February 2, 2004
From: Mark Hoffman
(304) 339-6034

February 6, 2004. Returned call from insured reporting accident on **February 2, 2004**. Miller reported driver was one Bryon Russell ("Russell"), and all that Miller knew about the accident was from Russell. Miller briefly told me what he understood had happened.

I asked if Russell was driving with his permission, and Miller said that he was. Miller said that Russell was an acquaintance whom he'd known from the 24-7 Gym over the last 2 months. They occasionally worked out and practiced rock climbing together at the gym. On the day of the accident, Miller had gone to the gym and talked to Russell. They wanted to talk over a possible back packing trip together, so they went to the Brew Pub. Miller put this at about 3:00 pm.

Miller said that they split a pitcher of beer, about 2 glasses each. Then they drove back to the gym, where Miller was to meet his girlfriend at 4:30 pm and Russell had his car. He dropped Russell off, and was waiting to park in Russell's spot. Russell's car wouldn't start, and Russell seemed angry because, he said, he had an important meeting with someone who was helping him in his attempt to get a job. Miller said Russell seemed really disappointed. So, Miller offered to let Russell use his car. Russell said he'd be back by 7:00 pm. The gym closed at 8:00 pm, and Miller said that

his girlfriend would have her car. Miller said that there were no other discussions of where Russell might or could go.

Russell showed up about 7:00 pm, but he was highly agitated and stated that he'd been in an accident over on Willow Road next to Leland University. He told Miller that he hit a bicyclist "who darted out of nowhere" as Russell made a right turn. Russell said he'd taken the cyclist, a young woman, in the car to the nearby Palo Verde Medical Center where he waited for 30 minutes. While waiting, Russell thought that he'd call Miller at the gym and went to find a phone. He couldn't get through and, when he returned to the emergency room, she was gone. Russell didn't think that she'd been seriously injured. He hadn't gotten her name, but he'd given her his name, phone and license numbers.

Russell and Miller went to check out the damage to his car. There was none. Miller then took Russell home. On the way, they drove by Willow Road and Oak Avenue to see if the bicycle was there. It wasn't. They decided against contacting police since it was apparent the cyclist had not been seriously injured.

Yesterday, Miller saw Russell, and Russell said he had gotten calls from the police, so Miller thought he had better notify us.

Prepared report. Waited to hear from possibly injured party.

February 10, 2004. Call from Sandra Castro referred to me. Told her I'd get the police report, and asked her to get copies of doctor, hospital, or repair bills and get back to me. Picked up copy of police report.

Noting Russell's 3 speeding tickets and recent drunk driving conviction, I called and went to meet with Russell. He confirmed Miller's account of how he borrowed the car. He said that they only had a few beers. Russell then went to his meeting. After a few questions, Russell told me his meeting had been at another bar, Sidewinders. Russell said he had another few beers and left a little after 5:00 pm, intending to run another errand over at Leland University and then return to the gym. I asked Russell whether

he had felt intoxicated after 4 or more beers in about 2-3 hours, and he said, no, that he felt “OK” to drive.

Russell said that the accident happened after 5 pm, and that he didn’t have his lights on. There was no need, since it was still daylight. (I checked archives on weather.com, and on February 2, sunset was at 5:45 pm.)

As he approached the corner, he saw no cars ahead or approaching on Willow Road. He slowed down, and saw a yield sign immediately before the crosswalk. He thinks he was traveling less than 10 mph at the time of impact.

Castro told him that her arm and leg hurt. Driving to the hospital, he told her that she “seemed to come out of nowhere.” She didn’t respond, but Castro did say that he (Russell) should have been more careful when driving next to the campus, as students are often on bicycles and on foot.

He pled guilty to the recent drunk driving charge, and spent nights and weekends in jail for about a month. He never told Miller about it. He tried to keep it quiet, even from friends, as it embarrassed him. He may have told Miller that he was concerned about getting cited for the accident because he was close to losing his license.

February 11, 2004. Visited scene. Took photos, but camera malfunctioned.

Oak and Willow is a tricky intersection. Approaching the intersection with Willow on Oak, as Russell would have been, there is a bike lane painted on the right side of the road. About 100' before the intersection, the bike lane turns onto the sidewalk and runs along right next to the road.

To turn right from Oak to Willow does not require a full stop. Just before Oak meets Willow, there is a right turn lane which rounds the corner. The crosswalk where the accident happened crosses this rounded right turn lane. There is a yield sign right at the edge of the crosswalk. Next to the yield sign there is a large utility pole.

It's easy to see how the accident may have happened. As Russell got near the intersection, Castro on her bike would have already gone from the bike lane onto the sidewalk and would be approaching the crosswalk. Russell and Castro reached the crosswalk at the same moment. Russell may have been looking to the left as he rounded the corner. He may not have looked back along the sidewalk for a bicycle about to enter the crosswalk without stopping. He may not have seen her because he did not look, or he may not have been paying attention, or he may have been obstructed by poor light or the utility pole.

February 22, 2004. Called Miller to follow up on what he thought about Russell's condition when he loaned him the car. Asked what he knew of Russell's driving record prior to accident: "I really didn't know much about Russell at all. Just another guy at the gym." Asked what Russell had told him about his driving record: "I think he told me, when talking about a possible trip together, that he'd had a couple of speeding tickets." Asked if that was when he was talking about his concern about losing his license. "Yes, I think that's when it was." But when I put it to him specifically, did you know about Russell's speeding tickets before the accident, Miller said: "I think that he mentioned the tickets prior to the accident." He was emphatic that he didn't know about a drunk driving conviction before I asked him about it. I asked if he had, would he have loaned Russell the car? He wasn't sure: "I don't know, since it never came up."

February 25, 2004. Received medical report and hospital bill ($250) from Castro. She didn't have receipt for bike, which she said cost her $150 a year ago. I offered her $700. She said that she was thinking of talking to a lawyer first.

Castro argued that Russell was going too fast and she thought that he'd been drinking. I asked her, if she believed that, then why did she let him give her a ride to the hospital? She said that it was only a 2 minute ride and that she didn't note the smell of alcohol on him until she was seated next to him in the car, and then it was obvious. She admitted that she didn't notice anything erratic in his driving or behavior, although she thinks that the reason Russell dropped her at the hospital and then disappeared was because he had been drinking.

PALO VERDE MEDICAL CENTER ADMITTING FORM:

Name of Patient:	Sandra Castro
Address & Telephone Number:	285 College Avenue, Apt. E
	Palo Verde, COL (111) 734 - 2685
Insurer: none	Date & Time Admitted: February 2, 2004 @ 1720
Sex: F	Race: Hispanic
Occupation:	Student
Business Address:	N/A
DOB:	March 2, 1985
Emergency Contact:	Gaspar Castro
Address & Telephone Number:	9832 Walmer Creek
	Overland Park, COL (924) 316-3814

Diagnosis: Patient admitted to ER at 1720. Complained of pain in left leg and right arm. Stated she sustained injuries when a car traveling without lights collided with her bicycle, knocking her to pavement. Visual examination disclosed numerous superficial lacerations of the leg and arm, some of which were bleeding actively though not profusely. As the examination failed to disclose any indication of possible fractures, no x-rays were ordered. The lacerations were cleaned and antiseptic gel was applied. Tetanus injection was also administered as patient could not recall when she last had booster. Patient was given tube of Lanocane to guard against possible infection and to soothe itching and burning. Patient released 1830. - Jorge Montoy, M.D.

Patient returned on February 4, 2004 (1730) complaining of pain in left leg and right arm. Examination revealed that she had normal movement in both extremities though the degree was limited markedly by the pain. Further examination did not disclose possible fractures in either extremity. The lacerations had healed well, though bruises which were quite sensitive to the touch were evident along the lower part of the right arm and below the knee of the left leg. Patient was advised that she would continue to experience pain but that it would diminish and eventually disappear within 2 weeks to a month. Patient was told to avoid all strenuous activity until pain disappeared. - Jorge Montoy, M.D.

Dictated but not read

Palo Verde Medical Center
2000 University Avenue
Palo Verde, Columbia 83014
(111) 733-3000

Direct Billing Statement of Account

Date: February 15, 2004

Account No.: 83187

Patient: Sandra Castro
285 College Avenue, Apt. E
Palo Verde, COL 83014

Date:	Description of Services	Charges	Payments
February 2, 2004	Emergency Room Services	$180	00
February 4, 2004	Emergency Room Services	$ 70	00

Balance Due: $250

TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
Bar
Examination

Performance Test A
LIBRARY

SANDRA CASTRO v. TOM MILLER

LIBRARY

Table of Contents

SELECTED COLUMBIA VEHICLE CODE PROVISIONS

§ 17150. Liability of Owner

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.

§ 17151. Limitation of Liability

The liability of an owner, imposed by section 17150 and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($15,000) for damage to property and for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for damage to property and for the death of or injury to more than one person in any one accident.

§ 21200. Rights and Duties of Bicycle Riders

Every person riding a bicycle upon a highway has all the rights and is subject to all the provisions applicable to the driver of a vehicle.

§ 21950. Right-of-Way at Crosswalks

(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided.

(b) The provisions of this section shall not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard. No pedestrian shall unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

(c) The provisions of subdivision (b) shall not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or

within any unmarked crosswalk at an intersection.

§ 23152. Driving Under Influence

It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

SELECTED COLUMBIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI)

Columbia's form jury instructions, BAJI, were formulated by the Committee on Standard Jury Instructions, Civil, Superior Court, to be as close as possible to generally applicable statements of the law.

3.50 Comparative Negligence Defined

Comparative negligence is negligence on the part of the plaintiff which, combined with the negligence of a defendant, contributes as a cause in bringing about the injury. Comparative negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant, but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff.

5.13 Yield Right-of-Way--Intersection

An immediate hazard exists whenever a reasonably prudent person in the position of the driver, upon approaching a yield right-of-way sign at an intersection, would realize that another vehicle in or approaching the intersection would probably collide with [his][her] vehicle if [he][she] then proceeded to enter or cross the intersection.

5.40 Influence of Alcoholic Beverage--Driver

Columbia Vehicle Code Section 23152 provides: It is unlawful for any person who is under the influence of any alcoholic beverage to drive a vehicle. A person is under the influence of any alcoholic beverage when as a result of drinking such beverage [his][her] physical or mental abilities are impaired to the extent that such person is not able to drive a vehicle in the manner that a person of ordinary prudence would drive under the same or similar circumstances.

5.41 Influence of Alcoholic Beverage--Circumstances to Consider

One is not necessarily under the influence of an alcoholic beverage as a result of consuming one or more drinks. The circumstances and effect must be considered. Whether a person was under the influence of an alcoholic beverage at a certain time is an issue for you to decide.

13.51 Liability of Owner--No Issue as to Permission

It has been established in this case that, at the time of the accident, the vehicle then being used by the defendant/driver was owned by the defendant/owner, and that it was being used with the permission of the owner. It follows, therefore, under the law, that if defendant/driver is liable, both are liable.

13.52 Liability of Owner--Contested Issue as to Permission

If you find that at the time of the accident, defendant/driver did not have the permission, express or implied, of the defendant/owner to use the vehicle, then defendant/owner is entitled to a verdict in [his][her] favor, regardless of what your decision may be as to the other defendant. But if you find that the vehicle used by defendant/driver was being used with the permission, express or implied, of the defendant/owner, then if the defendant/driver is liable, so is the defendant/owner.

13.53 Limited Permissive Use--Effect of Use Beyond Scope of Permission

When the owner of a motor vehicle gives another permission to use that vehicle, the owner may restrict the permitted use to a given locality or to a specified period of time or to a particular purpose. Disobedience of the owner's orders will not relieve the owner from the legal consequences of permission, unless the disobedience amounts to a use substantially beyond the scope of the permission as to either time, place, or purpose.

Armenta v. Churchill

Supreme Court of Columbia, 1954

Plaintiffs, the widow and children of Amador Armenta, Sr., brought this action to recover damages for his wrongful death. The deceased, while working on a road-paving job, was killed when a dump truck backed over him. The truck was operated by defendant Dale Churchill, whose wife and codefendant, Alece Churchill, was the registered owner.

Plantiffs' amended complaint contained two counts. The first count charged negligence on the part of Dale Churchill as driver of the truck, acting as agent and employee of his wife, Alece Churchill, and within the scope of his agency and employment. The second count contained the added allegations that Alece Churchill was herself negligent in entrusting the truck to her husband, she having actual knowledge that he was a careless, negligent and reckless driver. As to the first count, defendants admitted in their answer the agency and scope of employment of Dale Churchill, but, as to the second count, they denied the added allegations. In support of the added allegations of the second count, plaintiffs offered evidence at trial to show that Dale had been found guilty of 37 traffic violations, including a conviction of manslaughter, and that Alece had knowledge of these facts. Defendants objected to the offered evidence because it was directed to an issue which had been removed from the case by the pleadings. After the objection was sustained, defendant Alece Churchill again admitted her liability for all damages sustained by plaintiffs in the event that her husband was found to be liable. The jury found for defendants. Plaintiffs contend that the trial court committed prejudicial error in instructing the jury and in excluding certain evidence.

The question presented here is whether there was any material issue remaining in this case to which the offered evidence of 37 traffic violations, including a manslaughter conviction, would be relevant. Defendant Alece Churchill admitted vicarious liability as

the principal for the tort liability, if any, of her husband.

Plaintiffs' allegations in the two counts with respect to Alece Churchill merely represented alternative theories under which plaintiffs sought to impose upon her the same liability as might be imposed upon her husband. Alece Churchill's unqualified admission that Dale Churchill was her agent and employee and that he was acting in the course of his employment at the time of the accident effectively removed from the case the issue of her liability for the tort, if any, of her husband: in effect, Alece Churchill was liable if her husband was liable for negligence. Accordingly, there was no material issue remaining to which the offered evidence could be legitimately directed. We therefore conclude that the trial court properly sustained defendants' objection to the relevance of the 37 traffic violations of defendant Dale Churchill.

The judgment is affirmed.

Osborn v. Hertz Corporation

Columbia Court of Appeal, 1988

In this appeal, we consider whether a car rental company is liable under the theory of negligent entrustment for injuries caused by a drunk driver who had rented a car while sober and presented a valid driver's license.

In the early morning hours of July 18, 1981, plaintiff Joan Osborn was on a date with Dennis Ege. Mr. Ege was driving while intoxicated and he drove the car in which they were riding into a tree. Plaintiff suffered serious injuries. Defendant Hertz Corporation had earlier rented the car to Ege.

Plaintiff contends defendant Hertz negligently entrusted the car to Ege even though Ege was sober and presented a valid Columbia driver's license when he rented the car from defendant. Plaintiff asserts defendant was negligent for failing to investigate further Ege's qualification to drive. Plaintiff argues that, had defendant conducted such an investigation, it would have discovered that Ege had been twice convicted of drunk driving, the most recent conviction having occurred some seven years earlier, and that Ege's driver's license had in the past been suspended for six months as a consequence. The trial court ruled for defendant on the negligent entrustment claim.

It is generally recognized that one who places or entrusts his or her motor vehicle in the hands of a driver whom he or she knows or, from the circumstances, is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness. Liability for the negligence of the driver to whom an automobile is entrusted does not arise out of the relationship of the parties. Rather, it arises from the act of entrustment of the motor vehicle with permission to operate the same to one whose incompetency, inexperience, or recklessness is known or should have been known to the owner.

Under the theory of negligent entrustment, liability is imposed on the vehicle owner because of his or her own independent negligence and not the negligence of the driver.

Columbia Vehicle Code section 14608 prohibits a rental car agency from renting to unlicensed drivers. A rental car agency may therefore be liable for negligently entrusting a car to an unlicensed driver. Excerpts from Ege's deposition established without contradiction that he showed defendant a valid driver's license and had not been drinking before renting the car. It is undisputed that Ege gave defendant no clue that he was then unfit to drive. There is therefore no triable issue whether defendant knew of Ege's unfitness.

Plaintiff claims defendant should have asked Ege: (1) whether he had a record of driving under the influence; (2) whether he had ever had his license suspended or revoked for drunk driving; (3) whether he had ever been refused automobile insurance; and (4) whether he intended to drive under the influence. Plaintiff claims defendant's entrusting the car to Ege without asking these questions was negligent.

An ordinarily prudent car rental agency is not obligated to ask its customers for information that has no useful purpose. The practical effect of plaintiff's contentions would be to make it impossible for anyone previously convicted of drunk driving or whose license was once suspended from renting a car. Because rental cars play an indispensable role in contemporary American business, adopting plaintiff’s position would impose a severe hardship on countless responsible citizens who were once convicted of vehicle offenses and who depend on rental cars to perform their jobs. Accordingly, we hold that a car rental company is not liable for injuries caused by a drunk driver who, while sober, rented a car and presented a valid driver’s license.

The judgment is affirmed.

Allen v. Toledo

Columbia Court of Appeal, 1980

Decedent was killed when Stephen Toledo, a 19-year-old driver, smashed his father's pickup truck into decedent's car as she was pulling out of a driveway. Decedent's four minor children sued the driver and his father, Robert Toledo, for her wrongful death. The cause of action against the father was for negligently entrusting Stephen with his truck when he knew, or should have known, his son was a reckless driver. The jury found the father permitted the son to use his vehicle when he knew or should have known the son was a reckless driver, the son's recklessness proximately caused the accident, and decedent was not negligent. The jury returned a general verdict of $200,000 against defendants, and they appealed.

Over objection, the trial court had admitted the following evidence: Robert knew Stephen had been in an accident on November 18, 1973, while driving Robert's vehicle. Robert also knew that Stephen was in an accident on March 29, 1975, in which the vehicle that Robert owned and Stephen was driving was damaged. Finally, Robert knew that Stephen was injured on October 25, 1975, as the vehicle Stephen was driving was damaged when it struck another vehicle and then hit a house. Less than three weeks after Stephen’s third accident, he killed the decedent.

Defendants contend the evidence of the earlier accidents and Robert’s knowledge of them should have been excluded under Columbia Evidence Code section 352, because its probative value was far outweighed by the likelihood the jury would improperly infer Stephen had been negligent or reckless in the present instance. Evidence of involvement in other accidents is inadmissible when its purpose is solely to prove negligence in the accident in question. Here, however, the evidence of Stephen's involvement in other accidents is relevant to Robert's liability for negligent entrustment. Robert's knowledge of Stephen's unfitness or incompetence to drive is an essential element of liability for negligent entrustment.

The doctrine of negligent entrustment is a common law liability doctrine wherein an owner of an automobile may be independently negligent in entrusting it to an incompetent driver. On the other hand, the vicarious liability of an owner who permits another to use his automobile is statutorily imposed. Columbia is one of several states that recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute. (See Columbia Vehicle Code, § 17150 et seq.)

Defendants argue the evidence of other accidents does not support the jury's finding Robert liable for negligently entrusting the pickup truck to Stephen. The tort of negligent entrustment requires demonstration of actual knowledge that the driver is incompetent or knowledge of circumstances which should indicate to the vehicle owner that the driver is incompetent.

Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care. Review of the evidence on this issue is limited to determining whether the jury's finding is supported by substantial evidence. The record contains uncontroverted evidence of Stephen having been in three earlier vehicle accidents, including two within the eight months before the collision involved here, and one of them nineteen days before. Moreover, in the most recent accident, the vehicle Stephen was driving collided with both another vehicle and a house. Robert was aware of Stephen's involvement. There was substantial evidence from which the jury could conclude a reasonable and prudent vehicle owner with knowledge of Stephen's previous accidents would not have permitted Stephen to drive. Thus, the jury's finding Robert liable for negligently entrusting the pickup truck to Stephen is supported by substantial evidence.

The judgment is affirmed.

Green v. Otis

Columbia Court of Appeal, 1979

The trial court found that the defendant used car dealer had not been negligent in entrusting a used car to a driver who had taken it on a testdrive, and thus was not liable for the death and injuries caused by the driver while he was operating the car.

On April 4, 1974, there occurred a three-car collision which generated this wrongful death action. Ross Dietrich ("Dietrich"), driving at high speed and without a driver's license in his possession, collided head-on with a vehicle driven by Valerie Green. Ruth Green was a passenger in Valerie's car. Valerie Green was pronounced dead at the scene. Dietrich was driving a 1972 Cadillac owned by Defendant John Otis ("Otis"), a used car dealer.

One Friday, an Otis salesman had allowed Dietrich to take a 1972 Cadillac off the lot for an extended testdrive. There was testimony at trial that the Otis dealership had a very loose policy about allowing its vehicles to be taken off the lot and driven by prospective customers. Otis's rules about who would be allowed to testdrive Otis cars were determined *ad hoc*. It was not uncommon for prospective customers to desire to have the car in which they were interested checked by an outside mechanic or examined by a spouse. Cars were sometimes kept overnight for such a purpose. There was no testimony as to the terms and conditions the Otis salesman communicated to Dietrich concerning the return of the Cadillac, but Dietrich had not returned the car by Sunday. The police arrested Dietrich for outstanding traffic warrants while he was driving the Cadillac and impounded the car some 30 miles from the Otis dealership. Otis's manager recovered the car by paying impounds and storage charges in the amount of $400.

On the following Tuesday, Dietrich returned to the Otis car lot driving a 1962 Chevrolet. He requested to testdrive the Cadillac again, but the manager refused to allow it and

asked Dietrich to pay the recovery costs of the Cadillac. Dietrich refused, insisting that he be allowed to testdrive an automobile and stayed on the premises complaining for several hours. He told John Otis, the owner of the car lot, that he merely wished to have the car checked by a mechanic at a location some eight blocks away.

Dietrich did not exhibit signs of intoxication. He was neatly dressed. Otis testified that he doubted at the time whether Dietrich was actually able to purchase the Cadillac but that he had not ruled out the possibility "100 percent." At the time, because of the recent energy crisis, sales of large luxury cars were moving slowly. Otis was interested in selling cars and was also anxious to end the confrontation with Dietrich.

Finally, at approximately 4:30 p.m., Otis gave Dietrich permission to testdrive an automobile. No paperwork was involved. Otis obtained Dietrich's address but did not ask him if he possessed a valid driver's license. Otis and Dietrich agreed orally that Dietrich would return the car by closing time, 6 p.m., and that he was to take the car for the sole purpose of having it checked by a mechanic. Dietrich failed to return. Otis's repossessor searched, but was not successful in locating Dietrich or the car. Two days after Dietrich took the car, the fatal collision occurred some eight to ten miles from the Otis lot.

By statute, Columbia has long provided for liability of a vehicle owner to third persons for damages sustained as the result of negligent operation of the owner's vehicle by a driver who has the owner's permission to drive. Columbia Vehicle Code Section 17150.

The courts have adopted various views of the meaning of "permission." There is (1) the "initial permission" rule that if a person has permission to use an automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties, is a permissive use; (2) the "minor deviation" rule that use is permissive so long as the deviation is minor in nature; and (3) the "conversion" rule that any deviation from the time, place or purpose specified by the person granting

permission is sufficient to take the owner outside of the statutory liability. The only limitation on the "initial permission" rule is that the subsequent use must not be equivalent to "theft or the like."

Irrespective of which definition of "permission" we apply here, Dietrich's continued possession of the Otis Cadillac for two days after he had promised to return it more nearly resembles the situation of "theft or the like." This was no minor deviation from the scope of permission; rather, it was a deviation of major proportions. The scope of permission had in fact been limited as to time, area, and purpose, and had been completely violated by Dietrich. Since there was substantial evidence supporting the trial court's determination that Dietrich was operating the vehicle without the permission of Otis at the time of the accident, we must uphold the conclusion.

Plaintiffs also claim that Otis is liable under the nonstatutory common law theory of negligent entrustment of a motor vehicle. Under the doctrine of "negligent entrustment," an owner of an automobile may be independently negligent in entrusting it to an incompetent, reckless, or inexperienced driver.

The owner owes a duty of "ordinary care or skill" for the breach of which the owner who routinely entrusts automobiles may be liable for injuries to third parties. We think it clear that ordinary care and skill on the part of a used car dealer requires that the dealer make inquiry of persons wishing to testdrive the dealer's cars whether such persons are duly licensed drivers. Those persons who cannot produce a valid license to operate such automobiles testdrive at the dealer's peril. Otis made no such inquiry of Dietrich, even though he knew that Dietrich had been arrested several days before for outstanding traffic warrants. We hold, therefore, that the undisputed facts support a finding of breach of the duty of care owed by Otis to third persons, and the imposition of liability for negligence on the Otis Company.

The judgment is reversed.

Answer 1 to PT - A

1)

February 22, 2005

Dear Attorney:

As you know, this firm represents Tom Miller with respect to Ms. Castro's (Castro) complaint for personal injuries. At this time, we believe it would be helpful for the parties to assess the strength of their respective positions and entertain the possibility of settlement. In furtherance of this undertaking, we have prepared the following statement of facts and statement of Mr. Miller's (Miller) position of the matter. Based on the analysis detailed below, Miller is willing to make an offer of settlement. The details of Miller's offer are contained in this letter.

Statement of Facts

On February 2, 2004, Miller gave Bryon Russell (Russell) [sic] returned to the 24-7 Gym and discovered that Russell's car would not start. Russell had an important appointment regarding a job he was trying to obtain and needed to get to his appointment. As such, Miller gave Russell permission to borrow his car for the purpose of attending a job interview but asked that Russell return the car by 7:00 p.m. that night. At the time Miller entrusted Russell with the car, Miller did not know that Russell had previously plead [sic] guilty to drunk driving.

Unbeknownst to Miller, Russell's meeting was at a bar and while there Russell endulged [sic] in a few beers. Thereafter, without Miller's permission, Russell decided to run a personal errand before returning Miller's car. This personal errand was in the area of the Leland University. While running this personal errand, Russell was engaged in an accident with Castro.

The accident occurred around 5:00 p.m. at the corner of Willow and Oak. At this corner there is a yield sign for those turning right, but it does not require a full stop. As you probably know, this is a tricky intersection because it has [a] large utility pole partially blocking view and the bike lane runs alongside of the road. Russell [w]as slowing to round the corner traveling about 10 miles an hour when Castro darted out from the sidewalk into the crosswalk. Although Russell attempted to stop to avoid the accident, Castro's appearance in the road was so sudden that he could not stop the vehicle. Russell struck Castro[,] causing her to fall from her bicycle. Russell stopped the car and aided Castro. Castro indicated that her arm and leg hurt so Russell took Castro to the hospital to get her treatment.

Castro sustained superficial lacerations to her leg and arm and was released from the medical center with ointment to treat her scrap[e]s. Castro also incurred some bruising. Castro's total medical bills amount to $250. Castro's bicycle was also damaged in the accident[,] causing about $150 damage. Thus, Castro's total actual damages are $400.

The police investigated the accident and found that there was insufficient evidence to charge Russell with any fault and the investigation was closed. Castro subsequently filed a personal injury claim alleging two causes of action: (1) liability based on permissive use under vehicle code section 17150; and (2) negligent entrustment. Miller denies all liability and contends that Castro's negligence also contributed to the accident.

Analysis of Ms. Castro's Claim

Cause of action for permissive use under section 17150 of the Columbia Vehicle Code

Section 17150 of the Columbia Vehicle Code provides that when an owner gives his permission to another to operate his vehicle, the owner is liable for any death or injury to person or property resulting for the negligence or wrongful act of the driver. Thus, there is no doubt that under this statute, Miller is vicariously liable for Russell's negligence if it occurred within the scope of the permission granted to him. However, Miller contends that Russell's use of the vehicle exceeded the permission granted and therefore Miller is not liable for Russell's negligence.

Russell's Use of Tom's Vehicle Exceeded the Scope of Permission Granted

There are many ways that "permission" can be defined. However, courts have applied the "minor deviation" rule finding that use is permissive so long as the deviation is minor in nature. Green. However, as you know, Miller contends that Russell's deviation was not minor and therefore was beyond the scope of the permission granted. Miller granted Russell permission to use his car to get to a job interview. That was it. Miller did not grant Russell permission to run personal errands or to drive while intoxicated. Miller did not know that Russell would be driving the car to a bar for the meeting or that he would be drinking before returning the car. As such, Russell's engagement in drinking before driving and using the car for personal errands substantially deviated from Miller's permission granted. As you know, pursuant to vehicle code section 23152, driving while under the influence is unlawful. As such, there is no way that Miller's permission would have included permission for Russell to break the law.

BAJI 3.52 says that if the jury finds that Russell did not have permission to use the car at the time of the accident that the jury must return a verdict in favor of Miller. As discussed above, Russell did not have permission to use the car for the personal errand. As such, should this case go to trial, we will ask that the judge instruct the jury as to BAJI 3.52, in which case a jury will find Miller not liable.

Alternatively, if the court finds there was permission, Miller will ask the judge to instruct a jury as to BAJI 13.53[,] which provides that if the use of the vehicle deviates substantially b[e]yond the scope as to either time, place or purpose, the jury may reli[e]ve the owner of liability for the permission. As discussed above, it is Miller's contention that Russell's use was was [sic] substantially beyond that permitted. Miller did not authorize the personal errand or the drinking and driving. As such BAJI 13.53 is appropriate and the jury will have no choice but to find in favor of Miller.

Police Investigation Closed Because there was Insufficient Evidence to Cite Russell

Also, as you know, the police thoroughly investigated the accident. After interviewing witnesses and inspecting the scene the police were unable to formulate a sufficient bases [sic] upon which to cite Russell. Also, it is unlikely that Castro will be able to make out a claim that Russell was drunk because Castro herself admits that he was not driving erratically or slurring his words. Further if Russell was drunk as Castro contends, why would she have accepted a ride to the medical center from Russell[?] Castro must seriously evaluate how this fact will be viewed by the jury. Castro's acceptance of a ride from Russell coupled with the police's decision not to cite Russell severely undermines Castro's argument for liable [sic] on Russell's part.

Thus, if Russell was not negligent and was not violating the law, then Miller cannot be vicariously liable.

Cause of action for Negligent Entrustment

Under the common law tort of negligent entrustment, anyone who entrusts his vehicle "in the hands of a driver whom he or she knows or, from the circumstances, is cha[r]ged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness["]. Osborn.

As you know, Miller was unaware of Russell's prior conviction for drunk driving. Miller was only aware that Russell had received a couple speeding tickets.

Tom was not required to investigate Russell's driving record

Castro contends that Miller had a duty to investigate Russell's driving record before entrusting him with the car. However, the law has imposed no such duty on a private individual loaning his car to a friend. In fact, the Columbia Court of Appeal has not even imposed such duty upon rental car companies who routinely rent cars to drivers. Osborn. In Osborn the rental car agency, Hertz, rented a car to defendant who had been convicted of drunk driving on two occuasions [sic] and had his license revoked. Hertz only asked that

driver [to] present a driver[']s licence. It did not inquiry [sic] into the driver's driving history. Had it done so it would have discovered the drunk driving convictions. The court found that it would be burdensome to require the agencies to check the driving records of every driver it rents a car to and therefore found that it had no duty to investigate the driver's driving history. Osborn.

Thus, if a rental car agency who routinely rents cars out has no duty to investigate, surely a private citizen loaning a car to [a] friend has no duty. Similarly because it would be burdensome on a rental company to check driving history, it would be exponentially more burdensome for a private individual who is not familiar with such things to run such a check.

There are two cases where the Columbia courts of appeal has [sic] imposed liability for negligent entrustment where the drivers had bad driving histories. However those cases are distinguishable for the case at hand. In the Allen case the court imposed liable [sic] for negli[g]ent entrustment because a father knew that his son had been involved in three accidents prior to loaning him the car. There the court found that a reasonably prudent person with knowledge of the son's driving record would not have entrusted him the car. In Allen there was a father and son, so of course the father was clearly aware of his son's driving record. That is not the case at hand. Miller is not a close friend of Russell and cannot be held to have an intimate knowledge of his driving record.

The Green case is similarly distinguishable on its facts. In Green, a car deal[er] had allowed a driver to take a car out for a testdrive without checking for license or driving history. While out on a testdrive, the driver was arrested by the police for outstanding traffic warrants. The dealer subsequently recovered the car. Later, the driver sought to testdrive the same car ago [sic]. After persistence the dealer allowed driver to testdrive the car. While out on the testdrive, driver was involved in a head-on collision killing the other driver. In Green, the court found that where the owner "routinely" entrusts automobiles it owes a duty of ordinary care and skill in entrusting the car. Because of the dealer's knowledge of the outstanding warrants, it was negligent in entrusting the car. Here, Miller is not in the business of "routinely" entrusting cars – he is not a dealer – and he was not aware of any warrants for Russell's traffic violations. As such, our case is factually distinct from Green. In addition, the Green case was decided in 1979 and the Osborn case was decided much more recently in 1988. Therefore the Osborn case better reflects the state of Columbia law on this issue.

Russell's Drunk Driving Record is Not Admissible

Castro will not necessarily be able to get into evidence Russell's drunk driving conviction. According to the Columbia Supreme Court in Armenta, this will only be relevant if the court finds that Miller knew of it. Further, if Miller is found vicariously liable for Russell's negligence, the driving record will similarly not be admissible. In Armenta, the defendant admitted vicarious liable [sic] for the negligence of its employee and plaintiff

sued for the alternative theory of negligent entrustment. The court found that if liability is established vicariously, there is no material issue to which the driver's driving record would be relevant. As such, it could not be admitted into evidence. In Armenta, the driver's record was far worse than Russell's. The driver in Armenta had 37 traffic violations and had been convicted of manslaughter. All of these facts were known to the owner of the car at the time it was entrusted. The case at hand is care [sic] less severe and Miller had no knowledge of drunk driving. As such, under Armenta, it is unlikely that Castro will be successful in getting the conviction admitted.

Russell was not Drunk When the Car was Entrusted

Russell was not drunk when Miller entrusted the car to him. While it is true that Miller and Russell share[d] a pitcher of beer a couple hours before the accident, Russell was not drunk or intoxicated. As BAJI 5.41 indicates, "one is not necessarily under the influence of an alcoholic beverage as a result of consuming one or more drinks. The circumstances and effect must be considered." This will be a fact for the jury to decide.

Here, the facts weigh in favor of the fact that Russell was not drunk when entrusted with the car. He did not rise to the level of legal intoxication which requires that his "physical or mental abilities are impaired to the extent that such person is not able to drive a vehicle in the manner that a person of ordinary prudence would [d]rive under the same or similar circumstances.["] BAJI 5.40. Russell was on his way to a job interview. It is highly unlikely that he was impaired because the reasonable person does not attend a job interview drunk. This further supports Miller's belief that Russell was not intoxicated. Given the strong case law support and instructions that would be given to a jury, we are confident that a jury would find that Miller did not negligently entrust his vehicle to Russell.

Ms. Castro was Contributorily Negligent and Therefore her Damages Recovery Will be Reduced

Even if a jury were to find that Russell was negligent and Miller thereby is vicariously liable, such liability will be reduced by the fact that Castro was also negligent in causing the accident.

As you know, the state of Columbia adopts comparative negligence. As such, we will ask that the judge read the jury BAJI 3.50 which provides that "Comparative negligence is negligence on the part of the plaintiff, which combined with the negligence of defendant, contributes as a cause in bringing about the injury. Comparative negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant, but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff."

Here, Castro had a duty as a cyclist to abide by all the vehicle code provisions applicable to drivers of vehicles. Section 21200. Also because Castro was crossing the

crosswalk like a pedestrian, she is also subject to the obligations imposed on pedestrians. Pedestrians have a duty to use due care for their safety and shall not suddenly leave a curb or other place of safety and run into the path of a vehicle. Section 21950(b).

Here, Castro did not even look before darting into the crosswalk. Witnesses to the accident can confirm this fact. Because she darted into the crosswalk without looking, she violated vehicle code section 21950. Castro's breach of duty care is further shown by the fact that she is familiar with the intersection. Thus, she knew that it was a tricky intersection that required her to exercise additional care for her safety. Castro failed to do so and as a result Russell was not able to stop in time to avoid the accident. In fact, Castro admits that she saw Russell coming. Thus, it remains a mystery as to why she didn't get out of the way. Castro's violation of this statute contributed to her negligence and therefore she will not be permitted to recover in full.

Ms. Castro's Injuries and Damages are Minimal

Castro's medical records indicate that she sustained superficial lacerations of the leg and arm and bruises. There were no fractures and the injuries are not permanent nor permanently disabling. Castro's medical bills amount to only $250 and damage to her bike is estimated at only $150. Castro has suffered no lost wages. Thus, Castro's actual injuries are only $400.

This was a minor accident and Castro's own doctor has indicated that her injuries were "superficial". Castro's demand of $15,000 is more than 30 times her actual damages. Castro's pain and suffering for "superficial" injuries are not that great. There is no doubt that a jury will not find Castro's injuries warrant a 30 times multiplier. Thus, Castro must be realistic about what she will be able to obtain, if anything, if this goes to trial. She must also take into account the additional costs associated with going to trial. Further, Castro must take into account that whatever figure she believes she can realistically recover at trial, that number will be reduced proportionally to her negligence. Thus, her recovery will be even lower. Further, keep in mind that any vicarious liability imposed is limited by statute. Section 17151.

Offer to Settle

Based on the foregoing, Miller is willing to offer Castro a total of $5,000 in settlement of her entire claim against Miller, including any claim for pain and suffering. We believe that this is a very generous offer[,] especially given Castro's contributing negligence. Thus, we hope that your client will give this offer very serious consideration. Please let me know no later than March 5, 2005, whether Castro wishes to accept this offer. If Castro does not accept the offer by March 5, 2005, Miller is prepared to take this matter to trial.

Sincerely,

Mariah Malone, Esq. END OF EXAM

Answer 2 to PT - A

2)

LAW OFFICES OF MARIAH MALONE
98 Prentiss Street, Suite A
Palo Verde, Coliumbia 83013

February 22, 2005

Plaintiff's Counsel
Address

Re: Castro v. Miller
DOA: February 5, 2004

Dear Plaintiff's Counsel:

As you are aware, my client, Mr. Tom Miller (Miller) has declined your client's (Castro) offer to settle this case for $15,000.

In this letter I outline my arguments against your client's allegation that my client is negligent for the accident between your client and Mr. Bryon Russell (Russell) for (1) the permissive use of an automobile and (2) negligent entrustment of the vehicle. In the interests of settlement, I would like to offer your client $5,000, which would include compensation for her injuries, property damage, and any pain and suffering as a result.

As you are aware, our answer affirmatively sets forth the allegation that your client was comparatively negligent and that Russell's use was beyond the scope and permission granted by my client. Let me first turn to the issue of permissive use of an automobile, followed by our allegation that its use was beyond the scope and permission granted, and finally the issue of your client's negligence. I will then turn to the issue of negligent entrustment.

Permissive Use of an Automobile

As you are aware, according to Columbia Statute Section 17150, a motor vehicle owner is liable and responsible for injury to a person or property resulting from a negligent or wrongful act or omission in the operation of a motor vehicle by any person using or operating the same with the permission, express or implied, of the owner. Col. Stat. Sec. 17150. The word "permission" has been determined by the courts to mean a few things. There is (1) the "initial permission" rule that if a person has permission to use an

automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties, is a permissive use; (2) the "minor deviation" rule that use is permissive so long as the deviation is minor in nature; and (3) the "conversion" rule that any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the owner outside of the statutory liability. Green v. Otis. However, in Green the permission exceeded the scope and was treated more like a theft.

In our case, Miller gave Russel[l] permission to use his car for the sole purposes [sic] of meeting someone who was attempting to help him get a job. Miller did give Russell permission to use his car and under rule #1, any use while in his possession during that time would constitute a permissive use. Under rule #2, any minor deviation would still be considered permissive use. Under rule #2, any minor deviation would still be considered permissive if it is minor. However, Miller will argue that although he gave Russell permission to use the car to drive to a meeting to get a job and then drive back[,] Miller did not know where the meeting would take place and did not know that Russel[l] would be driving around otherwise. Therefore, Miller will argue that the permission exceeded the scope of driving to a job meeting and back.

However, even if permission was given and not outside the scope of the permission granted, Miller's liability as an owner is limited to $15,000 for property damage injury to one person. Col. Stat. Sec. 17151. However, as discussed below, your client's contributory negligence will reduce any recover[y] to her in proportion to the amount of negligence attributable to her, as defined under Col. Jury Instruction 3.50.

Comparative Negligence of Castro

As stated above, Columbia Jury Instructions provides for a plaintiff's recovery to be reduced in the event plaintiff is determined to be comparatively negligent.

In this case, Castro was comparatively negligent when, according to the Palo Verde Police Report[,] Castro admitted to riding her bike along the bike path on Oak Avenue and entering the crosswalk at the intersection of Oak and Willow when, just "as she entered," she looked to her left and "immediately" saw the vehicle that hit her. This evidence supports the statement that Russell gave to the police officer that "as he approached the crosswalk a cyclist 'suddenly darted' in front of his car and that he was unable to stop in time." Further, this evidence supports the statement that the witness gave to the police officer that "the cyclist did not stop before she entered the crosswalk." The witness further stated that she believed Russell applied his brake lights and was slowing to approximately 20 mph before he entered the turn and that he was unable to stop in time. Additionally, the witness stated that Castro was probably behind the guardrail and that she was not visible to the driver until she actually entered the crosswalk, again, "without stopping."

The evidence supports our contention that Castro was negligent in that she entered the

crosswalk, knowing that there was also a guardrail that could block her view and vehicle driver[']s view, without looking for oncoming traffic and that she merely darted in front of traffic. Col. Stat. Sec. 21950(b) states that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard." Col. Stat. Sec. 21950(b). Although Castro was riding a bike, she was on the sidewalk and attempting to cross a pedestrian crosswalk; therefore, she would be considered a pede[s]trian for the purposes of this statute. Further, cyclists have all the rights and are subject to all the provisions applicable to the driver of a vehicle. Col. Stat. Sec. 21200. That being said, common sense would provide that Castro had the right to look for vehicles that were approaching and unable to stop for sudden movements of others.

If it weren't for your client's negligence in not looking for traffic before entering a "blind" intersection before darting into the crosswalk, your client would not have been injured. Additionally, your client was riding a bike without a light, near dusk, and was wearing dark clothing, all of which may have contributed to her injury.

Therefore, a reasonably jury [sic] could find in favor of defendant 100%, or would reduce your client's recovery by approximately 50%, due to the fact that she was probably at least 50% at fault.

As to your second cause of action, it is my opinion that your client will not prevail under a negligent entrustment theory, my reasons for which are stated below:

Negligent Entrustment

Negligent Entrustment due to knowledge of driving record:

The tort of negligent entrustment requires demonstration of actual knowledge that the driver is incompetent or knowledge of circumstances which should indicate to the vehicle owner that the driver is incompetent. Allen v. Toledo. Liability for negligent entrustment is determined by applying general standards of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care. Allen.

The evidence in our case shows that Miller had no knowledge of Russel[l]'s previous drunk driving conviction. He was, however, aware that Russell had two speeding tickets and was afraid of losing his license. Allen is distinguishable because in that case the father knew for a fact that his son's driving record was poor and that it consisted of three accidents within a two year period, and the fourth accident was only caused three weeks after his last injury accident. In our case, Russell confided that he had two speeding tickets, not accidents. However, Russell did not tell Miller about a previous DUI and Miller had no reason to believe he had such a record.

Therefore, Miller was not negligent in entrusting Russel[l] with his car based on knowledge

of his driving record.

Negligent Entrustment due to failure to further question or investigate driving record:

Although Miller was informed about Russell's prior speeding tickets, he was not informed of his prior DUI and does not have a duty to inquire further into his driving record if there were no circumstances surrounding the reason to ask further questions. In Osborn v. Hertz Corporation, the court held that an ordinary prudent car rental agency was not obligated to ask its customers for information that has no useful purpose. Osborn. In that case, a driver who had been twice convicted of drunk driving and that [sic] his license had been suspended in the past, presented a valid driver's license in order to rent a car from Hertz. There was no evidence in that case to show that the driver was unfit to drive and therefore, Hertz did not have to inquire into his driving record relating to drunk driving convictions.

Because a rental car company has no duty to inquire into the driving record of a licensed driver, a lay person should not have a greater duty to inquire into the driving record of a friend or acquaintance before he lends his car, especially, if there were no circumstances surrounding the need to question. Russell's car would not start and Miller offered to lend him his car after he expressed his disappointment and stress by the fact that he would be unable to meet who was going to help him find a job. There were no odd circumstances that would have alerted Miller to be concerned about his past drunk driving record. Therefore, there was no need to investigate further. This was a good [S]amaritan offering and lay persons should not have to be subject to inquiring into personal driving records of those who do not obviously pose a threat to the public. Miller had no reason to believe that Russell would get drunk and drive, especially since he was going to meet someone regarding a job and then was going to return back by 7:00[;] that was only a little over 2 hours after he lent him his car.

Further, in Green, a used car dealer was held responsible for not inquiring if Dietrich had a valid license; however, the court only held that ordinary care and skill on the part of a used car dealer requires that the dealer make inquiry of persons wishing to testdrive the dealer's cares [sic] whether such persons are duly licensed drivers. Green. It did not hold the dealer responsible for not inquiring into the driving record of a testdriver. This case further supports our contention that Miller had no duty to inquire into the driving record of Russell. Moreover, Miller did not doubt Russell was a licensed driver because Russell stated that he was "concerned" about losing his license. A licensed driver would not say he was concerned about loosing [sic] his license if he didn't have a valid license. Therefore, Miller appropriately had enough information that he needed to safely and non-negligently lend Russell his car.

Miller was not negligent in not inquiring into Russell's driving record further.

Negligent Entrustment if Person was Intoxicated:

Your client has alleged that Russell was going too fast and that she thought he had been drinking. However, your client's statement to the police contradicts this statement. Your client told the police officer that she did not observe slurred speech or other indications of alcohol impaired behavior. In fact, she stated that he was calm, and well groomed. Had she smelled alcohol on his breath, as she later mentioned she did when getting into the car with him, she would have mentioned that to the police officer. She failed to mention this important fact to an officer of the law, which casts doubt on her later contrived story that she believed Russell may have been drinking. In my opinion, I do not think a jury would take too well to this.

However, even if Miller should have been aware that he was handing his keys to a person who may consume alcohol (that is, if he knew that Russell had a prior DUI record), the circumstances surrounding the lending of his car would not lead Miller to believe Russell was intoxicated or impaired to the point where lending his car would be negligent.

Further, Col. Jury Instruction 5.41 holds that one is not necessarily under the influence as a result of consuming one or more drinks. Therefore, even if Russel[l] had one or two drinks to the point where maybe your client had smelled the presence of alcohol, the mere smell and the fact he may have consumed some alcohol does not render him automatically impaired. Your client's statement to our investigator admits that she accepted a ride to the hospital from Russell and that she did not notice anything erratic in his driving or behavior. This would support our contention that Russell was not intoxicated or impaired by any means.

Further, the police report stated that Russell took your client to the emergency room himself. Additionally, the interview of Russell by our investigator reveals that Russell waited at the hospital after dropping off your client for approximately 30 minutes and then returned later after trying to find a phone to call Miller. A person who had been drinking and was intoxicated would not have offered to take an inured victim to the hospital or even go into the hospital where nurses and other staff would be able to smell alcohol on his breath. Further, a person who had been drinking would not have returned to the hospital approximately an hour later if he had been intoxicated. I believe a jury would tend to believe this fact and determine that Russell was not intoxicated.

Therefore, Miller will not be liable under negligent entrustment to a "potentially" intoxicated person.

<u>Injury Must be Proximately Related:</u>

Moreover, it is further held that one who entrusts his motor vehicle in the hands of a driver whom he or she knows or, from the circumstances, is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided that the plaintiff can establish that the injury was proximately caused by the

driver's disqualification, incompetency, inexperience or recklessness. Osborn v. Hertz.

The injury occurred when your client suddenly darted out from the sidewalk into the crosswalk. Evidence will show that Russell had slowed down (yielded) before entering the turn area. Both Russell and the witness attest to this fact. The witness, as stated above, believes she saw the brake lights illuminate just before the turn and that Russell was not able to stop in time because your client came from behind the rail and entered the crosswalk without stopping. Russell also admits that he was paying attention to traffic, noting no traffic, turned his attention back to what was in front of him as he slowed to approximately 10 mph before making his turn and that it was at that time that he saw your client enter the crosswalk on his [sic] bike. Further, the fact that there was damage to his car, and your client's injuries were slight, tends to show that the impact was not severe[;] therefore, the speed was probably slow and appropriate for the area.

Therefore, all of this evidence tends to refute that any intoxicating impairment had anything to do with the accident. Even if Russell were looking to his left for any oncoming traffic and hit your client, his negligence would be due to his inattention, not to anything relating to intoxication. Further, an intoxicated person would probably not have slowed down to make the turn. The witness will admit that Russell did slow down and the injury to your client and the lack of damage to his car would again support our contention that he was driving slow. Moreover, when Russell reported the accident to Miller, Miller did not make any comment regarding the smell of alcohol and a reasonable person would probably have attempted to ascertain whether intoxication could have anything to do with the accident or a reasonable person would have tended to smell the presence of it, especially if your client claims that she smelled it on Russell. So, why didn't Miller?

Admissibility of Evidence of Prior Record

Your client may attempt to introduce into evidence the Dept. of Motor Vehicles Driver License Search Report, which includes a conviction for DUI in January of 2003, over one year ago. However, the probative value of this report will probably be outweighed by the likelihood of prejudice in that the jury may improperly infer that Russell had been negligent or reckless (and intoxicated) in this accident. Col. Evid. Code Sec. 352 excludes such items if its probative value is far outweighed by likelihood of prejudice. Evidence of involvement in a prior DUI is inadmissible when its purpose is solely to prove intoxication (and, therefore, negligence) in the accident in question. Allen.

Therefore, because the report will be prejudicial, your client will most likely not be able to use it. Therefore, you[r] client does not have sufficient evidence to prove that Russell was negligent or that Miller knew about it or should have know [sic] about it.

Furthermore, even if Miller had known about the prior DUI, it's [sic] use would be irrelevant in this matter anyway. According to the case Armenta v. Churchill, a Supreme Court case, evidence of defendant[']s 37 traffic violations was inadmissible because it was irrelevant

to the case at hand. It was irr[e]levant because Alece Churchills' unqualified admission that Dale Churchill was her agent and employee at the time effectively removed from the case the issue of her liability for the tort[,] because if Dale Churchill was negligent, Alece Churchill, as his employer, was negligent. Armenta.

Therefore, if it is conclusively established that Miller is liable for the negligent acts of Russell under the liability of owner statute, Col. Stat. Sec. 17150, Miller will be liable for your client's injuries. As a result, the report will be irrelevant to show that he was negligent in entrusting Russell with the vehicle because he will be liable as a result of giving him permission to use the vehicle.

Amount of Plaintiff's Injuries

Additionally, your client should take a look at the amount of her actual injuries. Your client incurred a hospital bill of $250 for the treatment of lacerations to her arm and leg. She did not sustain any fractures or sprains/strains of any kind. In fact, she was released from the emergency room with Lanocane approximately one hour after she arrived. Although your client returned to the ER two days later complaining of continued pain in her leg and arm, examination revealed that she had normal movement, although such movement was limited by pain. The doctor examined for fractures and determined there were none, and noted that she had bruises in the areas of complaint. The doctor advised her that she would continue to have some pain in those areas but that it should diminish over the next two weeks to a month. Your client has not returned to the ER nor sought additional treatment that would support a damage request of $15,000.

Furthermore, the damage to her bicycle is less than $150, which is the amount of her bike when purchased one year ago.

Even if we were to add her damages together, we are looking at $400. Therefore, based on the above discussion regarding our liability and your client's own negligence, I feel that an offer of $5,000 is more than fair and is probably more than she may recover in front of a jury, especially since she a jury [sic] may find her comparatively negligent and reduce her recovery.

I look forward to hearing from you after you have had a chance to discuss this offer with your client.

Sincerely Yours,

Mariah Malone

END OF EXAM

THURSDAY AFTERNOON
FEBRUARY 24, 2005

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

MARRIAGE OF EIFFEL

MARRIAGE OF EIFFEL

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing from the **Library** you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance to instructions and on its content, thoroughness, and organization. Grading of the two tasks will be weighted as follows:

Task A	----	30%
Task B	----	70%

LAW OFFICES OF
ALEJANDRO RUZ AND RENA TISHMAN
THE CANYONS, COLUMBIA

MEMORANDUM

To: Applicant

From: Rena Tishman

Re: **Marriage of Eiffel**

Date: February 24, 2005

I want you to help me prepare Appellant's Opening Brief for our client, Angela Eiffel, nee Killian. The appeal is from an order following a trial on the sole issue of the enforceability of the Marital Settlement Agreement ("MSA"). Her husband wrote an agreement they both agreed to and signed. Then they had the agreement formalized into a complete MSA, which they also signed. The lawyer who prepared the MSA for them had previously represented each of them in other, unrelated matters. The trial court, despite finding that both the wife and husband had knowingly and voluntarily entered into the MSA, invalidated the agreement on the ground that the attorney drafting it did not make an adequate conflict of interest disclosure.

I have attached the trial court decision and trial transcript. The complete record (including the petition for dissolution of marriage, response, complete MSA, and judgment) is not necessary for your task.

Please draft for my approval *only* the following two sections of an Appellant's Opening Brief:

A. A statement of facts.
B. An argument demonstrating that the trial court erred.

For each section, please follow the guidelines set out in the Office Memorandum on the Drafting of Appellant's Opening Briefs. I shall draft the remaining sections of the brief.

LAW OFFICES OF
ALEJANDRO RUZ AND RENA TISHMAN
THE CANYONS, COLUMBIA

OFFICE MEMORANDUM

To: Associates

From: Rena Tishman

Re: **Drafting of Appellant's Opening Briefs**

All Appellant's Opening Briefs ("AOB") must conform to the following guidelines:

- All AOBs must include the following sections: a table of contents; a table of cases; a summary of argument; a statement of the jurisdictional basis of the appeal; a procedural history; a statement of facts; an argument comprising one or more claims of error; and a conclusion.
- The *statement of facts* must contain the facts that support our client's claims of error and must also take account of the facts that may be used to support the opposition. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the opponent's favor. Above all, it must tell a compelling story in narrative form and not merely recapitulate each witness's testimony.
- The *argument* must analyze the applicable law and bring it to bear on the facts in each claim of error, urging that the law and facts support our client's position. It need not attempt to foreclose each and every response that the opponent may put forth in their brief, but it must anticipate their strongest attacks on our client's

weakest points, both legal and factual. It must display a subject heading summarizing each claim of error and the outcome that it requires. The subject heading must express the application of the law to the facts, and not a statement of an abstract principle or a bare conclusion. For example, do *not* write: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. *Do* write: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA, HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF AVENTURA

In re the Marriage of Eiffel
ANGELA EIFFEL,
Petitioner
v. Case No. 140733
PAUL ALEXANDRE EIFFEL, **Memorandum of Decision**
Respondent
_____/

On July 13, 2002, petitioner Angela Eiffel (Wife) and respondent Paul Alexandre Eiffel (Husband) filed a joint petition for summary dissolution of marriage. The matter proceeded to trial in May, 2003.

This Memorandum of Decision shall constitute the Court's findings of fact and conclusions of law:

1. Wife (now known as Angela Casey Killian) and Husband were married on September 24, 1994. During the marriage Husband became unemployed, and Wife, who was still working, put Husband through paralegal school.

2. In February 2001, Husband was arrested in Aventura County on a no-bail warrant issued by San Joaquin County for Husband's failing to appear in a criminal paternity case. Wife then sought the services of attorney Robert Gant to defend Husband. The very next day, Wife was arrested in Aventura County on a no-bail warrant issued by San Joaquin County for allegedly making criminal threats concerning the San Joaquin County District Attorney handling Husband's case. Wife too was thereafter represented by Mr. Gant. The criminal case against Husband was dismissed following a separate acknowledgement and settlement of the paternity claim. Wife was acquitted in a trial on the criminal threats charge.

3. In May and June 2002, Husband and Wife discussed their marital problems and community debts, and Husband agreed to refinance and borrow money against real property in his name in Texas to pay community debts and to fund the separation of the

parties. Whether the Texas property is characterized as community or separate property, Husband agreed to donate the loan proceeds from refinancing to liquidate community debts.

4. By July, 2002, Husband and Wife had agreed to separate. As part of the separation they agreed on a division of property and payments of debts.

5. Husband and Wife contacted attorney Robert Gant about drafting a Marital Settlement Agreement ("MSA") for them. Mr. Gant reluctantly agreed.

6. Husband and Wife each agreed to and signed an agreement on July 19, 2002. The agreement is attached as Exhibit A. Husband drafted and freely executed the July 19, 2002 agreement. Husband faxed Exhibit A to Mr. Gant after it was signed by Husband and Wife.

7. Based upon this fax and his conversations with Husband and Wife, Mr. Gant prepared an eleven-page MSA. The majority of the MSA contained the standard provisions of a marital settlement agreement, and these provisions are not in dispute.

8. The MSA contained the agreements set forth in Exhibit A, and an additional provision that Husband would repay the entire loan on the Texas property. Husband agreed with all of the provisions.

9. Prior to execution of the MSA, Mr. Gant had Husband and Wife execute a written waiver of conflict. That written conflict waiver statement read:

> "This will confirm that Angela Eiffel and Paul Alexandre Eiffel have been advised that Robert Gant's mere typing of an agreement made between the parties may be a potential conflict of interest, despite the fact that he was not in an advisory capacity, nor involved in the negotiation of the agreement. Each party knowingly waives any potential conflict of interest in the preparation of the parties' agreement. In addition, each party has been advised to seek independent counsel and advice with respect to this statement and the agreement."

10. Pursuant to the terms of the MSA, Wife assumed and paid a substantial amount of community debt, including the attorney fees she owed to Mr. Gant. Husband made one spousal support payment, but failed to make further payments. Wife then petitioned this Court for enforcement of the Marital Settlement Agreement.

11. The Court finds the MSA was in fact the free and voluntary agreement of the parties as of the date it was made, and specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence.

12. The Court also concludes that Mr. Gant's testimony on the admonitions, warnings, and conflicts disclosures he made to the parties was clear, credible and convincing, and specifically concurs in Mr. Gant's observation that there was nothing to suggest that the MSA was anything other than what the parties freely and genuinely "wanted" and consented to at the time it was signed. The Court concludes that Mr. Gant was not motivated to obtain payment of the attorney fees that were due him. He was not trying to "protect himself" nor guilty of "overreaching," as Husband now contends.

13. Notwithstanding the above findings, the Court also finds that the MSA is subject to attack and is not enforceable because the conflict disclosures made by Mr. Gant were inadequate to permit his dual representation of the parties under the circumstances. Under *Klemm v. Superior Court* (Columbia Court of Appeal, 1977), he could proceed with dual representation only after making full disclosure of all facts and circumstances necessary to enable both parties to make a fully informed decision regarding such representation. The evidence in this case regarding disclosure was inadequate to meet this standard. As a result, under the Court's equitable powers, the agreement is not enforceable.

14. The Court is persuaded that the weight of authority in Columbia is that a lawyer may represent both parties only in exceptional circumstances. [*Marriage of Vandenburgh* (Columbia Court of Appeal, 1993); *Klemm v. Superior Court*, supra.] Even when a party waives separate representation, confusion can arise and the party may think that he or she is getting legal representation. The theory that a lawyer can serve both parties and be a mere "scrivener" does not absolve the lawyer should a dispute arise. At the very least such agreements are subject to heightened scrutiny. (*Marriage of Vandenburgh*, supra.) As experts on ethics and family law have concluded, "most lawyers *refuse* dual representation in all cases. Despite the spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests." [*Klemm v. Superior Court*, supra, quoting from Elrond and Elrond, "Common Ethical Problems In Family Law Practice," 82 *Col. State L. J.* (1975) (emphasis original).]

15. The Court emphasizes that the only issue before this Court is the enforceability of the September, 2002, MSA.

Dated: July 21, 2003. *Kevin J. Burke*

Kevin J. Burke
Judge of the Superior Court

EXHIBIT A

Angela and I agree to the following terms:

1) Until a new lease is signed Angie will receive from me by the 3rd of each month $750.
2) After the new lease is signed Angie will receive 50% of the new lease income after the money for the loan is taken into account. This money will be paid directly by Northland Corporation to Angie.
3) Should the new lease account for less than $2,000 a month for Angie, I agree to make up the difference.
4) Angie will receive 50% of the yearly percentage income given by Northland for the lease.
5) This agreement will be in effect for a maximum of five years or until Angie has regained her feet to include a stable job.
6) Angie will be responsible for $15,000 in legal fees for her defense and I will be responsible for those fees remaining that were incurred in my paternity case.
7) Angie will receive a copy of the new lease after it is signed.

I hereby agree to the above:

Angela Eiffel
Angela Eiffel

I hereby agree to the above:

Paul Alexandre Eiffel
Paul Alexandre Eiffel

July 19, 2002 July 19, 2002

Date Date

IN THE MATTER OF THE MARRIAGE OF EIFFEL, MAY 15, 2003

BY THE COURT: Let's begin. First, let me review the state of the record. In the Marriage of Eiffel, the essential facts of the marriage, separation, and jurisdiction have been admitted. This trial is solely on the issue of the validity and enforceability of a Marital Settlement Agreement executed by the parties. Its authenticity is also admitted, and it is already in the record. You may proceed, Ms. Tishman. The witness, Mrs. Eiffel, has been sworn.

BY THE WITNESS: Excuse me, your honor, I don't use that name anymore. My name is Angela Casey Killian.

BY PETITIONER'S COUNSEL, RENA TISHMAN:

Q: Thank you for the correction, Ms. Killian. You are married to Paul Alexandre Eiffel?

A: Yes. We were married on September 24, 1994.

Q: Where do you live?

A: Here in The Aspens. At the Creek Side Apartments, number C 16.

Q: Ms. Killian, please look at the document that the clerk has marked as Exhibit A. Do you recognize the document?

A: Yes. It is the settlement agreement that Paul wrote. My husband, Paul Eiffel.

Q: Is that your signature on the document?

A: Yes, and that of Paul, too.

Q: I assume that you are familiar with his signature. Is that Paul Eiffel's signature under the statement "I hereby agree to the above?"

A: I saw him sign it. The signature is Paul's.

PETITIONER'S COUNSEL, MS. TISHMAN: Move to admit as Exhibit A.

THE COURT: Admitted as Petitioner's Exhibit A.

Q: Would you please describe the document?

A: It is the agreement Paul and I made when we split up. Each of us was to take care of our bills. Paul got to keep his property in Texas but I was to get at least $2000 a month for five years, but Paul only made the first payment, and he's still getting the profits.

Q: To put this in context, Ms. Killian, this one-page agreement that you and Paul signed is the one that then was used by the lawyer that represented you and Mr. Eiffel to write the much longer marital settlement agreement, correct?

BY RESPONDENT'S COUNSEL, RICHARD HENKE: Objection. The question assumes that the lawyer who drafted it was representing Mr. Eiffel.

THE COURT: I'll allow it. It's preliminary, and we know that whether and by whom Mr. Eiffel was represented is the matter now at issue.

A: Yes, it was the basis of the legal settlement agreement.

Q: Let's look at each paragraph. Now, number 1 says "Until a new lease is signed Angie will receive from me by the 3rd of each month $750." What is the lease?

A: Before we got married, Paul inherited a dry cleaning business in Houston. When we married, he moved here, and since then he's rented the space out, when he could. Mostly it has been vacant, but a convenience store was going to rent it, and that's why we put in that my share was 50%.

Q: How much was the new rental income to be?

A: They were negotiating the exact amount, but it was supposed to be between $4,000 or $5,000 a month, plus another payment at the end of the year, a percentage of the profits on the sales. I was to get one-half, and that was to be at least $2,000 a month and one-half of the annual profits.

Q: Had both you and Paul been making the mortgage payments on the building?

A: At first Paul did since it was in his name. But since Paul wasn't working most of the time, I made the payments. For the last 8 years at least.

Q: How much was the mortgage on the Texas building?

A: It was $460.90 each month. When we agreed to separate and needed money to pay off our bills, Paul refinanced, and so the monthly loan payment was more. I never made those payments, since we were separated.

Q: Before separation did you handle most of the money?

A: Yes, although we each had our own checking accounts and credit cards. Paul's account was used mostly for the Texas property, paying taxes and repairs, and depositing rent checks, but as I said, since for many years there was no income, I

paid the mortgage from my account. I paid both credit cards also. Paul and I had serious problems, but we did not fight about money.

Q: Was the division at the time of your separation amicable?

A: Well, we both saw divorce was coming, and spent time the last couple of months together working out how we'd split things, and mainly get out of debt. We owed our lawyer Mr. Gant $21,000. And together we owed over $20,000 on our credit cards. So we decided that, since renting the Texas building looked very likely and the mortgage was paid down, that Paul would refinance the mortgage and we'd try to pull out about $50,000, so that each of us could start off fresh.

Q: Is that roughly what you did?

A: Yes. We paid off Mr. Gant and the credit cards. Paul got $5000 for first and last months' rent on a new place and to buy some new furniture. And we split the stuff we'd accumulated in 10 years.

Q: You were able to agree on personal possessions as well?

A: It wasn't that much. Each of us had our own car, Paul's was almost new. Our furniture was old, and none of it expensive or valuable any more. Paul collected avant garde art, and he insisted on keeping all of it, even the paintings that he bought and had given me as gifts. I didn't like that, and objected at first, but in the end all I wanted was to be free. I never liked them anyway. I took them down the day Paul moved out, even before he picked them up.

Q: The cars and art. How were they bought or paid for?

A: With our -- my account. Since Paul wasn't working and the Texas building wasn't rented, my salary was all our income. I guess we did sometimes argue whenever Paul found a painting he just had to have.

Q: So, everything in the agreement was done, except what Paul was to pay you?

A: Exactly. I got $750 once. I know that the building is rented, but I haven't gotten any of my share, or even seen the lease, as Paul promised. He's kept it all.

Q: How did this typed agreement, Exhibit A, come about?

A: In about May or June of last year, when we were splitting up, dividing the property and all that, Paul said we needed a legal agreement. He had studied to be a

paralegal, but never really did it. We said we'd go see our lawyer Mr. Gant and have it drawn up for us. So, we made an appointment. When he heard that we were there to get divorced and for him to help us, he said no, actually he said, "No way."

Q: What was the reason?

A: He said a lawyer couldn't represent both of us, that it would be a conflict, a conflict of interests. In fact, he stated each of us had to get our own lawyer. Two new lawyers, because Mr. Gant would not even help one of us. We hadn't counted on hiring any more lawyers. Paul really argued with Mr. Gant. Telling him that we had agreed on everything. That we had no disputes. That it was all done.

Q: Did you agree, or say that to Mr. Gant?

A: Yes. We had agreed on everything, and divided things up. Paul had rented a place, and the bank in Texas was about to send us the money to pay everything off. Paul finally persuaded Mr. Gant that he could write up our agreement and that Mr. Gant was just to make it a legal agreement. We were doing the divorce ourselves and Paul had already typed out the forms and filed them.

Q: Mr. Gant did agree to draft the settlement agreement?

A: Finally. But you could tell he did not want to. He insisted that we write out and sign a document of all our agreements, and send him only that. No other communications, he said. He said that he'd only be a draftsman for us. That was the word he used.

Q: Did you and Paul do as Mr. Gant said?

A: Yes, we met at Paul's new place, and sat at his computer, and Paul typed out the agreement, the one you call Exhibit A. He printed it. We each signed it, and faxed it to Mr. Gant.

Q: You agreed with and signed the agreement?

A: Yes, although Mr. Gant called me a day or two later to ask about who was going to pay off the mortgage. He said that it should be in there as well. Of course, I agreed that it belonged there. A couple of weeks later his office called and said that we should come in to sign the legal agreement. I guess they called Paul too, and we

met there to go over the legal documents. We signed them, and I thought that it was done until Paul didn't pay.

Q: Did you read the documents at Mr. Gant's office?

A: Yes. He made us read every word, and explained it all. I realized that it was much more complicated than I'd thought. I had had my doubts that we needed a legal document, perhaps that Paul was just saying that because he liked playing lawyer, but Mr. Gant had included provisions that belonged there.

Q Did Mr. Gant actually say that for him to represent you both was a conflict of interests?

A: Yes, he was extremely clear about that, telling us again and again that he was not advising us on how to divide our assets or how much support I should get. He even had us read and sign another document saying that he had told us that and that it was okay with us.

Q: I was coming to that. Mr. Gant also had you sign a written waiver of conflict?

A: We had to read that too. Read each paragraph. Mr. Gant would ask if we had questions. And even though we didn't, he would explain what it meant.

Q: Did Mr. Gant go through the same steps on the marital settlement agreement?

A: Yes. It took a long time. Mr. Gant kept asking us if he had written down what we had agreed to. Was it everything? Was there anything else we wanted in it?

Q: When you signed the waiver and the marital settlement agreement did you believe that you fully understood what you were doing?

A: Yes. Although I thought I understood before, Mr. Gant then made sure.

Q: In sum, Ms. Killian, did you think that the agreement was fair?

A: Yes. It would have allowed each of us a fresh start. Paul had gotten training and education, even though it was his choice not to take advantage of it. Now it was my turn to improve my situation. Paul knew that it was fair.

Q: You stated that you understood that Mr. Gant was not giving you legal advice, but now you have a lawyer, and have been given legal advice about the agreement. Do you believe that the agreement was fair?

A: Yes I do.

Q: No further questions.

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Ms. Killian, Mr. Gant was your lawyer? He had defended you in a serious criminal case just last year?

A: Yes, he did, and I was acquitted.

Q: You were charged with threatening the life of a public official here in Columbia?

PETITIONER'S COUNSEL, MS. TISHMAN: That's irrelevant. Mr. Gant represented both Mr. and Mrs. Eiffel regarding the disputes arising from Mr. Eiffel's adultery and his paternity case. Both of these people were in debt because of his irresponsibility.

THE COURT: This is unnecessary. You have stipulated in chambers that Mr. Gant had represented both parties. Mr. Eiffel first, when he was charged in a criminal paternity case, and perhaps in an overly aggressive defense of her husband, Mrs. Eiffel -- Ms. Killian -- was charged, tried and acquitted of threats against the District Attorney of San Joaquin County. Let's have nothing further on either of these matters.

Q: Thank you, Your Honor. Ms. Killian, as I understand your present situation, you still work, that is, you have the same job as before, you aren't making payments on huge credit card debt, and you aren't making mortgage payments. Your rent is the same. Aren't you better off, financially, than you were before?

A: I am supporting myself, as I was before, but I haven't been able to get more training or education, as Paul did.

TESTIMONY OF ROBERT GANT

PETITIONER'S COUNSEL, MS. TISHMAN: Mr. Gant, you are here pursuant to a subpoena, correct?

A: Yes. I am not here voluntarily to testify for or against Angela or Paul. They are both my clients.

Q: Would it be fair to say that based on your past representation, you had a very good understanding of their situation, their financial situation?

A: Yes. At least up until their separation. I had to defend Paul in the paternity case, and negotiate a settlement based on what he could afford. I represented Angela in a several day trial, so I think I knew her pretty well too.

Q: What was your reaction when they came to see you to draft a marital settlement agreement?

A: I refused to do it, and advised them in the strongest manner I could that they each needed to have another lawyer. I tried my best to persuade them that property divisions could be complicated, and that each of them should have a lawyer to advise them on their rights. They were insistent, however.

Q: Would you say that either one of them was more interested in having one lawyer, or conversely was one more reluctant to follow your advice?

A: No, not at all. They were both alternately arguing with me. One would say they couldn't afford it. The other would say that both of them trusted me. Finally, Paul said he'd write their agreement, and all they wanted was for me to add the so-called "boilerplate" of a MSA, a marital settlement agreement.

Q: Did that finally persuade you?

A: I concluded that they had talked extensively, even negotiated, and had worked out a settlement that each of them thought was fair and workable. These are two intelligent people. Paul has completed a paralegal program. No one takes advantage of him. Paul says it is because his heritage makes him wary. Angela is a competent public administrator in the city planning office. The San Joaquin County DA learned when he tried to browbeat her into turning against Paul that no one walks over Angela. I was persuaded that they really understood that I was not going to give them advice and would do no more than translate their agreements into a marital settlement agreement. When I said that I would not help one of them against the other, they got it. I have no doubt of that, and subsequent events showed that they understood it.

Q: How so?

A: Well, after I told them that if they would write up and agree upon their complete agreement, I'd have it typed into a MSA, Paul faxed the agreement over. When I

went to dictate the terms into a standard MSA form, I noted that they had put in language about deducting the mortgage from the rent, but they hadn't said who would pay the mortgage. I knew from talking to them that it was to be Paul, but rather than adding it, I called each and asked whether they wanted it in the agreement. Angela said yes. Paul did likewise, but then he asked me, "Is this something I have to do?" I told him that I would not say, and if he had any question about it, he must see a lawyer. He laughed and said that he knew I'd say that and he was just testing me.

Q: Angela and Paul thereafter returned to review and sign the agreement?

A: In September, 2002, the MSA was done, and I called them to come in.

Q: You also had prepared a waiver, a written statement that there was a waiver of any potential conflict of interests?

A: Yes, I dictated it myself. I didn't want legalese. Simple, direct, plain English. Then, I had them read it. I read each of the two paragraphs aloud, and explained what they meant, such as, my just being a drafter, and that I wasn't acting in an advisory capacity, and that my only advice was to get another lawyer. I recall saying, if I were in their shoes, I would not do it.

Q: But they did?

A: Yes, they both signed, and then we moved on to the MSA, and, once again, they read each paragraph, and I'd explain what it meant. When I thought they understood, we'd move on to the next provision. We were there for two hours.

Q: At any time, in either of your meetings or conversations, did you think that either Angela or Paul was under duress or pressure to go along with the agreement?

A: Never. This agreement was voluntary, something each genuinely wanted.

Q: At any time, did you think that either had been misled or tricked?

A: No, never. They knew each other, knew what they were doing.

Q: Thank you. Nothing further.

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Mr. Gant, you never gave Mr. Eiffel a written disclosure of each type of conflict that could arise?

A: Do you mean in addition to the one that both Paul and Angela signed?

Q: Well, I'd say that document is a waiver of your conflict of interests, not a disclosure of adverse consequences. For example, did you provide Mr. Eiffel a written statement of each area of potential conflict involved in dividing all of their community property and paying community obligations?

A: No. That would be quite a job, and I can't imagine how you would do it without seeming to be arguing against what they had agreed to.

Q: Ethical obligations can be like that. Specifically did you provide a written statement stating that an area of potential conflict was whether Ms. Killian was entitled to spousal support, or for how long and in what amount?

A: No.

Q: For all she knew, she might have been entitled to more, without knowing it?

A: Yes. With her own lawyer, as I urged, she could have found out.

Q: Did you notify Mr. Eiffel, orally or in writing, that his separate property in Texas was an area of potential conflict?

A: No.

Q: Thus, Mr. Eiffel agreed to put his separate property into the agreement without any disclosure that he might have a right to retain the proceeds of this property?

A: He knew that the property was in his name, and that I explicitly refused to give him advice on it. I neither urged nor opposed any provision. I stayed completely away from the pros and cons of their agreements.

Q: Would you agree that telling either of them the pros and cons might have persuaded one of them to withdraw?

A: That is possible.

Q: And you didn't want to talk either of them into withdrawing?

A: That was not my job. The only thing I tried to talk them into was obtaining separate independent advice. Then, they could decide for themselves.

Q: If one of them withdrew, your fee of over $20,000 might not be paid, correct?

A: No, my payment was in no way dependent on the agreement. I had complete confidence that both Angela and Paul were going to pay the amount due me for past services.

Q: But, it is true that you were reluctant to undertake this dual representation, that you conditioned your representation on their signing a document absolving you of responsibility, that you devoted considerable time to the task, and I understand charged neither party a fee. You did all this without any thought that it might be the only way to collect the $20,000 that they owed you?

A: That's what I did.

Q: Let me ask another specific question. Did you disclose to either party that by choosing to have one lawyer, they had given up the attorney-client privilege, and in any future dispute, such as this one, nothing they said was privileged and confidential?

A: No.

Q: Mr. Gant, it appears that the only disclosure you made was to protect yourself with a waiver, with nothing to protect Mr. Eiffel or Ms. Killian.

A: I do not agree with that. I would not have helped them if I had not thought that basically what they had agreed to was fair to each of them.

Q: Thank you, Mr. Gant. Will there be redirect or anything further, Ms. Tishman? No? Then, Respondent calls Mr. Paul Alexandre Eiffel.

TESTIMONY OF RESPONDENT PAUL ALEXANDRE EIFFEL

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Mr. Eiffel, before you and your wife drew up the one-page document identified as Exhibit A had either of you consulted a lawyer other than Mr. Gant?

A: No, we did that strictly on our own.

Q: Before signing the MSA in Mr. Gant's office did you consult with any other lawyer?

A: Just Mr. Gant.

Q: You had agreed with Ms. Killian to refinance, borrowing about another $50,000, secured by the property in Texas, that the loan proceeds would be used to pay off family debts, including the $15,000 she owed Mr. Gant for her own criminal defense, and then that you alone would be responsible to pay back the entire loan. Is that correct?

A: Yes. When you put it that way, it sounds foolish, but that is what I did.

Q: You further agreed that even though Ms. Killian was not going to help pay the mortgage on the building, she would get one-half of the income and profits?

A: Yes. That too.

Q: Before making these agreements with respect to the loan proceeds, repayment or income, did you obtain any advice from a lawyer?

A: No, none.

Q: What were you thinking?

A: As I said, I thought that we had to do something. We owed Mr. Gant $21,000 and another $20,000 on two credit cards. I thought that there was no other way. I was under immense pressure to come up with a solution. I thought I had no choice. It never occurred to me that the property might be just mine.

Q: If someone had told you that you might have the right to retain the proceeds of the Texas property, that is, the loan proceeds and income, would you have made the same agreement?

A: I doubt it. Certainly, I would first have wanted to know if that was correct before making a legally binding agreement.

Q: Did you try to get help from Mr. Gant on your rights with regard to the Texas property?

A: Yes. After that first time we saw him, he called to ask whether he should put into the MSA that I was going to pay off the entire mortgage myself, and I asked him whether I had to do it. He got upset, and told me there was a huge potential conflict of interests and that he wanted to remain as neutral as possible.

Q: So, knowing that you were unsure about whether you were obligated to share the loan proceeds but be saddled with all the debt, Mr. Gant went ahead and wrote the MSA to say exactly that?

A: Yes. He went ahead and wrote it that way.

Q: I think that should be enough. Nothing further.

PETITIONER'S COUNSEL, MS. TISHMAN:

Q: Good afternoon, Mr. Eiffel. As I understand it, you refinanced the mortgage on the Texas property through a bank in Texas, and thereby obtained cash?

A: Yes, after fees, we received around $46,000.

Q: What did you do with the money?

A: I turned it over to Angela. She paid our bills.

Q: So, you agreed that the money would be used to pay the family debts?

A: Yes, and, well, the money couldn't go into my checking account because there was a court order garnishing the funds in my account for child support arrears.

Q: Hadn't you and Angela agreed many years ago that all family income would go into Angela's bank account?

A: Yes, we thought that would be the best way to manage our affairs.

Q: You and Angela agreed that she would receive at least $2,000 a month for five years once the building was leased?

A: Yes, that is what the agreement said.

Q: And she was to get that amount even if the 50% of the net on the lease did not add up to $2,000, correct?

A: Yes, that too was in the agreement.

Q: The building is leased.

A: Yes.

Q: How much are you receiving a month from Northland?

A: I don't receive direct payment. The rent goes to the Texas bank for the mortgage, and the balance goes into an account I set up in Texas. My net has been $4,400 a month.

Q: And you have paid none of that to Angela, right?

A: No. I've been advised that those proceeds are my property.

Q: Mr. Eiffel, when you wrote and signed the one-page agreement, Exhibit A, you agreed with everything in it, correct?

A: Yes, at that time.

Q: And when you signed the MSA, you agreed with everything in it?

A: Yes, as I said, based on what I knew, I went along with it.

Q: No more questions.

THURSDAY AFTERNOON
FEBRUARY 24, 2005

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MARRIAGE OF EIFFEL

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COLUMBIA RULES OF PROFESSIONAL CONDUCT

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.

* * * * *

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

* * * * *

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Some tasks commonly performed by lawyers require no distinctly legal skill. Some courts in an earlier era determined that the lawyer was then a mere "scrivener" and that communications relating to such tasks were not privileged. The older decisions reflected a culture in which many clients were illiterate and lawyers were employed because they could read and write, rather than employed because of their legal skills or knowledge. (See *Blevin v. Mayfield*) [Columbia Court of Appeal, 1961], where the court upheld the deed an attorney had drafted, because "the agreement had already been reached between the two parties and therefore the only service performed [by the attorney] was that of a scrivener.")

However, in contemporary practice it will be unusual for a lawyer to prepare a document without communication with the client to determine, at a minimum, the client's objectives. Except in unusual circumstances clearly indicating otherwise, no distinction under this Section should be drawn between situations where the lawyer performs perfunctory services and those involving greater complexity or moment.

Subsection (C)(1) has its origins in the case law beginning with *Lessing v. Gibbons*, (Columbia Court of Appeal, 1935). That court held that it was proper for one lawyer to negotiate a contract for two parties, despite potential conflicts, since the parties retained one lawyer with the goal of working out a mutually satisfactory agreement. In *Lessing*, the court found that the attorney developed an attorney-client relationship with both parties. Since that time, many courts have upheld the principle of one lawyer representing multiple parties in transactional settings.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an antenuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2). Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters. There are some matters in which the conflicts are such that written consent may not suffice for nondisciplinary purposes. (See *Marriage of Vandenburgh*) [Columbia Court of Appeal, 1993.]

Klemm v. Superior Court

Columbia Court of Appeal (1977)

The ultimate issue herein is to what extent one attorney may represent both husband and wife in a noncontested dissolution proceeding where the written consent of each to such representation has been filed with the court.

Dale Klemm (hereinafter "husband") and Gail Klemm (hereinafter "wife") were married and are the parents of two minor children. They separated after six years of marriage, and the wife filed a petition for dissolution of the marriage *in propria persona*. There was no community property, and neither party owned any substantial separate property. Both parties waived spousal support. The husband was a carpenter with part-time employment.

At the dissolution hearing attorney Catherine Bailey appeared for the wife. Bailey is a friend of the husband and wife and because they could not afford an attorney she was acting without compensation. The attorney had consulted with both the husband and wife and had worked out an oral agreement whereby the custody of the minor children would be joint, that is, each would have the children for a period of two weeks out of each month, and the wife waived child support.

The trial judge granted an interlocutory decree and awarded joint custody in accord with the agreement. However, because the wife was receiving Aid for Families with Dependent Children (AFDC) payments from the county, he referred the matter of child support to the Family Support Division of the County District Attorney's office for investigation and report.

The subsequent report from the Family Support Division recommended that the husband be ordered to pay $25 per month per child (total $50) child support and that this amount be paid to the county as reimbursement for past and present AFDC payments made and being made to the wife. Attorney Bailey, on behalf of the wife, filed a written objection to the recommendation that the husband be required to pay child support.

At the hearing on the report and issue of child support on April 25, 1977, Bailey announced she was appearing on behalf of the husband. She said the parties were "in agreement on this matter, so there is in reality no conflict between them." No written consents to joint representation were filed. On questioning by the court the wife expressed uncertainty as to her position in the litigation. The wife said, "She (Bailey) asked me to come here just as a witness, so I don't feel like I'm taking any action against Dale." The judge pointed out that she (the wife) was still a party. When first asked if she wanted Bailey to continue as her attorney she answered "No." Later she said she would consent to Bailey's being relieved as her counsel. She then said she didn't believe she could act as her own attorney but that she consented to Bailey's representing the husband. After this confusing and conflicting testimony and a request for permission to talk to Bailey about it, the judge ordered, over Bailey's objection, that he would not permit Bailey to appear for either the husband or the wife because of a present conflict of interest and ordered the matter continued for one week.

At the continued hearing on May 2, 1977, Bailey appeared by counsel, who filed written consents to joint representation signed by the husband and wife and requested that Bailey be allowed to appear for the husband and wife (who were present in court). The consents, which were identical in form, stated:

> "I have been advised by my attorney that a potential conflict of interest exists by reason of her advising and representing my ex-spouse as well as myself. I feel this conflict is purely technical and I request Catherine Bailey to represent me."

The court denied the motion, stating,

> "Under our canons of ethics and rules of conduct it would be improper for Ms. Bailey to appear in this proceeding on behalf of the respondent where there is not in the court's opinion a theoretical conflict, but an actual conflict of interest. There is obviously a potential if not actual point in time when the petitioner may not be receiving public assistance, in which case whatever order, if any, is made to her benefit on account of child support in this proceeding would be the amount subject to modification that she would receive on account of child support at least for some

period of time."

The husband and wife have petitioned this court for a writ of mandate to direct the trial court to permit such representation.

Rule 3-310 of the Columbia Rules of Professional Conduct prohibits an attorney from representing conflicting interests, except with the written consent of all parties concerned. The Columbia cases are generally consistent with Rule 3-310 permitting dual representation where there is a full disclosure and informed consent by all the parties, at least insofar as a representation pertains to agreements and negotiations prior to a trial or hearing. For example, in *Lessing v. Gibbons* (Columbia Court of Appeal, 1935), the court approved an attorney acting for both a studio and an actress in concluding negotiations and drawing agreements. The court refers to the common practice of attorneys acting for both parties in drawing and dissolving partnership agreements, for grantors and grantees, sellers and buyers, lessors and lessees, and lenders and borrowers.

Where, however, a fully informed consent is not obtained, the duty of loyalty to different clients renders it impossible for an attorney, consistent with ethics and the fidelity owed to clients, to advise one client as to a disputed claim against the other.

Though an informed consent be obtained, no case we have been able to find sanctions dual representation of conflicting interests if that representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another. As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be *per se* inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

However, if the conflict is merely potential, there being no existing dispute or contest

between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial.

In our view, the case at bench clearly falls within the latter category. The conflict of interest was strictly potential and not present. The parties had settled their differences by agreement. There was no point of difference to be litigated. The position of each *inter se* was totally consistent throughout the proceedings. The wife did not want child support from the husband, and the husband did not want to pay support for the children. The actual conflict that existed on the issue of support was between the county on the one hand, which argued that support should be ordered, and the husband and wife on the other who consistently maintained the husband should not be ordered to pay support.

While on the face of the matter it may appear foolhardy for the wife to waive child support, other values could very well have been more important to her than such support, such as maintaining a good relationship between the husband and the children and between the husband and herself despite the marital problems thus avoiding the backbiting, acrimony, and ill will. Thus, it could well have been if the wife was forced to choose between AFDC payments to be reimbursed to the county by the husband and no AFDC payments she would have made the latter choice.

Of course, if the wife at some future date should change her mind and seek child support, and if the husband should desire to avoid the payment of such support, Bailey would be disqualified from representing either in a contested hearing on the issue. There would then exist an actual conflict between them, and an attorney's duty to maintain the confidence of each would preclude such representation.

We hold on the facts of this case, wherein the conflict was only potential, that if the written consents were knowing and informed and given after full disclosure by the attorney, the attorney can appear for both of the parties on issues concerning which they fully agree. It follows that if we were reviewing the order of the trial court after the first hearing held on April 25, 1977, the petition for mandate would have to be denied on the ground that no

written consents to joint representation had been procured at that time. Moreover, as a result of the judge's questioning of the wife, he could have reasonably concluded that the wife's consent was not given after a full disclosure and was neither intelligent nor informed.

The order before us, however, is the order entered after the second hearing held on May 2, 1977, at which time the written consents of both the husband and wife, dated that date, were received by the judge without further inquiry of the clients or of the attorney. It could well have been that between April 25 and May 2 and before signing the written consents the parties became apprised of sufficient information to make the written consents intelligent and informed. The situation on May 2 was not necessarily the same as it was on April 25. The record of the May 2 hearing reflects no inquiry whatsoever as to whether the written consents were knowing, informed and given after full disclosure.

Thus it appears the trial judge failed to exercise his discretion in accordance with proper legal principles. Accordingly, the cause must be returned to the trial court to make the determination of whether the consents were knowing, informed, and given after a full disclosure.

Finally, as a caveat, we hasten to sound a note of warning. Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice. Failing such disclosure, the attorney is civilly liable to the client who suffers loss caused by lack of disclosure. In addition, the lawyer lays himself/herself open to charges, whether well founded or not, of unethical and unprofessional conduct. Moreover, the validity of any agreement negotiated without independent representation of each of the parties is vulnerable to easy attack as having been procured by misrepresentation, fraud, and overreaching. It thus behooves counsel to cogitate carefully and proceed cautiously before placing himself/herself in such a position. As some commentators have stated,

"For these reasons, it has been our observation that most lawyers *refuse* dual

representation in all cases. Despite the spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests. In our opinion, dual representation is ill-advised, even if arguably permissible under Rule 3-310." Elrond and Elrond, "Common Ethical Problems In Family Law Practice," 82 *Columbia State Law Journal*, 1150, 1163, (1975).

It is an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not only to prevent the dishonest practitioner from fraudulent conduct, but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

It is ordered that a peremptory writ of mandate issue directing the trial court to reconsider Bailey's motion to be allowed to represent both husband and wife, that the court determine if the consent given by each was knowing and informed after a full disclosure by the attorney, and to decide the motion in accordance with the principles set forth in this opinion.

Marriage of Vandenburgh

Columbia Court of Appeal (1993)

This is an appeal from a judgment granting the plaintiff-husband a divorce and, *inter alia,* setting aside the parties' separation agreement. The marriage of these parties was both short and stormy. After a bitter all-night quarrel extending through to the morning, wife demanded that husband leave the marital home. He refused to leave without a written separation agreement, in response to which wife contacted an attorney who agreed to meet with them at 8:00 A.M. that very morning. They reconciled that afternoon and returned to the attorney's office to delay any further action. A separation agreement had already been prepared which the parties executed together with several supporting documents to be utilized in the event their reconciliation failed. The agreement provided that wife could purchase husband's interest in the marital home for $2,500, but no mention of the parties' significant marital savings was made. Subsequently, another violent argument erupted resulting in husband's peaceful departure from the residence.

Husband and wife reaffirmed the separation agreement in writing, which included the statement that each agreed the attorney could represent them both in the preparation of the agreement. Husband received $2,500 in exchange for the previously executed deed. On the very next day, husband learned that wife had become a secretary to the attorney who prepared the separation agreement and immediately sought to rescind it and regain title to the marital home. Following a trial, the court set aside that portion of the separation agreement with respect to the marital residence and directed that the property be sold and the net proceeds divided equally between the parties. On this appeal wife challenges that part of the judgment which modified the separation agreement.

The Columbia Supreme Court has established that "property settlement agreements occupy a favored position in the law of this state." (*Adams v. Adams*, 1947). The Columbia Legislature embraced this principle. The policy favoring property settlement agreements has been codified in Columbia Family Code section 3850:

"A husband and wife may agree, in writing, to the immediate separation, and may provide in the agreement for the support of either of them and of their children during the separation or upon dissolution of their marriage. The mutual consent of the parties is sufficient consideration for the agreement."

In *Adams*, the Supreme Court stated,

> "When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court."

Property settlement agreements are contracts subject to the general rules of contract interpretation and enforcement. A trial court may set aside a property settlement agreement on traditional contract law. The agreements are governed by the legal principles applicable to contracts generally. These grounds include mistake, unlawfulness of the contract, and prejudice to the public interest.

The trial court also had the power to invalidate the property settlement agreement if it was inequitable. Family law cases are equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity. Equity will assert itself in those situations where right and justice would be defeated but for its intervention. Thus, property settlement agreements may be set aside where the court finds them inequitable even though not induced through fraud or compulsion.

While it frequently occurs in negotiations between a husband and wife for settlement of property matters that one attorney serves both parties, in fairness to both parties concerned, when negotiations for settlement of property matters between a husband and wife are on hand, both parties should at all times be represented by counsel.

It is, of course, much better for all concerned if both sides have independent counsel, but

there is no way by which a litigant can be compelled to secure an attorney. Where the attorney for one of the parties is compelled to deal directly with the other litigant he is under a most strict duty to deal with such litigant fairly and objectively, and the agreement will be scrutinized most carefully to be sure that there has been no overreaching. At least the attorney should make sure that each party is fully advised as to his or her legal rights and to the right to independent counsel.

Separation agreements are held to a higher standard of equity than other contracts and may be set aside if manifestly unfair to one spouse because of overreaching by the other, circumstances that the trial court determined existed here. Agreements drafted with only one attorney ostensibly representing both parties are subject to heightened scrutiny.

We find ample basis in this record to sustain the judgment, particularly because the trial court had the advantage of viewing the witnesses and weighing their credibility. Here, the agreement was made under circumstances which at best are described as hurried, stressful and questionable. A major family asset in the possession of wife was ignored. Wife was given the right to buy husband's interest in the marital home containing an income apartment, which husband had purchased prior to the marriage, for a minimal sum. Wife commenced employment with the attorney who ostensibly represented both parties the day following the separation, the reaffirmation of the agreement and the transfer of the property. In sum, there is sufficient evidence to sustain the trial court’s findings and conclusions.

The judgment is affirmed.

Answer 1 to PT - B

1)

To: Rena Tishman
From: Applicant
Re: Marriage of Eiffel – Statement of Facts And Argument For Appellant's Opening Brief
Date: February 24, 2005

Below is the two part project you requested – a statement of facts and an argument demonstrating the trial court erred in the Marriage of Eiffel matter. Please let me know should you need further assistance in this matter.

PART A. STATEMENT OF FACTS

Angela and Paul Eiffel ("Husband and Wife") were married on September 24, 1994. Up until their divorce, Wife had dutifully put Husband through paralegal school while she was still working (despite the fact that this is generally not considered a community property expense) and also made payments on Paul's separate property commercial building which he had inherited. Wife made such payments for the last eight years. As a result of some marital difficulties involving underlying criminal charges and financial debts, the couple agreed to separate on July 13, 2002, and filed a joint petition for marital dissolution. Husband and wife privately and voluntarily each agreed to and signed an agreement dividing their property and payment of debts in an agreement on July 19, 2002. Specifically, Husband voluntarily agreed to refinance and borrow money against real property in his name to pay off the community debts owed by the couple and to fund their separation.

Thereafter, the parties also contacted an attorney, Robert Gant, who had previously represented both Husband and Wife in previous criminal matters in which they were not adverse parties. Mr. Gant drafted a Marital Settlement Agreement ("MSA") on July 19, 2002 despite the fact that the couple had already agreed to and drafted an enforceable contractual agreement between the two [of] them.

The MSA contained the following provisions: 1) $750 of spousal support from Husband to Wife until a new lease is signed by Wife, 2) 50% of new lease income to be paid to Wife, 3) Husband will make up the difference if the new lease accounts for less than $2000 per month, 4) Wife will receive 50% of yearly percentage income from Northland for the lease, 5) the agreement would be in effect for five years or until Wife got back on her feet, 6) Wife would be responsible for $15,000 in legal fees for her defense and Husband would be responsible for his fees in a paternity case, and finally, 7) Wife would receive a copy of new lease after it is signed. Although he was to perform mere perfunctory tasks in his capacity as an attorney, Mr. Gant informed Husband and Wife of the conflict of interest involved by presenting two spouses in this matter, and had them sign

a written conflict waiver. (See Exhibit A.)

Despite the fact that these provisions seem to lean in Wife's favor, she allowed Husband to keep a number of community property assets, including art purchased with her community property funds in her account, as well as his car. Wife also made mortgage payments on a commercial building inherited by husband. Attorney Gant fully informed Husband and Wife of a potential conflict in [sic] and did advise them to seek the advice of independent counsel during discussions when 1) they asked him to be an attorney in this matter, 2) when he asked them to sign the MSA, and 3) when he provided a written waiver of conflict form, which specifically mentioned a potential conflict.

PART B. ARGUMENT

I. The Court Erred Because The Parties Had Entered A Valid And Binding Marital Agreement Not Tainted By Fraud Or Compulsion And Thus Requires A Peremptory Writ Of Mandate Directing The Trial To Consider Only Whether There Has Been Informed Written Consent.

Under California Rule of Civil Procedure §3-310 regarding "Avoiding the Representation of Adverse Interests," an attorney must make a full written disclosure of an actual or potential conflict and obtain informed written consent before proceeding with the case. The Rule holds that "disclosure" means informing the client or former client of the relevant circumstances and actual and reasonably foreseeable adverse consequences to the client or former client. "Informed written consent" means written agreement by the client to representation following written disclosure. The rule prohibits, without informed written consent, 1) accepting representation where there is a potential conflict, 2) accepting or continuing representation where there is an actual conflict, and 3) representing a client in while representing another at the same time in an adverse matter. Thus, the central issue before this court in the matter at hand is whether parties, Husband and Wife, received full written disclosure.

A. Despite The Trial Court's Premature Dismissal Of The Agreement At Issue, It Is Common Practice For Attorneys To Represent Husbands And Wives In Drafting Dissolution Agreements, Especially Where Such Agreements Are Not Tainted By Fraud Or Compulsion.

Although the court seems to summarily assume that the case at hand could not have possibly involved informed written consent by the clients, it is common practice for attorneys to represent a husband and wife and other types of joint parties in forming dissolution agreements. For example, in Lessing v. Gibbons, cited by the court in Klemm v. Superior Court, the court approved an attorney acting for both a studio and an actress in concluding negotiations and drawing agreements. The court refers to the common practice of attorneys acting for both parties in drawing and dissolving partnership agreements. Thus, it is common practice for attorneys to represent a husband and wife

in drawing up dissolution agreements.

Also as the court in Adams v. Adams, cited by the court in Marriage of Vandenburgh, put it: "When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court." Here, the court has found that the MSA was "in fact the free and voluntary agreement of the parties as of the date it was made and specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence." (See Memorandum of Decision, p. 7.) Although the opponents might argue that the underlying agreement and MSA were not valid because Husband was a paralegal and therefore must have had superior knowledge as to contractual arrangements, this argument will fail because, as noted in the trial transcript, Wife indicated that she understood what she was signing repeatedly and Gant repeatedly asked if she had any questions. (See Transcript p. 14.)

Accordingly, the only issue to consider was whether the parties had received full disclosure of the conflict such that they were fully informed before signing the waiver of conflict form.

II. There Was No Attorney's Role[;] Was Merely That Of a Scrivener Because He Was Merely Typing And Adding Boilerplate Provisions To What Was Merely An Enforceable Contractual Agreement And Thus Requires A Peremptory Writ Of Mandate Directing The Trial To Consider Only Whether There Has Been Informed Consent.

In Blevin v. Mayfield, cited by the author's discussion under CRPC §3-310, it is noted that some tasks by lawyers did not really require legal skill and thus implies that the underlying communications are not subject to the same privilege. Although Appellants do not make the argument that privilege does not apply, it is important to note that Attorney Gant's tasks here were simple and uncomplicated, involving a mere recitation and formalizing of an underlying agreement, and he was merely acting in his named capacity as an attorney to give the document a greater legal effect. In these circumstances, it would seem that the conflict of interests would not be as pressing because the confidentiality interest is not being compromised and the attorney's interests are not tainting the underlying agreement.

Opponents may attempt to argue that no distinction under the Rule is drawn where the lawyer performs perfunctory services and those involving greater complexity, but this is only applied absent unusual circumstances. An unusual circumstance exists here, which is the fact that the husband and wife Angela Eiffel, had already wrote [sic], agreed to, and signed an agreement before the lawyer prepared a later Marital Settlement Agreement. Furthermore, martial dissolution contracts are enforceable and subject to defenses such

as mistake, illegality, prejudice to public interests, as well as inequity. (See Marriage of Vandenburgh.) The facts and record established that the parties had already established an enforceable agreement. Moreover, the parties actually signed a waiver of conflict which specifically stated that "Robert Gant's mere typing of an agreement made between the parties...," which indicates all parties and their attorney's knowledge of the attorney's minimal duties in this matter. Considering these unusual circumstances, Appellant submits that the court should reconsider the setting aside of the Marital Settlement Agreement, because Attorney Grant was merely acting as a scrivener.

III. The Court Erred Because The Eiffel Case Involved A Potential, Not Actual[,] Conflict Because There Was No Point of Difference to Be Litigated As To Husband and Wife's Agreement And The Case Must Be Mandated To The Trial Court To Determine Only If There Was Informed Consent.

In Klemm v. Superior Court, the court deal[t] with the case of a husband and wife who had orally agreed that child support was waived. An attorney– Catherine Bailey, had repres[e]nted the wife during the dissolution hearing. Because the wife was receiving ADFC payments, however, the judge at the family court custody case referred the issue of child support to the Family Support Division, which recommended that the husband actually pay $50 per month in child support. As a friend of husband and wife, Bailey agreed to appear at the hearing on the issue of child support and state that the parties were in agreement on the matter. Later, Baily obtained and filed written consents to joint representation.

The Klemm court determined that this case involved a potential, not actual[,] conflict, despite the fact that Bailey had represented both Husband and Wife and [sic] different points. The court's rationale was that "[t]he parties had settled their differences by agreement. There was no point of difference to be litigated." The only issue of conflict was the county's decision regarding the issue of support, and this was an issue upon which both husband and wife had agree[d]. Thus, once the attorney had obtained written consent of both the husband and the wife, the only remaining issue was whether such consent was procured after knowing, informed, and full disclosure.

Similarly here, Attorney Gant had represented both Husband and Wife in a matter in which they were not adverse. Wife had been charged after threatening a DA's office when they threated [sic] to browbeat her into turning against her Husband. And Husband had a paternity case. Thus, Husband and Wife were not represented by the same attorney in an adverse matter. There was also no point of difference between them as to the current agreement and MSA. Rather, as is indicated in the trial transcript, each agreed to the agreement and simply wanted Attorney Gant to type it up and add boilerplate provisions. The only issue possibly remaining for the court[,] therefore, is to determine whether there has been informed consent based on the prior discussions and waiver of conflict form.

V. Attorney Fully Advised Parties Of Their Rights And Right to Independent Counsel In The "Waiver Of Conflict" Form And In Prior Discussions[,] Thereby Meeting A Standard Of Heightened Scrutiny[,] And The Only Issue Remaining Is For The Trial Court To Determine the Waiver Was Signed After Informed Consent And Full Disclosure.

Again, under CRPC §3-310 regarding "Avoiding the Representation of Adverse Interests," "disclosure" means informing the client or former client of the relevant circumstances and actual and reasonably foreseeable adverse consequences to the client or former client. "Informed written consent" means written agreement by the client to representation following written disclosure. Also, in Marriage of Vandenburgh, the court indicated that an attorney drafting a dissolution agreement for both parties is held to a standard of "heightened scrutiny." The attorney must make sure that each part[y] is fully advised of his rights and right to independent counsel.

Here, Attorney Gant actually made sure that the parties actually signed a waiver of conflict which specifically stating [sic] that "Angela Eiffel and Paul E[i]ffel have been advised that Robert Gant's mere typing of an agreement made between the parties may be a potential conflict of interest...". thus foreclosing the possibility that the parties were unaware of the potential conflict. Also, once Husband and Wife asked Attorney Gant to represent them, he refused, stating that each of them had to get their own attorneys. The parties told Mr. Gant that they had no disputes and agreed on everything, and only after which did Gant agree to "merely type" the dissolution agreement. Attorney Gant also insisted that if he were in their shoes he wouldn't sign the agreement or have him as counsel, and the parties still signed and had him as counsel. Thus, the only remaining issue for the court to consider is whether this waiver and the previous discussions was [sic] sufficient.

VI. Property Settlement Agreements Occupy A Favored Position In Columbia Barring Equitable Considerations And The Settlement Agreement At Issue Was Fair and Equitable, Especially Given Wife's Generous Allowances Of Community Property Assets To Husband, Leaving The Trial Only With The Issue Of Whether There Was Informed Consent And Full Disclosure.

The Columbia Supreme Court has established that "property settlement agreements occupy a favored position in the law of this state." (See Adams v. Adams). The Legislature has also embraced this principle by codifying Columbia's Family Code section 3850, which provides that husbands and wives may agree to a dissolution agreement based on mutual consent. Barring any claims of unenforceability or conflict of interest or lack of written disclosure, the agreements will be upheld unless they are inequitable.

A. Respondents Will Fail In Their Argument that The Agreement Was Inequitable Because Wife Paid For Separate Property Mortgage Payments And Agreed To Let Husband Have A Car And Art Purchased With Community Property

Funds.

The court in Marriage of Vandenburgh setting [sic] aside the separation agreement based on the heightened scrutiny standard of focusing on equitable considerations. The agreement in that case involved the a [sic] dissolution agreement that was "hurried, stressful, and questionable." Specifically, the wife was given the right to buy the husband's interest in the marital home containing an income [a]partment, which husband had purchased prior to the marriage, for a minimal sum. Also, a major family asset in the possession of the wife was ignored. Under such inequitable circumstances, the court determined that the trial court's judgment setting aside the separation agreement should be affirmed.

Here, the MSA contained a provision that Husband would repay the entire loan on the Texas property. Although opponents will argue that this [was] inequitable, it was actually quite generous considering that Wife had dutifully put Husband through paralegal school while she was still working (despite the fact that this is generally not considered a community property expense) and also made payments on Paul's separate property commercial building which he had inherited. This was $460.90 per month. Wife made such payments for the last eight years. Paul also insisted on keeping his car and the avant garde art, all of which had been purchased with Wife's income, which was community property funds.

Accordingly, the case should be issued a peremptory writ of mandate back to the trial court to determine only if there has been informed written consent.

END OF EXAM

Answer 2 to PT - B

2)

FACTS

Appellant Angela Eiffel (Wife) and Appellee Paul Alexandre Eiffel (Husband) dissolved their marriage in 2002. As part of this dissolution, the parties negotiated and executed a detailed Marital Settlement Agreement (MSA).

The parties proceeded through the bulk of the divorce process without the help of counsel. Both parties are competent and intelligent. Paul Eiffel has training as a paralegal, although he does not practice in the field. Angela Eiffel is a competent public administrator in the city planning office. They were therefore able to effectively negotiate the legal system without counsel.

Acting without representation, the parties negotiated the terms of their settlement agreement. However, the parties realized that they were more likely to be able to produce an enforceable, legally binding settlement agreement if they enlisted the help of counsel in the drafting. The parties contacted an attorney, Robert Gant. Gant had represented both parties in the part [sic], in criminal matters that were unrelated to the terms of the settlement agreement. The parties requested that Gant, whom they viewed as their attorney, write up their Marital Settlement Agreement.

As first, Gant flatly refused, stating his concern that this would create a conflict of interest. The parties became concerned that now, in order to realize the enforcement of their deal, they would each need to retain expensive new counsel. To avoid this expense, they attempted to convince Gant to carry out their wishes. Paul Eiffel told Gant emphatically that the parties had agreed on all of the provisions of the ultimate agreement, and that there were no remaining disputes. Based on the parties' persuasion, Gant agreed to "be a draftsman" and to put the parties[‘] agreement into legally operative form. However, Gant continued to encourage them both to seek independent counsel.

Notwithstanding Gant's advice, both parties chose not to retain independent counsel. At Gant's request, Paul Eiffel "drafted and freely executed" an agreement that would serve as the basis for Gant's full MSA. He then faxed this draft agreement to Gant. Gant used the agreement as the basis for the settlement document, and added boilerplate language to create a legally effective MSA. Where provisions in the faxed agreement were unclear, Gant called the parties and requested clarification.

Throughout the process, Gant declined to give any legal advice to either of the parties. At one point during his telephone conversations with the parties, Paul Eiffel asked Gant for advice about his legal rights. However, Gant responded that giving legal advice would exceed the scope of what he had agreed to do, and he refused to give the requested

advice.

After the MSA had been drafted, Gant met with both parties. Before proceeding, Gant requested that both parties read and sign a written waiver that Gant had prepared. The waiver contained the following language:

This will confirm that Angela Eiffel and Paul Alexandre Eiffel have been advised that Robert Gant's mere typing of an agreement made between the parties may be a potential conflict of interest, despite the fact that he was not in an advisory capacity, nor involved in the negotiation of the agreement. Each party knowingly waives any potential conflict of interest in the preparation of the parties' agreement. In addition, each party has been advised to seek independent counsel and advise [sic] with respect to this statement and the agreement.

After reading this form, the parties voluntarily signed it. After obtaining this consent, Gant reviewed with them the MSA that he had typed on the basis of the parties' written agreement. He explained each provision to them in full. Then, each party voluntarily signed the Marital Settlement Agreement.

Following execution of the agreement and the dissolution of the marriage, Appellee [sic] performed her obligations under the settlement agreement in full. However, Appellant's [sic] has not lived up to his obligations under the contract. Specifically, the settlement agreement required that Appellee pay Appellant 50% of the rental income on an out-of-state property. The obligation was to continue until Appellant found a stable job and was capable of self-support. However, the Appellee has made only one, one-time payment of $750 to Appellant. His rental income has been approximately $4400 per month.

Appellee had intended to use this money to finance additional education to obtain a higher paying job. Since the Appellant [sic] has failed to live up to his obligations, Appellee has been unable to obtain this further education.

ARGUMENT

I. THE COURT'S FINDING THAT THE MARITAL SETTLEMENT AGREEMENT IS UNENFORCEABLE IS INCORRECT AS A MATTER OF LAW, BECAUSE THE COURT MUST GIVE EFFECT TO A SETTLEMENT AGREEMENT UNLESS THE COURT FINDS THAT IT IS THE PRODUCT OF FRAUD OR COMPULSION OR IS MANIFESTLY UNFAIR, AND THIS COURT EXPRESSLY FOUND THAT THE AGREEMENT WAS NOT THE PRODUCT OF SUCH IMPROPRIETY.

Property settlement agreements on dissolution of marriage "occupy a favored position" in the law of Columbia. *Adams v. Adams.* According to the Adams court: "A property settlement agreement . . . that is not tainted by fraud or compulsion or is not in

violation of the confidential relationship of the parties is valid and binding on the court." *Id.* Later courts have added as grounds for rejection of a property agreement a finding by the court that the agreement is "manifestly unfair to one spouse because of overreaching by the other." *Marriage of Vandenburgh*.

The trial court ignored this principle of law when it held that the Eiffels' marital settlement agreement was unenforceable. The sole reason for the court's decision was that the parties' attorney had not "adequately" disclosed a potential conflict of interest. The court did not find that the settlement agreement was the product of fraud or compulsion or that it was manifestly unfair.

Indeed, the court expressly found that "the MSA was in fact the free and voluntary agreement of the parties as of the date it was made, and [stated that it] specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence." This finding should have forced the court to find the agreement enforceable as a matter of law.

Instead, the trial court sought to avoid this result by fashioning a new rule of law, under which marital settlement agreements are to be rejected if the court determines that an attorney's disclosure of conflicting interests was less than adequate.

This rule conflicts with Columbia courts' general policy of effecting the voluntary, expressed will of parties to a dissolution as expressed in their marital settlement agreements. Furthermore, this new rule does not serve any overriding public interests. In this case, an informed written consent was obtained, following lengthy discussion between parties and counsel of counsel's role in the matter. Any additional requirement that the court seeks to have imposed would do little to protect parties' interests, over and above what was undertaken in this case.

The court, through its technical rule, has not only failed to promote the purpose of ensuring that settlement agreements are fair and equitable. It has created a situation that is patently *unfair*. In this case, the parties agreed to a discrete set of terms that would govern the dissolution of their marriage. The terms, as in any contract, should be understood as a trade-off between competing interests. However, the court, in finding the agreement unenforceable for a technicality, has denied Appellant the right to receive the benefit of her bargain. She has performed her obligations under the contract, and Appellee has been excused from performing his. This ruling has therefore resulted in an inequity, and should be corrected.

Any concern by the court that the parties were not adequately informed of the risks of the settlement would be better considered, not through the fashioning of an arcane and technical rule regarding disclosures, but through common-sense application of the existing rule that a marital settlement agreement is not valid where it is the product of fraud or duress or where its terms are grossly unfair.

In this case, the court determined that the agreement was not unfair or the product of duress. The facts on which this finding rest presumably include the participation of Attorney Gant in the drafting of the settlement. Therefore, if the court were to properly consider the conduct of the attorney under this jurisdiction's existing precedent, it would be constrained to conclude that the agreement was enforceable.

In sum, the court's expansion of the law in this field should be rejected, and the court's holding that the material settlement agreement is unenforceable should be overturned.

II. THE COURT'S FINDING THAT THE ATTORNEY'S DISCLOSURES WERE INADEQUATE UNDER THE CIRCUMSTANCES IS ERRONEOUS, BECAUSE THE PARTIES HAD RESOLVED THEIR DIFFERENCES BEFORE SEEKING GANT'S ASSISTANCE, GANT WAS ACTING IN A LIMITED CAPACITY AS A DRAFTSMAN, AND GANT HAD EXPRESSLY ADVISED THE PARTIES NOT TO RELY ON HIM FOR LEGAL ADVICE, BUT TO SEEK THEIR OWN, INDEPENDENT COUNSEL.

Even if this Court were to conclude that the rule of law applied by the trial court was proper, it should nevertheless overturn the decision of the trial court for its failure to faithfully apply its rule. The court reasoned that a marital settlement agreement should not be enforceable where the attorney drafting the agreement did not obtain valid, informed consent. However, in this case the attorney did obtain adequate consent. Therefore, failure of consent cannot provide a proper ground for denying enforcement of the parties' settlement agreement.

The trial court's conclusion that the consent obtained in this case was not adequate is erroneous. First, the court mistakenly believed that an attorney can almost never represent two parties to a transaction. This is incorrect. Second, the court seemed to rely on the special status of family law as precluding dual representation. However, this goes against precedent and is not supported by strong policy considerations.

Dual Representation is a Common Practice

The trial court concluded that, as a matter of law, a lawyer may represent two parties to a deal only "in exceptional circumstances." This reading of the law of professional responsibility is erroneous. In *Klemm v. Superior Court* (the very case on which the district court relies for support of its conclusion), the court recognizes that it is a "common practice of attorneys [to] act[] [sic] for both parties in drawing and dissolving partnership agreements, for grantors and grantees, sellers and buyers, lessors and lessees, and lenders and borrowers."

Moreover, this practice of acting on behalf of both sides to a deal is expressly permitted by the Columbia Rules of Professional Conduct. Rule 3-310 provides that

attorneys may with the "informed written consent of each client . . . [a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict." The Rule requires only written consent. It does not require "exceptional circumstances."

Dual Representation Merely Requires Informed Consent, Which Must Be Adequate Under the Circumstances

The requirement of informed written consent is satisfied when the client agrees in writing to the representation, following full written disclosure "of the actual and reasonably foreseeable adverse consequences" of dual representation. Rule 3-310. In this case Attorney Gant provided full disclosure of the relevant circumstances. He informed the parties that they were accepting a grave risk if they entered into a settlement agreement without seeking legal advice as to their respective rights. In addition, Gant informed them that he could not, because of the conflict involved, serve as a advisor to either of them. He agreed only, at the parties' insistence, to serve in the limited capacity of a draftsperson of a legal document based on the parties' independently negotiated agreement, and he fully explained the limitations of his representation. Throughout the process of preparing the document, he refrained from giving the parties any advice whatsoever as to its provisions.

The services performed by Gant were analogous to those found to be proper in *Blevin v. Mayfield*. The court rejected an argument that a deed that had been drafted by a single attorney acting for two parties was invalid. The court stated that "the agreement had already been reached between the two parties and therefore the only service performed by the attorney was that of a scrivener." *Id.* Here, the agreement as to the terms of the marital settlement had already been reached before Gant's participation. This fact is memorialized in the written agreement that Paul Eiffel wrote and both parties signed. Gant simply translated the terms of the pre-existing agreement into the format of a valid marital settlement agreement.

As suggested by the trial court, the adopters of the Columbia Rules of Professional Conduct rejected a per se rule that an attorney acting as scrivener be exempted from the rule regarding disclosure of potential conflicts. However, this conclusion was based on their presumption that "in contemporary practice, it will be unusual for an attorney to fulfill the role of mere scrivener.["] However, the adopters allowed for "unusual circumstances clearly indicating otherwise."

The facts of this case clearly indicate these unusual circumstances. Attorney Gant made every effort to limit his role in the preparation of the settlement agreement to that of scrivener, and to insure that the parties fully understood his function.

The court found that the disclosures were inadequate simply because the attorney did not spell out, in detail, the possible interests of the parties that might be compromised by the agreement. However, this would place a significant burden on attorneys to

familiarize themselves with the legal issues in a case for which they intend to provide no legal advice. There would be very little benefit from placing such a burden on attorneys and clients to require extensive research solely for the purpose of securing a waiver allowing the attorney to act in a non-advisory capacity.

Finally, Appellee might dispute that the informed consent is not valid, because the disclosures made by Gant were not "written." As Rule 3-301 provides, the informed written consent must be based on written disclosures. However, the spirit of the rule has clearly been complied with, and Appellee's attempt to enforce this requirement of a writing would not serve to promote the purposes of the rule.

The Court's Suggestion That Family Law is a Special In [sic] Not Supportable.

The court seems to suggest that the context of this case- - - family law - - - merits special requirements. The court quotes language in *Klemm v. Superior Court* to the effect: "Despite spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests. In our opinion, dual representation is ill-advised, even if arguably permissible under Rule 3-310." This quote is, however, taken out of its context. Indeed, in *Klemm*, the court permitted an attorney to engage in joint representation of two spouses. The court, furthermore, allowed such dual representation where the parties clearly had a serious risk of ending up adverse to each other in future litigation over child support payments, and, furthermore, where there was every indication that the parties were generally confused by the legal process and uncertain whether they should agree to waive their conflict.

Furthermore, the court emphasized that parties should be permitted to make their own waivers, if those waivers appear to be voluntary and knowing. It is not the job of the court to second-guess the wisdom of the parties' decision because, for example, "[w]hile on the face of the matter it may appear foolhardy for the wife to waive child support, other values could very well have been more important to her than such support, such as maintaining a good relationship. . ."

Rather, parties to family-law contracts should be accorded the same sort of freedom of will that parties to other types of contracts enjoy. These parties should be able to choose their attorney based on the considerations that the parties consider important.

In sum, this honorable Court should permit the parties to this case to make decisions on the basis of their own values and to choose to engage the attorney of their choice, where there has been adequate consideration given to this choice. The court should find that the waiver in this case was effective, and that the failure of consent could not possibly operate as a bar to enforcement of the parties' duly negotiated marital settlement agreement.

TUESDAY AFTERNOON
JULY 26, 2005

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE WINSTONS

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

IN RE WINSTONS

Columbia Center for Disability Law
Protection and Advocacy System for Columbia
645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

MEMORANDUM

To: Applicant

From: Ginny Klosterman

Date: July 26, 2005

Subject: **In re: Ralph, Margaret and Clint Winston**

The Winstons have asked us to represent them in their attempt to purchase a home in Pinnacle Canyon Estates, a "55-and-older" residential community. Ralph and Margaret Winston have a 23-year-old developmentally disabled son, Clint, who lives with them. When Ralph and Margaret tried to purchase a house in Pinnacle Canyon Estates, they were told that Clint couldn't live there because the residential community has a minimum age of 35 for residents. We have received a letter from the attorney for Pinnacle Canyon Estates Homeowners Association that reiterates and explains its position.

Please write a letter in response that argues persuasively that Pinnacle Canyon Estates Homeowners Association is legally required to waive the age restriction for Clint. In addition to arguing our affirmative position, be sure to address and refute the arguments made in the letter from the attorney for Pinnacle Canyon Estates Homeowners Association.

Transcript of Interview of Ralph and Margaret Winston

Ginny Klosterman (Ginny): Mr. and Mrs. Winston, do you mind if I tape record our interview? It will help me remember what you tell me. I won't do it if you are not comfortable with it.

Margaret Winston (Margaret): No, it is fine with us if you record it.

Ginny: Thanks. Why don't you tell me your full name, your ages, and what is going on that brought you to me?

Mr. Winston (Ralph): My name is Ralph Winston, and I am 59. My wife is Margaret Winston, and she is. . .57?

Margaret: No dear, I'm still only 56. (Laughs.) We are here because we tried to buy a house but were rejected. We have a developmentally disabled son who lives with us, and we think they don't want us to live there because of that.

Ginny: What do you mean, you were rejected?

Margaret: The homeowners association for the community told us that our son couldn't live in the house with us because it is an over-55 only community, and our son is much younger than 55. He has to live with us. He has severe developmental disabilities, and if he didn't live with us he would have to be in some sort of institution, and that is out of the question.

Ginny: What is your son's name?

Ralph: Clint.

Ginny: Can you tell me a bit about your son?

Margaret: He is a wonderful loving person, and we are very proud of him. He was born with serious developmental problems. He functions pretty well, but he can't be safely left alone and can't live without us. He is 23 years old but functions at a level well below that. He has a lot of trouble learning, remembering, and he has some communication difficulty, of course.

Ginny: Ok. What is the name of the community?

Ralph: Pinnacle Canyon Estates.

Ginny: Did you have a particular house in mind?

Margaret: Yes. We saw a listing in the paper for a house for sale by the owner, and when

we looked, the house was just perfect. Both Ralph and I are getting a little older, and now that our other children have moved out we don't need all the space just for the three of us. The seller was very nice and very reasonable concerning the price of the house.

Ginny: What was the seller's name?

Margaret: Her name is, I've got it written down here, Pamela Garcia. Pamela wanted to sell because her husband had died and she wants to move to Tucson. So it was a good match. The house has a nice arrangement with a bedroom on one side that would work well for Clint. And it is a very nice community, with a lot of people about Ralph's and my age.

Ginny: When did you find out that the community didn't want you to buy?

Ralph: We had set everything up, and it was a few days before escrow was going to close. At that time, a representative from the Pinnacle Canyon Estates Homeowners Association, Phyllis Lim, told us that our son couldn't live in the home with us because it is a 55-and-over community and he isn't 55 or older. She was very nice, actually. She said they were very sorry, that it had nothing to do with the fact that Clint is developmentally disabled, and that there are in fact a lot of disabled people in the neighborhood. She said something about them having to maintain their situation under the law as housing for a 55-and-over community and that letting anyone under 35 live there is not permitted by something called "the C C and Rs." I didn't know what that meant, and I didn't really believe that had anything to do with it. We thought they just didn't want anyone with disabilities to live there.

Ginny: Yes, it is confusing. The letters C C and R are an abbreviation for covenants, conditions and restrictions. They are very common community requirements for property in a neighborhood and include a bunch of stuff. Some neighborhoods want to be for older residents only and put age requirements in the CC&Rs.

Ralph: Oh, I see. Is it legal for them to do that?

Ginny: That's hard to say. Sometimes 55-and-over communities are allowed in effect to discriminate on the basis of age. But it is not permissible for housing communities to make it hard for people with disabilities to select the housing they want. What did you do when she told you that?

Ralph: Well the seller, Pamela Garcia, got pretty mad and said that was ridiculous, the rules were silly, and where was Clint supposed to live? But we cancelled the closing. She

said if we could get the community to agree to let Clint live with us, she will be happy to sell us the house. She also suggested we see a lawyer because she thinks the community should be sued, or something. She was very supportive of us. Of course, she probably wants the sale, but it's not like the price is a great deal for her. So is there anything that can be done?

Ginny: What are your goals at this point? Is it really to find another house somewhere else?

Ralph: We'd like to move into that house if we could. We aren't in an incredible hurry, but we need to move eventually. And I'm kind of worried, because we'd like to live in a community where people are our age, but, if they are all going to do this, we won't be able to do so unless we have Clint institutionalized, and we don't want that and can't afford it.

Ginny: Tell me more about why Clint can't live on his own.

Margaret: He can't prepare meals. He might burn himself on the stove. He needs help with basic housekeeping and hygiene. He can't handle his own finances, things like paying bills and having a checking account. People could easily take advantage of him when it comes to handling money.

Ginny: Does he have a job?

Ralph: He works in a sheltered workshop, you know, where they hire disabled people. But he can't safely use public transportation, so one of us has to drive him there and back.

Ginny: Do you think he would pose difficulties for the other people living in the neighborhood?

Margaret: Oh my goodness, no. Clint is quiet and shy, kind and very gentle. He doesn't really approach strangers and doesn't leave the house without one of us.

Ginny: Has there ever been a problem at any of the places you've lived before?

Margaret: With Clint? No, never.

Ginny: Ok. I think that the appropriate first step is for me to research this a bit more, because I've never run into a situation exactly like yours. But if things are as I think, I can call the Pinnacle Canyon Estates Homeowners Association and request that it waive the 55-and-over age restriction. I've made requests similar to that before for various clients with disabilities, and some homeowner associations are quite flexible about it, while others are not. So they might agree to that. If not, we could go to court to seek a ruling that their

refusal to grant your requested waiver violates the Columbia Fair Housing Act. Going to court wouldn't be as extreme as it might sound. Hopefully, we will be able to resolve it with a phone call. Does that sound like a good way to proceed?

Margaret: Yes, that is what we would like you to do, isn't it, Ralph?

Ralph: Yes, I think so. I'd like to work it out if we could, and if we can't, well then let's make Pamela Garcia happy, and sue them. It is worth it to see if we can live there.

Ginny: Ok, then I'll get started with some research and then give them a call.

Ralph: Thank you very much for spending time with us.

End of Interview

COLUMBIA CENTER FOR DISABILITY LAW

Protection and Advocacy System for Columbia

645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

MEMORANDUM

To: File

From: Ginny Klosterman

Date: July 5, 2005

Subject: Phone Call to Pinnacle Canyon Estates Seeking Reasonable Accommodation for Clint Winston

On July 5, 2005 I called Ms. Phyllis Lim ("Lim") of the Pinnacle Canyon Estates Homeowners Association (the "Homeowners Association"). Lim, it turns out, is a real estate lawyer who is the general manager of the Homeowners Association. I told her I was calling on behalf of the Winstons, explained what had happened when the Winstons wanted to purchase the home from Pamela Garcia, and asked Lim if their story was correct. Lim said it was, and that Pinnacle Canyon Estates is a 55-and-older community with a 35-and-older age restriction in the CC&Rs. I then requested that the Homeowners Association waive, for Clint Winston, the CC&R requiring all residents to be over 35. I explained that Ralph and Margaret Winston themselves are both over 55, that their son must live with them because he is developmentally disabled, and that they want to live in a community of people their age but are unwilling to contemplate institutionalization for their son. I also explained that the Columbia Fair Housing Act ("CFHA") prohibits discrimination against people with disabilities, and all we want them to do is waive the age restriction. I suggested that a waiver was also the decent thing to do under the circumstances. To let her know that this wouldn't just go away if they turned down the waiver offer, I alluded to the fact that the Winstons were willing to pursue this and had indicated that the seller, Pamela Garcia, supported them.

Lim said she understood how the Winstons might feel, and that she would ask the Homeowners Association to consider it. But she seemed to almost predict that the Homeowners Association would decline the request. She said the Homeowners Association would follow up with a letter indicating its decision.

Rommett, Fairbrooks, Fromkin, & Zucconi, LLP
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Fairview, Columbia, 55521
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Facsimile: (555)547-4705

July 22, 2005

Ginny Klosterman, Esq.
Columbia Center for Disability Law
645 Walther Way, Suite 208
Santa Claritan, Columbia 55515

Reference: Pinnacle Canyon Estates Homeowners Association — Ralph and Margaret Winston, Pamela Garcia Request for Age Waiver

Dear Ms. Klosterman:

Phyllis Lim, the general manager of Pinnacle Canyon Estates Homeowners Association ("Homeowners Association"), has referred to me the request you made on behalf of Mr. and Mrs. Winston for a waiver of the Homeowners Association's age restrictions. They want to purchase the residence of Pamela Garcia and intend to have their disabled son, Clint, reside on the premises with them after they move in.

As you know, Pinnacle Canyon Estates ("PCE") has a general requirement that limits occupancy of residences in the development to "older" persons, meaning those who are aged 55 and above. It is the essence of living in the PCE community that this requirement be observed scrupulously. That is why people chose to live there and is, no doubt, why the Winstons, who are in their late 50s, have offered to purchase the Garcia residence.

As I understand it, Clint Winston is a 23-year-old developmentally disabled person. He requires constant adult supervision and has always lived with his parents. We do not dispute that Clint is disabled within the meaning of the applicable disability laws, and we sympathize completely with Mr. and Mrs. Winston, but, for reasons I will explain here, the Homeowners Association is unable to waive the age requirement.

You have suggested that to refuse to do so would amount to unlawful discrimination against Clint because he is young and disabled. I take issue with your characterization.

First, Clint Winston's disability has nothing at all to do with the Homeowners Association's decision to exclude him from residing in the development. That decision is purely a function of his age. To allow Clint to reside with his parents on the premises would violate PCE's covenants, conditions & restrictions (CC&Rs). Under the CC&Rs, which as you know are contractual in

nature, no person under the age of 35 may reside on the premises, even if the principal occupants are over 55. If Clint were at least 35, we would not be having this dispute.

Second, PCE, as a housing development for older persons, is completely exempt from the age discrimination laws. We are legally entitled under the Columbia Fair Housing Act (C.R.S. §41 *et. seq*.) to exclude persons who do not meet our age criteria. Indeed, we are *required* to discriminate in order to continue to qualify for the exemption. We currently meet the criteria set forth in C.R.S. §42, and it is our desire to maintain those qualifications that is a principal reason for our rejection of the Winstons' request for a waiver.

One of the requirements for maintaining eligibility for our exemption is that at least 80% of the units in the development be occupied by persons 55 years of age or older. At the current time, we are right at the 80% level. One of our major concerns is that if we embark on a pattern of waiving the age requirement, we will fall below the 80% breakpoint, as a consequence of which we will lose our age selection exemption.

Third, and it is tied to the commitments we make to the property owners in our CC&Rs concerning the 55-and-older nature of the community, there is the danger that allowing younger persons to reside in the development will disrupt the peace and quietude that the property owners have a contractual right to expect. As a matter of fact, we get an average of two requests a month from current residents for waivers that would allow their teenage and young adult children to move in with them. Sooner or later, the number of teenagers and rowdy young adults would increase traffic and noise pollution to the great detriment of the older residents. The concomitant result would be a diminution in the property values associated with the restrictive nature of the development.

Moreover, granting such waivers would completely change the nature of the PCE community, a consequence that we are not required to risk either under the age laws or the disability laws. The Homeowners Association is not required to waive its statutorily granted ability to preserve the nature of the community. It would not be reasonable to require the Homeowners Association to do so. And to preserve the nature of the community, we must continue to demonstrate our intent to maintain the nature of the PCE community as 55-and-older.

Fourth, death from natural causes and illness is a frequent event among the community's property owners. If that were to happen to the Winstons, what would happen to Clint? Who would care for him? It is a constant concern that the Homeowners Association should not have to shoulder. It would create severe administrative problems, such as, for example, our having to make interim arrangements, tracking down other family members, and the like. The Homeowners Association is not a social services agency and consequently is not equipped to take on these tasks. Under the case law interpreting the disability laws, such an administrative burden obviates the need for entities such as the Homeowners Association to accommodate younger people.

The combination of the administrative burdens, the change in the character of the community, and the probable loss in property values that would result from the granting of frequent waivers creates an undue hardship on the PCE community that it is not required to endure.

As I have said, our concern is *not* that Clint is disabled. We have a number of disabled residents in

the development, a circumstance that surprises no one in light of the aged constituency of the community. To the extent that we may have a desire (although we have no affirmative *obligation*) to accommodate the Winstons in their request, it would put us in the untenable position of giving them and Clint *favored* treatment, as opposed to the totally neutral treatment that our age-based policy confers. Rather than being a neutral application of our neutral policy, it would thus be a form of reverse discrimination in *favor* of a disabled person who is not otherwise qualified to be a resident.

I direct your attention to the decision of the courts of our neighboring State of Franklin. In Noble v. Ventosa Ridge Estates, applying a statute identical to the Columbia statute, the Franklin court completely supports our position.

There are no Columbia cases on point. Even the Columbia Court of Appeals' decision in Townley v. Rocking J Residential Community, which arguably comes closest, supports our position that while we *may* have an obligation to make a disability accommodation for *homeowner/residents* who qualify for initial admission under our neutral criteria, we are not required to do so for those who, like Clint, are not qualified for admission as residents.

As a matter of fact, we have never failed to make accommodation for our qualified residents. Over the years, members of the community have spent hundreds of thousands of dollars on access and disability improvements, such as wheelchair ramps, oversized elevators, restroom grab bars, and the like in the community's common areas.

Finally, it goes without saying that there has been a residential housing glut in our greater metropolitan area for the past several years. There are many desirable houses for sale that are not in 55-and-older communities. The Winstons should not have any problem finding housing outside of PCE that will accommodate both them and their son.

Very truly yours,

Emma Zucconi

Emma Zucconi

TUESDAY AFTERNOON
JULY 26, 2005

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IN RE WINSTONS

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SELECTED PROVISIONS OF THE COLUMBIA FAIR HOUSING ACT

§41 Definitions

In this article, unless the context otherwise requires:

1. "Disability" means a mental or physical impairment that substantially limits at least one major life activity, a record of such an impairment or being regarded as having such an impairment.

2. "Dwelling" means any building, structure or part of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families.

3. "Familial status" refers to the status of one or more individuals being younger than the age of eighteen years and domiciled with a parent or another person having legal custody of the minor or minors.

4. "Person" means one or more individuals, corporations, partnerships, associations, legal representatives, mutual companies, trusts, trustees, receivers, and fiduciaries.

§42 Housing for older persons exempted; rules; definition

A. The provisions of this article relating to familial status do not apply to housing for older persons.

B. Housing qualifies as housing for older persons if:

1. At least eighty percent of the units are occupied by at least one person fifty-five years of age or older per unit, and

2. The housing community demonstrates, by publication of and adherence to policies and procedures, an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

§43 Discrimination in sale or rental

A person may not refuse to sell or rent after a bona fide offer has been made, or refuse to negotiate for the sale or rental of or otherwise make unavailable, or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin. A person may not discriminate against any person in the terms, conditions or privileges of sale or rental

of a dwelling, or in providing services or facilities in connection with the sale or rental, because of race, color, religion, sex, familial status or national origin.

§44 Discrimination due to disability; definitions

* * *

B. A person may not discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of:

1. That person;

2. A person residing in or intending to reside in that dwelling after it is so sold, rented or made available;

3. A person associated with that person.

C. For the purposes of this section, "discrimination" includes:

1. A refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications may be necessary to afford the person full enjoyment of the premises.

2. A refusal to make reasonable accommodations in rules, policies, practices or services if the accommodations may be necessary to afford the person equal opportunity to use and enjoy a dwelling.

Noble v. Ventosa Ridge Estates

Franklin Court of Appeal (2004)

This case presents a conflict between the Franklin Fair Housing Act's ("Franklin FHA") requirement that people with disabilities be given equal opportunities concerning choice and use of housing and the exemption to the FHA given to communities that qualify as "55 or over." This context appears to be a case of first impression for Franklin courts, and the parties present no case on point from any jurisdiction. The cross-motions for summary judgment concede that there are no material facts in dispute and the issue is the application of the law to those facts. The trial court granted summary judgment for the Defendant and denied summary judgment for the Plaintiffs.

Plaintiffs Mary and Frank Noble are the parents of Doug Noble who, at the time of the events, was a 34-year-old man. Because of Doug's disability, he is unable to live independently and is cared for by his parents. Mr. and Mrs. Noble contracted to purchase from Arnold Peck his home that was for sale in Ventosa Ridge Estates ("VRE"), a development governed by defendant. VRE is a residential community that requires at least one person 55 years of age or older to reside in each unit. VRE's covenants, conditions and restrictions ("CC&Rs") provide that no person under the age of 45 may reside in the community. Accordingly, when the president of the Ventosa Ridge Homeowners Association ("Association") learned of the purchase agreement between the Nobles and Peck, she informed Peck that a person younger than 45 years could not live in the subdivision and that the restriction could not be amended or waived by the Association.

The Nobles filed a housing discrimination action, alleging that the Association had engaged in unlawful housing discrimination against a disabled person in violation of the Franklin FHA by failing to make a reasonable accommodation to allow Doug Noble to live in a VRE home with his parents. The Nobles alleged that the Association should have waived the age restriction as a reasonable accommodation, and that the Association's actions have a disparate impact on persons with disabilities. The Nobles do not allege, for purposes of the motions, that the Association had a discriminatory intent. Nobles contend that the

enforcement of the age restriction covenant prevents adults with serious disabilities from living with their parent caregivers in the housing community of their choice, which might force institutionalization of the disabled adult, and which results in a disparate effect on a person with a disability.

The Association denies discrimination based on disability and asserts that its actions were lawful and were intended to enforce the age restriction equally. The Association asserts that the Franklin FHA requirement of a reasonable accommodation does not require it to waive the age requirement, because the Franklin FHA only requires equal treatment to people suffering from a disability and does not require them to grant greater than equal opportunity to use and enjoy a dwelling. The Association also contends that enforcement of the age restriction does not constitute discrimination under the Franklin FHA because it applies to all people under the age of 45 regardless of disability.

Pursuant to the Franklin FHA, a verbatim adoption of the Federal Fair Housing Act, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a disability of (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter. Discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

Although the Franklin FHA prohibits housing discrimination on the basis of familial status, qualified "housing for older persons" is exempt from the familial status anti-discrimination provisions in the Franklin FHA. This exemption gives qualified "housing for older persons" (also called "55-or-over") communities the ability to put whatever age restrictions it desires in the CC&Rs without concern that it might be violating the familial status provisions of the FHA. Housing qualifies as "housing for older persons" if

> (i) at least 80 percent of the units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community demonstrates, by publication of, and adherence to, policies and procedures, an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

Accordingly, the parties have competing rights and interests at stake. The age restrictions governing the housing development are a sanctioned form of discrimination. There is a specific exception for communities like the VRE community. In order to qualify for the exception, VRE must establish its intent to maintain housing for occupants 55 and older. VRE must adhere to policies and procedures that demonstrate this intent. In this case, VRE's policy included a provision that no person under the age of 45 shall reside on the property. The Nobles' competing interest is found in the Franklin FHA requirement that providers of housing reasonably accommodate those with disabilities to allow them to enjoy housing on an equal basis with others.

We find that the VRE Homeowners Association's actions do not constitute a failure to reasonably accommodate the needs of a person with a disability. First, the Association is not discriminating against Doug Noble on the basis of his disability, so it does not appear that the Franklin FHA requires it to make a reasonable accommodation. Doug Noble was excluded because of his age rather than because he is a disabled person. The purpose of VRE's age restriction is lawful and does not discriminate based on disability. A significant number of disabled residents reside in VRE, which demonstrates that the Association has not excluded anyone over the age of forty-five on the basis of disability. The Association excluded Doug Noble solely because he did not meet the age requirement, and the Franklin legislature allows communities to maintain age minimums if they follow the requirements, as VRE has done here. There is thus no causal nexus between the Association's invoking of its forty-five and over requirement and Doug Noble's disability.

In addition, the Association is not required to waive its forty-five and over requirement to reasonably accommodate Doug Noble. The goal of a reasonable accommodation is to allow a disabled person to enjoy housing on an equal basis with others, but the requested accommodation here would give Doug Noble greater than "equal opportunity," as it would

give him an advantage over all nondisabled people under 45. A duty to accommodate only arises when necessary to afford a disabled person an "equal opportunity" to use and enjoy a dwelling. It is doubtful that any accommodation would be reasonable if it would require abandoning a statutorily granted ability to assert a facially disability-neutral restriction, and, in any event, an accommodation is not reasonable if it requires a fundamental alteration in the nature of a program or imposes undue financial and administrative burdens. To allow a person younger than the age of 45 years to live at VRE would fundamentally alter the nature of its community and jeopardize its status as "housing for older persons" under the Franklin FHA. In addition, allowing an exception for Doug Noble could result in a large number of people under age 45 seeking to live in VRE with their parents and thus create undue administrative burdens. Applying the facially neutral age restriction will not force the Nobles to institutionalize their child and is only a minimal restriction on their housing choices.

Affirmed.

Project HOME vs. City of Catalina

Columbia Court of Appeal (1998)

This is an appeal from the trial court ruling granting summary judgment for Project HOME and denying summary judgment for the City of Catalina (“City”). This case arises under the Columbia Fair Housing Act ("CFHA"). The plaintiff alleges that the defendant City's failure to grant a requested zoning permit for a proposed home for homeless persons constitutes "a refusal to make reasonable accommodations in the rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . ."

Plaintiff Project HOME is a Columbia nonprofit corporation that provides a continuum of services to homeless persons who are mentally ill and/or recovering substance abusers. The organization operates emergency shelters open to any chronically homeless person in the City and offers treatment at two drug- and alcohol-free transitional homes. Recognizing that many residents of the transitional homes would benefit from more privacy and independence than the two homes afford, Project HOME sought to create a "Single Room Occupancy" ("SRO") facility with small individual rooms and community kitchen facilities that would give the resident a sense of control over his or her environment.

Project HOME acquired a building on Fairmount Avenue to use for its proposed SRO. The property includes a substantial side yard which extends the entire depth of the block, but no rear yard. When Project HOME applied for a zoning and use permit for the Fairmount Avenue property, two civic associations opposed the introduction into the neighborhood of a new residential facility for persons beset with handicaps, and the City denied the zoning and use permit application on the ground that the Fairmount property has no rear yard. Under the Catalina Zoning Code, a commercial building or a residential building housing families must have a rear yard. Project HOME sought a waiver from the back yard requirement on the ground that the ample side yard is an adequate substitute. The City refused.

Project HOME and potential residents seek a declaration that as a matter of law the City's conduct constitutes a violation of 44C(2) of the CFHA, which provides that unlawful discrimination includes failure to make "reasonable accommodations in rules, policies, practices or services . . . necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling." They argue that the reasonable accommodation they seek, that the back yard requirements are waived because the side yard is adequate, is necessary in order to provide their disabled residents with the housing of their choice. The City seeks a ruling that as a matter of law it need not waive the requirement.

The CFHA is copied from its federal counterpart. In creating the CFHA, the Columbia legislature expressed its intent "that the state undertake vigorous steps to provide equal opportunity in housing . . . extend housing discrimination protection to the disabled, exempt housing for the elderly from the provisions prohibiting discrimination against families with children. . .and obtain substantial equivalency with the federal government's housing discrimination enforcement efforts."

We are mindful of the CFHA's stated policy "to prevent housing discrimination and provide for fair housing throughout Columbia." One of the purposes of the CFHA is to "integrate people with disabilities into the mainstream of the community." The CFHA is a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals. Because it is a broad remedial statute, its provisions are to be generously construed, and any exemptions must be construed narrowly in order to preserve the primary operation of the purposes and policies of the CFHA.

Concerning the reasonable accommodation requirement, we stress the CFHA's imposition of an affirmative duty to reasonably accommodate disabled persons. A facially neutral requirement that affects disabled and non-disabled individuals alike implicates the reasonable accommodation section of the CFHA when it prevents a disabled individual from gaining access to proposed housing. The legislative history of the reasonable accommodation portion of the CFHA indicates that one of the purposes behind the reasonable accommodation provision is to address individual needs and respond to

individual circumstances and that the concept of reasonable accommodation has a long history in regulations and case law dealing with discrimination on the basis of a person's disability. A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with disabilities an equal opportunity to use and enjoy a dwelling.

The City argues that there is no CFHA violation because there is no "causal nexus" between the section of the Zoning Code provision at issue--the rear yard requirement--and the handicaps of the prospective residents. The City contrasts the case at hand with a situation in which a zoning code barred the installation of elevators in three-story buildings. In such a case, a disabled person who sought to install an elevator so that he could live in a three-story building would be able to show a direct causal link between the Zoning Code and a City action that bars him from residing in this dwelling because of his handicap. Although the City acknowledges that "discrimination" is defined in §44C as a refusal to make a reasonable accommodation, it argues that what is unlawful under the CFHA is discrimination "<u>because</u> of disability." §44B (emphasis added).

The City reads the statute too narrowly. The CFHA provision concerning discrimination based on a refusal to make a reasonable accommodation contains an independent definition of "discrimination"--a definition not modified by the phrase "because of a disability" found in §44B. Thus the language of §44C does not suggest that, to establish a CFHA violation on the basis of discrimination against a person with a disability, a plaintiff must show a "causal nexus" between the challenged provision and the disabilities of the prospective residents, and cases that have interpreted §44C provide strong support for the conclusion that no such causal nexus is required.

In addition, according to the legislative history of the CFHA, one method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on land use in a manner that discriminates against people with

disabilities. Such determination often results from false assumptions about the needs of disabled people, as well as unfounded fears of difficulties about the problems their tenancies may pose. These and similar practices are prohibited by the CFHA. The City's argument that the statute only reaches special restrictions that specifically prohibit the sale or rental of a dwelling to disabled individuals is thus without merit. So is the City's argument that prohibiting the SRO facility from operating would have no discriminatory effect on plaintiffs or disabled persons in general because there are other facilities in Columbia.

Enforcement of a restrictive covenant or ordinance can, despite the apparent neutrality of the covenant or ordinance toward people with disabilities, constitute discrimination because of a disability. A reasonable accommodation would have been to waive enforcement of the covenant. Such an accommodation would not impose an undue financial or administrative burden on the private defendants nor would it undermine the basic purpose behind the practice of enforcement, namely, to maintain the residential nature of the neighborhood.

A plaintiff can thus establish a violation of the CFHA by showing that the defendant failed to make reasonable accommodations in rules, policies or practices, including rules, policies or practices that do not themselves discriminate on the basis of disability. If a restriction is an impediment to the disabled person's ability to obtain equal housing opportunity, the disabled person is permitted to invoke the "reasonable accommodation" requirement of the CFHA so long as the accommodation "may be necessary" to afford that person equal opportunity to use and enjoy a dwelling.

In this case, a waiver of the back yard requirement is necessary to afford the plaintiffs the equal opportunity to use and enjoy the Project HOME dwellings envisioned for the property. While an accommodation is not reasonable if it imposes a fundamental alteration or substantial administrative or financial burdens on the accommodating party, the City does not appear seriously to dispute that the requested substitution of side yard for rear yard is reasonable. Substituting side yard for rear yard would impose no financial or administrative burden on the City. Nor does it appear that granting the accommodation

requested would require a fundamental alteration of the Zoning Code.

Affirmed.

Townley v. Rocking J Residential Community

Columbia Court of Appeal (2003)

In this case we are asked to decide whether a community permitted by an exemption in the Columbia Fair Housing Act ("CFHA") to exclude persons under the age of 55 violates the CFHA's disability discrimination provisions by refusing to waive its minimum age requirement for an over-55 prospective resident with a disability who requires a live-in caretaker under the age of 55.

According to undisputed facts, plaintiff Art Townley ("Townley"), a 68-year-old man who has a disability that renders him unable to live independently, agreed to purchase from seller Dina Whitmore a home in Rocking J Residential Community ("Rocking J") housing development. Rocking J requires at least one person fifty-five years of age or older to reside in each unit. The Rocking J covenants, conditions and restrictions ("CC&Rs") state that no person under the age of 55 may reside in the community. Townley's live-in caregiver, Frank Johnson ("Johnson"), who has lived with and taken care of Townley for the past five years, is currently 32 years old. When Ms. Whitmore notified the Rocking J Homeowners Association (the "Association") of the purchase and that the buyer would have a 32-year-old live-in caregiver, the Association told Ms. Whitmore and Townley that Townley was welcome as a resident but Johnson would not be permitted to live in any home at Rocking J.

Townley and Ms. Whitmore filed suit to enjoin Rocking J from refusing to permit Townley's live-in caregiver to live in the home. They alleged that Rocking J is required under the CFHA to permit underage caregivers to live with over-55 residents, in order to allow adults with serious disabilities opportunities to live in the housing community of their choice. The trial court granted summary judgment for Rocking J.

Rocking J argues that because Rocking J qualifies as a "55 and over" community under the CFHA, the community is entitled to enforce its CC&R concerning the age requirement. Its position is that if it lets anyone under the age of 55 live in the community, the community

will lose its status as exempt “housing for older persons,” resulting in a fundamental alteration in the nature of the community. It also argues that permitting the plaintiff buyer to have a 32-year-old living in his home would result in granting to the plaintiff buyer greater than equal opportunity to use and enjoy a dwelling, while the CFHA does not require anything more than equal treatment. It also argues that it does not discriminate against Townley on the basis of disability because it already has many disabled elderly residents living there.

The CFHA's "housing for older persons exemption" does not exempt the defendants from its CFHA-imposed obligation to reasonably accommodate persons with disabilities. Section 41 of the CFHA prohibits discrimination against families with children. At the same time, however, Section 42 of the CFHA explicitly exempts “housing for older persons” from the prohibition against familial status discrimination. In other words, if an over-55 housing community abides by the CFHA’s requirements regarding occupancy by persons over the age of 55, such qualifying communities are free to exclude underage persons from the housing community and not be found liable for familial status discrimination. This exemption, however, only protects the housing community from liability for status discrimination. See §42. It does not protect the over-55 community from discrimination claims based upon race, color, national origin, religion, gender or disability.

The Supreme Court of Columbia, adopting United States Supreme Court interpretations of the identical Federal Fair Housing Act, has held that an accommodation is not reasonable (1) if it would require a fundamental alteration in the nature of a program, or (2) if it would impose undue financial or administrative burdens on the defendant. Defendant argues that the waiver would fundamentally alter the nature of the community by jeopardizing its "55 and over status."

Under the “55 and over” housing exemption, an over-55 housing community is exempt from familial status discrimination if: (1) at least eighty percent of the units are occupied by at least one person who is fifty-five years of age or older per unit, and (2) the housing community publishes and adheres to policies and procedures that demonstrate the intent

to maintain the community as 55 or over, only. Nothing in the statute requires that all occupants of a unit be over the age of 55 in order to obtain or maintain eligibility for a "55 and over" exemption. The statute specifically requires only "one person who is fifty-five years of age or older. . ." §42 (B)(1). The federal regulations promulgated by The Department of Housing and Urban Development (HUD), which we find useful and persuasive, fully contemplate situations where persons under the age of 55 will reside in over-55 housing communities. Under those regulations, a community will meet the 80% occupancy rule where there are units occupied by persons under 55 who are necessary to provide reasonable accommodation to disabled residents. Thus the HUD regulations implicitly contemplate that an over-55 community does not lose its status as "housing for older persons" if a caretaker under the age of 55 resides with an over-55 resident.

Accordingly, Rocking J is not correct that the community will jeopardize its status as a "55 and over" community if it waives the age requirement for Townley's live-in caregiver. A waiver will not have any impact on the "55 and over" status of the community. Townley's household will still count toward the 80% occupancy requirement, because there will be one person over 55 living in his unit. And the waiver would not indicate that Rocking J had failed to publish and adhere to policies and procedures that demonstrate the intent that Rocking J be housing for older persons and is not inconsistent with the community's intent to remain an over-55 community. A waiver granted in order to comply with a state law that requires reasonable accommodation for a disabled person's need for a live-in caregiver can not be interpreted as an intent to relinquish its status as "housing for older persons." As long as Rocking J's general policies, practices, procedures and services are specifically aimed at providing compatible housing for older persons, the waiver will not jeopardize the community concerning the intent requirement for the exemption.

Nor will the waiver inevitably cause a fundamental change by resulting in a "flood" of people wishing to share a residence with underage individuals. Reasonable accommodations vary depending on the facts of each case, and what is reasonable in a particular circumstance is a fact-intensive, case-specific determination. The CFHA allows Rocking J to consider each request individually and to grant only those requests that are reasonable.

Presumably, only a narrow group of persons would be entitled to the limited exception to the CC&Rs necessitated by disabled individuals' need for an underage live-in caretaker.

Defendant also argues that a waiver is unreasonable because the CFHA requirements that people with disabilities be given equal treatment does not require giving the plaintiff-buyer greater than equal opportunity to use and enjoy a dwelling. Defendant's argument might be persuasive if the definition of "discrimination" under the disability prohibitions of the CFHA were the same as the definitions prohibiting "discrimination" due to an individual's race, color, religion, sex, national origin or familial status. The CFHA prohibition on "discrimination in the sale or rental of housing" has been interpreted to require entities to provide "equal treatment" in their dealing with (for examples) men and women, Hispanics and non-Hispanics, African-Americans and Caucasians. In interpreting this requirement, courts have clearly distinguished "equal treatment" from the affirmative duty to provide a "reasonable accommodation" and an "equal opportunity." Thus the discrimination provisions that require "equal treatment" under this portion of the CFHA have not been interpreted to impose on housing providers a duty of greater than equal treatment to avoid or to rectify discrimination in housing on the basis of an individual's race, color, religion, sex, national origin or familial status. In contrast, the CFHA's provisions defining discrimination due to disability require more of housing providers than to provide equal treatment to disabled and non-disabled persons alike. These CFHA provisions place on housing providers an affirmative duty to, among other things, "reasonably accommodate" a person with a disability if the accommodation may be necessary to afford the person "equal opportunity" to use and enjoy a dwelling, §44C(2). "Equal opportunity" under this portion of the CFHA gives the disabled the right to live in the residence and community of their choice because that right serves to end their exclusion from mainstream society.

Accordingly, although Defendant is correct that the CFHA's general prohibitions concerning housing discrimination do not require an entity to provide anything more than "equal treatment," Defendant is not correct that they have no obligation to give more than "equal treatment," because the CFHA's "reasonable accommodation" requirement concerning housing for people with disabilities by its very nature may impose a duty of

more than equal treatment. To reasonably accommodate a disabled person, an individual or group may have to make an affirmative change in an otherwise valid policy. Thus the Rocking J community's CFHA imposed-obligation is more than to provide "equal treatment" for all disabled residents. It is to make necessary alterations in its rules so as to allow Townley "equal opportunity" to live in the residence of his choice.

Similarly, the fact that the Defendant does not generally discriminate against residents with disabilities does not insulate Defendant from its obligation to make a reasonable accommodation to Townley. Defendant's argument that it could not be found to have discriminated against Townley on the basis of disability because it already has many disabled elderly residents living there misses the point. The issue here is not whether the Defendant excludes or discriminates against residents with disabilities in general, but whether it failed to provide a *reasonable accommodation* to a particular individual who needed it in order to live in the Rocking J community. The fact that other disabled persons already live in the community does not relieve the community from its obligation to make reasonable accommodations to permit another disabled individual to live there.

This state has adopted the public policy of assisting the physically and developmentally disabled by promoting their deinstitutionalization and encouraging community integration. The overriding policy of the CFHA, which is to ensure equal opportunity to disabled persons to have adequate opportunities to select the housing of their choice, requires that Rocking J waive the age requirement. Consequently, state policy reflected in the CFHA and other statutes concerning disabled persons requires Rocking J to reasonably accommodate Townley by waiving its age requirement for a live-in caretaker for Townley.

Reversed.

Answer 1 to Question PT-A

1)

To: Emma Zucconi
Rommett, Fairbrooks, Fromkin & Zucconi, LLP

July 26th, 2005

Columbia Center for Disability Law
Santa Claritan, Columbia

Reference: Pinnacle Canyon Estates Homeowners Association--Request for a Disability Waiver

Dear Ms. Zucconi,

It is with great regret that we received your letter in the matter of the Winstons. The Winstons, naturally, still wish to live in the fine community of Pinnacle Canyon Estates, and the denial of the Homeowners Association of their request for a simple waiver, preventing them from completing the sale of the property from Pamela Garcia, represents, of course, a considerable blow to their aspirations, as they could hardly be expected to place Clint Winston in an institution. While we appreciate the concerns and arguments you have advanced in your letter, we believe that a closer examination of the applicable law will lead you to the same conclusion we have reached: that the denial of the waiver is in violation of the provision of the Columbia Fair Housing Act. We have no desire, of course, to be forced to go into litigation, even though the case is appropriate for summary judgment given the undisputed facts, when reconsideration of the applicable precedents and statutes may lead them to the same conclusion we have reached: that a waiver for Clint is a "reasonable accommodation" under the act.

The Statute

Perhaps, in your excitement over this case, and your obvious concern over maintaining the character of the community, you neglected a few of the finer points of the statute. The Columbia Fair Housing Act (CFHA) is concerned with any sort of discrimination that results in the denial of equal opportunity to enjoy a community, and the age-restrictive nature of Pinnacle Canyon Estates is not a defense to a disability discrimination claim.

Statutory Language

We would like to draw your attention to Section 44 of the CFHA, which bans discrimination on the basis of disability in any of the "terms, conditions or privileges of sale or rental of a dwelling ... because of a disability" either of the person directly purchasing or

renting, or because of the disability of a person "residing in or intending to reside in that dwelling." Additionally, "discrimination" is defined as including a "refusal to make accommodations in rules, practices or services" is [sic] the accommodations are "necessary to afford the person equal opportunity to use and enjoy a dwelling." The statute defines a disability as any "mental or physical impairment that substantially limits at least one major life activity" and "dwelling" as "any building ... designed for occupancy." And the "condition" - - the minimum 35 year age requirement - - is equally obvious.

The Statutory Requirements Are Satisfied

While we appreciate your acknowledgment of Clint's disabled status, we would like to make it clear that Clint's disability would not be in dispute in this case: Clint cannot handle basic housekeeping or cooking, cannot handle his own finances, and cannot safely use public transportation – that is, he is restricted in ordinary domestic activities, economic life, and transportation, and these are clearly "major life activities." Similarly, a single-family house at Pinnacle Canyon is clearly "major life activities." Similarly, a single-family house at Pinnacle Canyon is clearly a "dwelling" as it is a building designed for occupancy. Additionally, Clint would, naturally, be a resident in the building, so he falls under 44B2. So the basic provisions are clearly satisfied.

Because Clint is so clearly disabled, a "refusal to make reasonable accommodations in rules," such as the "C C Rs" which the homeowners association refers to, could potentially implicate CFHA - 44C2. As we will explain below, the precedents of *Columbia* [sic] clearly support modification or waiver of age requirements; similarly, the precedents define "equal opportunity" much more broadly than strictly "equal treatment."

Facially Neutral Requirements Can Implicate Disability

Thankfully, we have more cases for guidance than simply *Townley*, which you referenced in your letter. *Project HOME* dealt with reluctance by a government, under pressure from various homeowners' associations, to provide accommodations in their zoning codes from persons with disabilities. The court there was dealing with a facially neutral statute that resulted in a denial of a permit for a facility because it lacked a backyard – a neutral statute that resulted in people with disabilities being denied housing. The court there indicated that any sort of "facially neutral requirement" – such as a minimum age of 35 – that resulted in the "prevent[ion of] a disabled individual from gaining access to proposed housing" would violate the CFHA. The court additionally commented that "traditional" requirements may have to be changed to accommodate those with disabilities.

Enforcement of Facially Neutral Restrictive Covenants Can be Discriminatory

We would certainly hope that the application of this binding precedent to the case

would be obvious, it should be clear that under Columbia law, courts have interpreted neutral restrictions that result in individuals with disabilities being denied housing as being discriminatory, and therefore requiring reasonable accommodations. Clint Winston is disabled, and the refusal of the community to waive the requirement can constitute discrimination. The fact that it is a neutral rule applied fairly and broadly is, unfortunately for your clients, not a defense. Of course, while the court in *Project HOME* was dealing directly with zoning, it also explicitly ruled that enforcing a "restrictive covenant or ordinance, can *despite the apparent neutrality of the covenant* ... constitute discrimination because of a disability" as part of its holding (emphasis added).

Equal Opportunity is more than Equal Treatment

As the Court in *Townley* indicated, the requirement of "equal treatment" under CFHA-43 is different from "reasonable accommodation" and "equal opportunity" under s44. The Court in Townley found the "equal opportunity" provisions create an affirmative duty to reasonably accommodate, even when dealing with neutral rules and regulations - - that equal opportunity can incorporate an affirmative duty to waive a general rule in a specific case. In this case, in order to avoid discriminating against an individual with a disability, the CFHA is obliged to make all reasonable accommodations for him.

Waiving an enforcement of a covenant can be reasonable

An individual with a disability, such as Clint Winston, is allowed to invoke the "reasonable accommodation" requirement if the accommodation "may be necessary" to allow that individual full and fair access to housing. The court has expressly found that a "reasonable accommodation would have been to waive enforcement of the covenant;" this is especially true when it would not "impose an undue financial or administrative burden ... nor would it undermine the basic purpose behind the practice of enforcement." Similarly, to "reasonably accommodate a disabled person, an individual or group may have to make an affirmative change in an otherwise valid policy[.]"

The test as outlined in Project HOME indicates what is "reasonable" only in the negative; that is, it defines an unreasonable burden as an undue financial or administrative burden or an accommodation that would undermine the basic purpose behind the practice of enforcement. In this case, we are merely asking that one developmentally disabled individual, so disabled that he is effectively unable to function without adult supervision at all times, be allowed to live with his parents. As he has something of an outside occupation in the workshop, he would not be present during the day, and Margaret and Ralph Winston would be available during the evenings to supervise him and make sure he does not disturb the other residents. Moreover, Clint is "quiet and shy ... [h]e doesn't really approach strangers," meaning that he would be unlikely to disturb the peace of the other residents.

In this instance, the waiver of the age requirement would not lead to a fundamental change, nor would it even lead to minor children residing in the community, but simply one quiet, loving, disabled adult. Specifically, it would not be a financial or administrative

burden, because the Winstons would be responsible for caring for Clint, nor would it undermine the basic purpose of enforcing the age restriction, because the Winstons themselves would still meet the age restriction, and Clint is in any event not a minor that the PCE is allowed to discriminate against.

Public Policy Supports the Grant of Accommodations

In drafting the CFHA, Columbia was trying to copy federal law, as well as to "undertake vigorous steps to provide equal opportunity in housing ... extend housing discrimination protection to the disabled, exempt housing for the elderly from the provisions prohibiting discrimination against families with children ..." (with "children" in this context meaning minor children). The legislature, in their inquiry into the problems of people with disabilities, have found that facially neutral rules and regulations resulted in the disabled being denied access to housing. Alas, we fear that what is happening in this case, with the application of Pinnacle Canyon's sensible, neutral rule regarding age being used in such a manner that Clint Winston will not have a place to live, precisely the sort of application of neutral rules to discriminate that the legislature was concerned with.

The legislature also intended to assist the physically and developmentally disabled by promoting their deinstitutionalization and encouraging community integration. Of course, Pinnacle Canyon is essentially trying to force the Winstons to institutionalize their own child, against the goal of encouraging integration, by preventing him from living with the two people who have helped him lead his life happily despite his disability. This goal of integrating the disabled - - of making them welcomed and accepted as part of the community - - is completely thwarted when they are denied their ability to live with their caregivers - - and it was probably this concern that led the legislature to include the aforementioned inclusion of "[disabled people] residing in or intending to reside in that dwelling.

Additionally, while you maintain that *Townley* is only applicable to "homeowner/residents," the statute itself makes no distinctions between people with disabilities, people living with people with disabilities, and people associated with people with disabilities. To assume that courts will make distinction when the legislature did not – and in fact expressly included all three categories, including the one at tissue – strikes me as a rather adventurous litigation strategy. This is especially so when you consider that remedial statutes are to be "generously construed, and any exemptions must be construed narrowly" in order to effectuate the goals of the statute. The goals are clearly to protect individuals with disabilities from discrimination, even discrimination based on neutral statutes.

Conclusion

Pinnacle Canyons [sic] is under a duty not to discriminate against the disabled, even in its applications of neutral rules. Clint is disabled; he is being denied reasonable accommodations, which would not impose a financial burden or change the nature of the community or undermine the purpose of the restriction. The PCE is under an affirmative

duty under the law to avoid discriminating even with respect to neutral law, and their position on the waiver issue is resulting in discrimination and a denial of Clint's rights to "equal opportunity" for housing.

Claims of Pinnacle Valley

We hope that you see the logic and justice in the Winstons' request for a simple waiver of the 35-year age minimum for one person. However, we are very much cognizant of some of the concerns and legal issues raised in your letter, and we would like to do our best to alleviate them, to the extent we have failed to do so already.

"Purely a Function of Age"

You indicated in your letter that the decision to deny Clint Winston a waiver was "purely a function of his age." We do not dispute that, and of course believe that you only have the best of intentions, of maintaining the nature of the community as being geared towards "older persons." But as we indicated above, the basis on which you discriminate under the CFHA does not matter; "discrimination" is merely a function of denial of opportunities, and the non-waiver has denied Clint the opportunity to live in that beautiful community. CC&Rs are certainly contractual – but contractual provision must be waived under the CFHA if they result in discrimination against the disabled.

"Completely Exempt from the Age Discrimination Laws"

Your claim that PCE, as a housing development for older persons, is exempt from age discrimination laws is inaccurate, for the reasons described above. However, your letter did indicate a legitimate concern with falling below the "80% breakpoint" and ceasing to be considered as "housing for older persons," and that you are on the 80% level currently. On this subject, I have wonderful news and can completely alleviate your concerns. As the court indicated in *Townley* – and as you indicated in your letter – the 80% requirement only applies to units, not individuals. As the "unit" the Winstons will be purchasing would have not one, but two individuals over 55 living in the unit, a waiver of the age requirement for Clint would have no effect and would maintain Pinnacle Canyon at its current level of 80% of units being inhabited by those over-55. As far as your concern over a "pattern" of waiving the age requirement, Courts have explicitly stated that disability discrimination is a very "fact-specific" process; obliging the Winstons with a waiver in this case would not have the effect of obliging the Homeowners Association to grant them in future cases. It would not "undermine the basic purpose behind the practice of enforcement" of the age restrictions, because the individuals living there would primarily meet them; it is simply an additional accommodation.

We acknowledge that you may be concerned over any sort of "disability" being used as the basis for a waiver; after all, what if disabled individuals under 55 were to try to live in Pinnacle Valley? You may well be obliged to grant accommodations to some of them – but as you point out in your letter, accommodations must be "reasonable." This is a one-

off case, and there has been no indication there has been a flood of under-55 disabled individuals seeking to purchase homes (and they would still have to find the money, mind) in Pinnacle Canyon. But, as indicated above, this is very "fact specific," and accommodations allowing households of those under-55 may well be viewed as "unreasonable by the courts." Even if they are not, if the PCE is already legally obliged under the CFHA, denial of a waiver in this case will not affect their legal duties *viz* other disabled individuals, so the waiver or lack thereof in this case won't affect your clients['] rights.

We, of course, share your concern over current residents who wish to allow teenagers or rowdy young adults to live in your fine community. However, allowing one disabled individual – who cannot drive himself and has difficulty communicating – will not result in a significant increase in "traffic and noise pollution." Clint will not add to traffic, for the simple reason that he cannot drive, and there is no indication anywhere that he is "rowdy" in the least. Of course, your clients may be concerned with the broader principle, but a concern with broad principles in the general case is hardly a viable excuse to discriminate in specific cases. Again, in *Townley*, the court rejected a very similar slippery-slope argument, and it would seem unlikely that the court would accept it here, given the "fact-specific" nature of disability claims. Of course, we very much hope that your clients will somehow see the folly of prolonged litigation on this issue.

Financial and Administrative Burdens

As far as the administrative burdens you are concerned with, you should keep in mind that the courts have warned against the dangers of overestimating the actual administrative burdens individuals with disabilities would pose – the "false assumptions" that people, regretfully, so often make when assessing the costs of disabled individuals. The PCE would only be obliged – if at all, and I am not entirely sure that is the case – to assist with Clint Winston in the event of the death of both Ralph and Margaret Winston. If those sorts of concerns are helping thwart the waiver, we would of course be willing to discuss them with the PCE, and perhaps appoint a trustee or administrator, or prepare an acceptable will to be witnessed by members of the Homeowners Association, to take over in the case that both of the older Winstons perish, so that your Homeowners Association would not be burdened with the tasks of a "social services agency." Additionally, insofar as there are financial burdens, surely prolonged and pointless litigation would pose a more severe one than administrative tasks in the event of the deaths of people who are currently over 15 years below the average U.S. life expectancy.

Overall

I am quite concerned, of course, about your arguments revolving around "reverse discrimination." Unlike the courts in Franklin, Columbia Courts have not found "reverse discrimination" to be a concern in interpreting disability discrimination. While we certainly respect the courts of Franklin, their holdings are not binding on our courts, and our courts have clearly rejected "neutrality" as a basis for evading liability, affirmative duties and responsibilities under the CFHA. In Franklin, "equal treatment" is sufficient to satisfy their

version of the FHA; in Columbia, it is not, and the law imposes and affirmative duty to act.

Additionally, we are puzzled by your letter's references to section 42's exemption for "housing for older persons." We fear that you may be misstating the law. Pinnacle Canyon is clearly[,] at the current time, evincing an intent to provide housing to those persons fifty-five years of age or older. However, the exemption for "housing for older persons" only applies to the provisions of the CFHA relating to familial status – and, as indicated in 41's definitions section, "familial status" refers to "individuals younger than the age of eighteen years." Which is to say, the CFHA's discrimination exception speaks to families having minor children, and only allows familial discrimination on that basis. There is no exception for other forms of discrimination on that basis. There is no exception for other forms of discrimination, or indeed for disability discrimination. We would hate for the Homeowners association of a place the Winstons very much intend to live waste their money on litigating an issue based on a simple, and understandable, misreading of the statute.

We of course applaud the accommodations and expenses the PCE have undertaken to make accommodations for your disabled residents. Of course, the general gives way to the specific; accommodations are required in every case where they are appropriate and reasonable – as the court in *Townley* indicated, general non-discrimination does not "insulate [from] obligation[s] to make a reasonable accommodation;" the test is for, as the court indicated, a particular individual and not the disabled in general. However, your client's generosity on accommodations is a great thing, and a significant factor in our client's desire to move there. And as far as a housing glut is concerned, the fact our client's wish to move to the PCE in such a glut, even after being denied a waiver, is indicative of how pleasant a place it is, and of the unique nature of any given piece of property. Moreover, given such a glut, the PCE may wish to consider the consequences of not letting its members sell their property to willing, qualified, and age-appropriate *bona fide* buyers.

Conclusion

The proposed accommodation is not a "fundamental alteration [of the nature of the property or covenant] or substantial administrative or financial burden." As indicated above, many of the concerns you outline in your letter concern a great many things that have little or nothing to do with Clint Winston. Waivers will still be granted on an individual basis, Clint will not significantly impact the community, and we can work around any financial or administrative burdens the PCE is concerned with. We would hate to have to litigate this case, as Columbian law is clear that neutral laws can be considered "discriminatory," that the Winstons fall under the protections given to individuals living with disabled persons, and that a waiver of a condition of a covenant is clearly a "reasonable accommodation," and such litigation would only result in a waste of resources for a Homeowner's Association that the Winstons fully expect to join shortly.

We are quite cognizant of the emphasis on the legal concerns in this letter. We must, of course, point out that nobody disputes that Clint Winston is a caring, loving individual, or that his parents are excellent caretakers. Nor is it doubtful that a disabled

person with limited communication skills, such as Clint, would damage the quiet and placid nature of the community in the same manner as minor children or non-disabled adults would.

Truly Yours,

The Columbia Center for Disability Law

Answer 2 to Question PT-A

1)

To: Emma Zucconi, attorney for Pinnacle Canyon Estates Homeowners Association
From: Applicant, Columbia Center for Disability Law
Date: July 26, 2005

Subject: In re: Ralph, Margaret, and Clint Winston

Dear Ms. Zucconi,

I am writing in response to your letter dated July 22, 2005, refusing to grant a waiver to Ralph, Margaret, and Clint Winston from the Pinnacle Canyons [sic] Estates (PCE) covenants, conditions, and restrictions (CC&R). We are disappointed that the PCE Homeowners Association declined to grant the Winstons a waiver from the CC&R provision forbidding persons under the age of 35 from residing on the premises. I write to you now to note that it is our position that the PCE Homeowners Association is legally required to waive the age restriction for Clint in order to comply with § 44C of the Columbia Fair Housing Act (CFHA) preventing discrimination due to disabilities, and to reiterate our request for that waiver.

Under the CFHA, PCE is required to provide "reasonable accommodations in rules, policies, practices or services if the accommodation may be necessary to afford the [disabled] person equal opportunity to use and enjoy a dwelling."

Clint Winston, the 23[-]year[-]old son of Ralph and Margaret, is disabled under the definition used by the CFHA, as he suffers from a mental impairment that "substantially limits at least one major life activity." § 41. Clint functions well below his 23[-]year[-]old level, and has some difficulty learning, remembering and communicating. He is unable to cook for himself or perform his own housekeeping or money management. Thus, he is incapable of living on his own, a major life activity. Furthermore, while he works in a sheltered workshop, he is unable to use public transportation to and from, so he is reliant on Ralph and Margaret to drive him, thus limiting another major life activity, employment.

Clint's parents take care of him, provide assistance with his housekeeping and get him to and from work. Without their assistance, since he cannot live on his own, he would require institutionalization, which his parents absolutely reject. It is their wish that he live with them in the house they attempted to buy in PCE. Section 44C of the CFHA includes in the definition of discrimination against disabled persons the refusal to make "reasonable accommodations in rules" if that accommodation is necessary to afford the disabled person "equal opportunity to use and enjoy a dwelling." Therefore, PCE must provide "reasonable accommodations" so that Clint may enjoy "equal opportunity to use and enjoy a dwelling" with his parents. § 44C. For this reason, the failure to grant a waiver results in

discrimination against Clint and his family on the basis of his disability, not on his age as you suggest in your letter we have been arguing.

Equal Opportunity to use and enjoy a dwelling

Columbia courts have interpreted the "equal opportunity to use and enjoy a dwelling" provision to give a right to disabled individuals to live in the residence and community of their choice. Rocking J. The provision was intended to "end their exclusion from mainstream society". Rocking J. For this reason, the mere fact that other housing exists in the community for the Winstons is insufficient to argue that a reasonable accommodation need not be made to allow them equal opportunity to enjoy PCE. Furthermore, § 44B of the CFHA forbids discrimination against any person on the basis not only of the disability of that person, but of "a person residing in or intending to reside in that dwelling" after sale, and of "a person associated with that person." Therefore, since discrimination includes the refusal to make reasonable accommodations, Ralph and Margaret have the same right to those reasonable accommodations as do their son, and it is their intent that he live with them in PCE.

Section 44C covers waivers from rules of otherwise general application

A refusal to make reasonable accommodations in rules to accommodate a disabled person violates § 44C even if that rule is of otherwise general application. The Columbia Court of Appeal held that no "causal nexus" is required between the reasonable accommodation requested and the handicap of the prospective resident. Project Home. The court in Project Home noted that the § 44C contains "an independent definition of 'discrimination'" that is not modified by § 44B's requirement that the discrimination be "because of disability." The Columbia Court of Appeal similarly noted in Rocking J that the CFHA provisions regarding disability discrimination are not governed by the same "equal treatment" construction given to the CFHA provisions governing other types of discrimination (such as race or sex). The court noted that § 44C requires "more of housing providers than to provide equal treatment to disabled and non-disabled persons alike." Rocking J. Therefore, your argument that Clint's disability has nothing to do with application of the age limitation in the CC&R is irrelevant to PCE's legal requirement to provide reasonable accommodation to Clint in the form of a waiver.

While the Franklin Court of Appeal in Noble did find that a similar age restriction in a 55+ community did not need to be waived to accommodate a disabled person, that court used reasoning that has been explicitly rejected by the Columbia Court of Appeal. While the Fair Housing statute in Franklin and Columbia may be identical, the construction made by the courts of the statute have deviated. The Franklin court in Noble argued that the age requirement was not discrimination "based on disability," and found "no causal nexus" between the requirement and Noble's disability, while the Columbia court rejected a requirement for causal nexus in Project Home as I have noted. Similarly, the Franklin court limited Noble's rights to accommodation to situations where necessary to allow a disabled person enjoyment of housing on "an equal basis" with others, while the Columbia court

explicitly found a greater requirement in Rocking J. The reasoning of the Franklin court has been rejected by the Columbia courts, and does not justify PCE's refusal to grant Clint a waiver.

PCE's accommodation of other disabled residents does not rebut their discrimination in this case.

You argued that PCE has never failed to make accommodation for your qualified residents. This is an admirable position for PCE to take, and shows an attention to the needs of disabled residents that we hoped would be extended to Clint. However, the lack of discrimination against other residents does not affect your legal responsibility to reasonably accommodate Clint. Rocking J. The purpose of the CFHA was in part to address individual needs and circumstances. Project Home. The obligation of the community to make these reasonable accommodations extends to each and every disabled individual who requires it.

The reasoning of Rocking J is not limited to individuals who have already qualified for residence[.]

Furthermore, your argument that Rocking J is limited to homeowners/residents who qualify for admission under the neutral criterial is not supported by either the statute in question or the case. While Rocking J does indeed concern a disabled man over 55 and his request for a waiver for his assistant who did not meet the age requirement, the reasoning in no way limits the case to this scenario, but addresses generally the waiver of the age requirement as a reasonable accommodation to a disabled person. Furthermore, as noted previously, the protections of § 44 extend not only to the disabled person himself, but to persons associated with him, and to cases where the disabled person will be living in the residence after sale, and thus will extend to the Winstons here.

The waiver being asked for here is a "reasonable accommodation" as 1) it will not result in the fundamental alteration in the nature of a program and (2) it will not impose undue financial or administrative burdens on defendant[.]

The Supreme Court of Columbia has held that an accommodation is not reasonable if it (1) requires a fundamental alteration in the nature of a program, or (2) imposes undue financial or administrative burdens on the defendant. Rocking J. The waiver of the age limitation in the CC &R requested by the Winstons meets neither of these criteria and thus is a reasonable accommodation that PCE is legally obligated to make.

Fundamental alteration in the nature of the program

In your letter, you suggest that this waiver will result in a fundamental alteration in the PCE

community for a number of reasons; however, none of these reasons are entirely accurate.

First, you argue that the grant of the waiver will result in the loss of the exemption under § 42 because PCE must maintain 80% unit occupancy by person 55+. However, the language of the waiver provision only requires that 80% of the units are occupied by at least one person 55 or older. Here, both Ralph and Margaret are over 55; therefore, they will be part of the 80% requirement you need regardless of whether Clint lives with them. Rocking J.

Second, you argue that PCE will run the risk of losing its exemption from the familial status provisions because PCE is required by § 42 to publish and adhere to policies and procedures demonstrating "an intent by the owner or manager to provide housing for persons fifty-five years of age or older." However, as the Columbia Court of Appeal noted in Rocking J, a waiver granted "in order to comply with state law" by reasonably accommodating the needs of a disabled person does not demonstrate any change in an intent to provide housing for the elderly.

Third, PCE will not be subject to a fundamental change based on changes in the community resulting from a flood of applications. You note that you receive two requests a month for waivers. However, granting Clint's waiver, as required by law, will not require you to grant the waivers of non-disabled persons. This is a waiver based on Clint's disability, not his age, and each waiver will still remain a "fact-intensive, case-specific' determination. Rocking J. Therefore, your concerns that frequent granting of waivers will result in a change in the suitability of the community for your elderly residents, and a decrease in property values, are unwarranted as this waiver would not require you to remove the age provision entirely.

Undue financial and administrative burdens

In your letter, you also suggest that this waiver will present undue financial and administrative burdens for PCE, and is therefor an unreasonable accommodation. However, the waiver will not present the burdens you describe. First, PCE already makes accommodations to its common areas to provide for its other disabled residents, this showing that PCE is able, and admirably, willing, to so accommodate its residents. Second, you suggest that the potential of the Ralph and Margaret predeceasing Clint presents the danger of administrative costs in caring for Clint after their deaths. This concern relates to "unfounded fears of difficulties about the problems their [the disabled persons] tenancies may pose." Project Home. It is exactly these types of concerns that resulted in the housing discrimination against disabled persons that the CFHA' s provision against disability discrimination were enacted to prevent. PCE has other disabled residents that have not apparently provided this type of administrative burden. Furthermore, as an elderly housing community, [it] is likely often formed to make interim arrangements and track down family members. The concern that Clint's disability in and of itself presents an administrative burden is not a sufficient or acceptable rationale to avoid the application of Columbia law preventing discrimination against the disabled in housing.

Finally, Ralph and Margaret are in their late fifties, and will likely be available to take care of Clint for many years. On the event of their deaths, the Winstons had other children that will likely be available to caretake for Clint. The Winstons, as Clint's caretakers and like parents everywhere, have the responsibility of arranging for his needs now and after their death. PCE, as a housing association, bears no greater administrative burden from their residency than they do for other residents.

For these reasons, we ask that you reconsider the decision to refuse a waiver of the age limitation in the PCE CC&Rs for the Winstons. PCE is legally required to waive the age provision, even though it is a provision of general applicability, in order to make a reasonable accommodation for Clint. Furthermore, the waiver does not present the danger of a fundamental alteration to the nature of PCE, nor does it present a risk of undue financial and administrative burdens and thus is a reasonable accommodation. Clint is a quiet, gentle man who has never posed a difficulty at any of the places he's previously lived, and the Winstons are ready and willing to pursue this matter in court if that becomes necessary. We hope that it does not come to that.

Respectfully,

Applicant

THURSDAY AFTERNOON
JULY 28, 2005

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

PROPERTY CLERK v. GRINNELL

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

PROPERTY CLERK v. GRINNELL

FILE

City of Madison, Columbia

Office of the City Attorney

MEMORANDUM

To: Applicant

From: Deena Wright, City Attorney

Date: July 28, 2005

Re: **Property Clerk v. Paul and Sarah Grinnell**

On April 29, 2005, Paul Grinnell was arrested for the crime of driving under the influence of alcohol ("DUI") in the city of Madison, Columbia. His blood alcohol level was .08 percent, which was above the legal limit. Paul Grinnell pleaded guilty to the charges two weeks ago. The issue now is the fact that the Grinnells' vehicle was seized at the time of Paul Grinnell's arrest. Sixty days ago, both Paul and his wife Sarah Grinnell were served a summons and complaint indicating that the Property Clerk was seeking the forfeiture of their vehicle, and giving them 10 days to answer. After the answer was filed, a hearing was scheduled. That hearing was today.

As you know, I have recently implemented a "Zero Tolerance on Drinking and Driving" initiative. I instructed the Madison Police Department to seize and initiate forfeiture actions on vehicles being driven by drivers who are arrested for drunk driving violations. The forfeiture statute has been on the books for many years, but has never been used in the DUI context until this case.

Following the hearing, the Grinnells' counsel sought to dismiss the action claiming the forfeiture statute violated the Eighth Amendment as applied to Paul Grinnell, and separately

argued that Sarah Grinnell's interest should not be forfeited under § 311-2 of the statute. The court gave the parties until tomorrow to brief these issues.

Please write a memorandum of points and authorities in response to the judge's order to brief these issues.

City of Madison, Columbia

Office of the City Attorney

MEMORANDUM

To: All Deputy City Attorneys
From: Executive Committee
Re: **Persuasive Briefs**

To clarify the expectations of the City Attorney and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our position.

The City Attorney follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, IMPROPER: COLUMBIA HAS PERSONAL JURISDICTION. PROPER: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The Deputy should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

TRIAL TRANSCRIPT

CLERK: Calling the matter of Property Clerk versus Paul Grinnell and Sarah Grinnell for trial.

DEENA WRIGHT (WRIGHT): City Attorney Deena Wright appearing for plaintiff Property Clerk.

THOMAS SCHWAB (SCHWAB): Tom Schwab appearing for defendants Paul and Sarah Grinnell.

COURT: You may proceed, Ms. Wright.

WRIGHT: Thank you, your honor. We will be brief. The plaintiff asks that the judgment of conviction in *People v. Paul Grinnell* be marked as Plaintiff's Exhibit 1 and be admitted.

COURT: Any objection?

SCHWAB: No objection.

COURT: Plaintiff's 1 is received into evidence.

WRIGHT: Counsel for defendants and I have stipulated to the following facts: The car which is the subject of this forfeiture, a 2003 Honda Civic, is registered in Columbia, and the title is in the names of Paul Grinnell and Sarah Grinnell; that at the time of his arrest for drunk driving, Paul Grinnell was driving the 2003 Honda Civic; and that Paul Grinnell pleaded guilty to an offense for which he could have been fined $1,000.

SCHWAB: We agree to the stipulated facts, your honor.

WRIGHT: We believe that Exhibit 1 and the stipulated facts establish a prima facie case for forfeiture, and therefore, the plaintiff rests.

COURT: Mr. Schwab, you may call any witnesses.

SCHWAB: Thanks. I call Paul Grinnell.

[The witness is sworn and identified.]

DIRECT EXAMINATION BY SCHWAB

Q: Please describe your activities on the evening on which you were arrested for the DUI.

PAUL GRINNELL (A): About three months ago, I stayed late at work to finish rearranging my store. I work as an assistant manager at Kroll-Mart. We just expanded the floor space of my store, and another assistant manager and I had to stay late moving stuff around. At

about 10:00 p.m. we finished and decided to have a drink to sort of celebrate. That was my mistake. I hadn't eaten anything much since lunch, and I was pretty tired. I only had a couple of beers. I know, it probably sounds like every DUI you've ever heard about – but really, I didn't think I was drunk. Anyway, we both got into our cars at around 11 p.m. to head home. It takes me about a half-hour to drive home from where I was. About twenty minutes after getting on the road, I got pulled over by a Madison Police Department patrol car. The officer said that my car was weaving. He did a breathalyzer on me. It measured .08. He arrested me, and took me to the police station.

Q: What happened at the police station?

A: I was booked – fingerprints, mug shot, jail cell and one phone call. It was a nightmare.

Q: Was this the first time?

A: Yes, I had never been arrested for anything before. And I've only had one speeding ticket my entire life. I had to call my wife to come down to the station to bail me out.

Q: Now I'd like to turn to the seizure of your car. What happened?

A: My car got impounded. The officer told me that the Madison Police Department was instructed to seize vehicles involved in DUI's. Then we got this summons and complaint. It says that my car could be forfeited to the City because of this.

Q: What's your wife's name?

A: Sarah.

Q: How many cars do you own?

A: We only have the one car.

Q: And the car's owned and registered in both of your names?

A: Yes.

Q: And do both of you work outside of the home?

A: Yes, I work downtown, and Sarah works in Greenfield, about 15 miles away.

Q: How do you manage with only one car?

A: Sarah takes public transportation when I have to stay late. Otherwise, we carpool. She drops me off and picks me up. So as of right now, since the car's been impounded, I have an hour-long commute by bus each way. Sarah's is about an hour-and-a-half each way.

Q: What kind of car was impounded?

A: It's a two-year old Honda.

Q: What's its approximate value?

A: About $15,000, I'd say.

Q: Is it paid off?

A: Yes, we actually got it as a gift from Sarah's parents. There's no way we could've afforded the car on our own. We had about $5,000 saved up a couple of years ago, and we looked around for used cars, but we couldn't find anything reliable and safe at that price. We've tried to qualify for loans, but we don't make enough money. We also had a baby two years ago, so now we don't even have any savings.

Q: Tell me more about your financial situation.

A: Well, I make about $24,000 a year. Sarah makes about $18,000. I don't know how much longer Sarah will be able to hang onto her job. She's been late to work the last week or so because the buses are always late. Luckily, Sarah's mom has been able to take care of the baby for us, but that's going to change. That's another reason we need our car back. Starting in a couple of months, we have to put Cammie, our daughter, in daycare. We won't be able to manage that without a car.

Q: How much drinking do you do?

A: I hardly ever drink at all. Once a month, maybe a beer or two. That's it.

Q: Well, thank you, Mr. Grinnell. That's all I have for now.

CROSS-EXAMINATION BY WRIGHT

Q: Just a few questions, your honor. Mr. Grinnell, was your car insured, as required by law?

A: Yes.

Q: How much did that cost?

A: About $1200 a year.

Q: You must have had the car serviced periodically— oil changes, lube jobs, new tires, etc.?

A: Yes, but not very often.

Q: Still, you must have spent a couple of hundred dollars a year on the car?

A: Probably.

Q: And we all know how expensive gas is. Mr. Grinnell, did you ever calculate whether public transportation was in fact cheaper than driving?

A: No, because it wasn't convenient.

Q: Nothing further, your honor.

SCHWAB: Your honor, I have no redirect. I now call Sarah Grinnell.

[The witness is sworn and identified.]

DIRECT EXAMINATION BY SCHWAB

Q: Ms. Grinnell, are you a co-defendant in this forfeiture action?

SARAH GRINNELL (A): Yes, they're trying to take our only car.

Q: And are you a co-owner of the vehicle in question?

A: I am. Actually, my parents gave the car to the two of us. We can't afford to buy another one.

Q: You are employed?

A: Yes. I'm a receptionist in a medical service office but I only get paid about $18,000 a year.

Q: And you have a child?

A: Yes. Cammie, our daughter, is two.

Q: If you lost this car would your family be affected?

A: Oh my goodness, it would be terrible. Paul and I work in different directions. Usually, one of us drops off the other and then picks up after work. Public transportation isn't very good and it takes so long. It's been terrible since they seized the car. I've been late to work several times and I'm worried I'm going to get fired. And then there's Cammie. I don't know what's going to happen to her.

Q: What about Cammie?

A: Well, my mother has been taking care of her but she's not that well. We have to place Cammie in daycare soon but I don't know how we'd get her there. And then we have to worry about pick-up. What will we do if she gets sick and they call us to take her home or to the doctor?

Q: OK. Let me ask you about Paul. Is he in the habit of drinking?

A: Oh no, almost never. Maybe once a month, on the weekend, and usually just at home or at a friend's house.

Q: Have you ever known him to drink and drive?

A: Never.

Q: So on the evening in question did you have any inkling that Paul would be driving in a legally intoxicated state?

A: No, none at all.

Q: Nothing further, your honor.

COURT: All right. Your witness, Ms. Wright.

CROSS-EXAMINATION BY WRIGHT

Q: Thank you, your honor. Ms. Grinnell, your husband called you from work the day he was arrested, correct?

A: Yes. He called around 4:30 to see if I could get a ride home.

Q: And he told you he'd be working late that night, didn't he?

A: Yes. They were finishing up a big rearrangement of the store. He said he wouldn't be done until about 10 o'clock.

Q: He also told you that he and his co-worker would go out to celebrate the conclusion of this job?

A: Well, he said they'd probably stop for something afterward. He mentioned that he hadn't had any lunch and he wouldn't have time to get any dinner.

Q: And he told you they would stop at the Roadhouse Bar and Grill?

A: Yes.

Q: And you know he was pretty tired because he had been working so hard, right?

A: Yes, he had been working long hours.

Q: I have nothing further.

SCHWAB: No more questions.

*** * *END OF TRIAL* * ***

State of Columbia

Record of Arrest and Disposition

NAME	OFFENSE	DATE OF OFFENSE	DISPOSITION	DATE OF DISPOSITION
Grinnell, Paul 555 2830	DUI	April 29, 2005	Guilty plea; Misdemeanor; $500 fine; 90 day license restriction; DUI school	July 18, 2005

PLAINTIFF'S EXHIBIT 1

THURSDAY AFTERNOON
JULY 28, 2005

California
Bar
Examination

Performance Test B
LIBRARY

PROPERTY CLERK v. GRINNELL

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA CIVIL FORFEITURE ACT

§ 310. Definitions

In this article:

1. "Property" means and includes: real property, personal property, money, negotiable instruments, securities, or any thing of value or any interest in a thing of value.

2. "Proceeds of a crime" means any property obtained through the commission of a crime defined herein, and includes any appreciation in value of such property.

3. "Substituted proceeds of a crime" means any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.

4. "Instrumentality of a crime" means any property, including vehicles, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime defined in subdivision six hereof.

5. "Real property instrumentality of a crime" means an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.

6. "Crime" means violation of any penal code section, whether charged as a misdemeanor or felony.

7. "Defendant" means a person against whom a forfeiture action is commenced and includes a "criminal defendant" and a "non-criminal defendant".

8. "Criminal defendant" means a person who has criminal liability for a crime defined herein. For purposes of this article, a person has criminal liability when (a) he has been convicted of a crime, or (b) the Property Clerk proves by clear and convincing evidence that such person has committed a crime.

9. "Non-criminal defendant" means a person, other than a criminal defendant, who possesses an interest in the proceeds of a crime, the substituted proceeds of a crime or an instrumentality of a crime.

10. “Property Clerk” means all persons appointed or elected by counties or cities to maintain custody of property subject to forfeiture and to initiate and prosecute forfeiture actions.

§ 311 Procedures

1. A civil action may be commenced by the Property Clerk against a criminal defendant or non-criminal defendant to forfeit the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime or the real property instrumentality of a crime, or to recover a money judgment in an amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime. Any action under this article must be commenced within five years of the commission of the crime and shall be civil, remedial in nature, and shall not be deemed to be a penalty or criminal forfeiture for any purpose.

2. No property shall be forfeited under this section if, and to the extent that, the property is held by an owner who did not know of, or consent to, the act or omission constituting the crime.

3. In a forfeiture action commenced by the Property Clerk against a criminal defendant or a non-criminal defendant, the burden shall be upon the Property Clerk to prove by a preponderance of the evidence the facts necessary to establish a claim for forfeiture.

4. An action for forfeiture shall be commenced by service pursuant to this chapter of a summons with notice or summons and verified complaint. No person shall forfeit any right, title, or interest in any property who is not a defendant in the action.

Bennis v. Michigan
United States Supreme Court (1996)

Petitioner Tina Bennis ("Bennis") was a joint owner, with her husband, John, of an automobile in which her husband engaged in sexual activity with a prostitute. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's activity. We granted certiorari in order to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment. We affirm.

Detroit police arrested John after observing him engaged in a sexual act with a prostitute in the automobile while it was parked on a Detroit city street. John was convicted of gross indecency. The State then sued both Bennis and her husband, John, to have the car declared a public nuisance and abated as such under Michigan's forfeiture law.

Bennis defended against the abatement of her interest in the car on the ground that, when she entrusted her husband to use the car, she did not know that he would use it to violate Michigan's indecency law. The Wayne County Circuit Court rejected this argument, declared the car a public nuisance, and ordered the car's abatement. In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law. He took into account the couple's ownership of "another automobile," so they would not be left "without transportation." He also mentioned his authority to order the payment of one-half of the sale proceeds, after the deduction of costs, to "the innocent co-title holder." He declined to order such a division of sale proceeds in this case because of the age and value of the car (an 11-year-old Pontiac sedan recently purchased by John and Bennis for $600); he commented in this regard: "There's practically nothing left minus costs in a situation such as this."

The gravamen of Bennis' due process claim is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both. Rather, she

claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law. But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.

In *Calero-Toledo v. Pearson Yacht Leasing Co. (1974),* the most recent decision on point, this Court concluded that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." Petitioner is in the same position as the various owners involved in the forfeiture cases beginning with the earliest in 1827. She did not know that her car would be used in an illegal activity that would subject it to forfeiture. But under these cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.

Petitioner relies on a passage from *Calero-Toledo*, that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." But she concedes that this comment was *obiter dictum*, and "it is to the holdings of our cases, rather than their dicta, that we must attend." And the *holding* of *Calero-Toledo* on this point was that the interest of a yacht rental company in one of its leased yachts could be forfeited because of its use for transportation of controlled substances, even though the company was "in no way involved in the criminal enterprise carried on by [the] lessee" and "had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law]." Petitioner has made no showing beyond that here.

In *Altman v. U. S.* (1993), this Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute

itself is "punitive" in motive. In this case, however, Michigan's Supreme Court emphasized with respect to the forfeiture proceeding at issue: "It is not contested that this is an equitable action," in which the trial judge has discretion to consider "alternatives [to] abating the entire interest in the vehicle."

In any event, for the reasons pointed out in *Calero-Toledo*, forfeiture also serves a deterrent purpose distinct from any punitive purpose. Forfeiture of property prevents illegal uses "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." This deterrent mechanism is hardly unique to forfeiture. For instance, because Michigan also deters dangerous driving by making a motor vehicle owner liable for the negligent operation of the vehicle by a driver who had the owner's consent to use it, petitioner was also potentially liable for her husband's use of the car in violation of Michigan negligence law. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.

We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. The Bennis automobile, it is conceded, facilitated and was used in criminal activity. Both the trial court and the Michigan Supreme Court followed our longstanding practice, and the judgment of the Supreme Court of Michigan is therefore affirmed.

U.S. v. Crandall
United States Court of Appeals, 4th Circuit (1995)

We must consider in this case the important question of whether civil forfeiture to the United States of a 33-acre farm, due to its involvement in violations of the federal drug laws, constitutes an excessive fine under the Eighth Amendment. In *Altman v. U. S.* (1993), the Supreme Court stated that the purpose of the Eighth Amendment was to limit the government's power to punish. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense. That is, the notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Thus, the question was not whether forfeiture is civil or criminal, but rather whether it is punishment. The Court concluded that forfeitures were a form of punishment subject to the Excessive Fines Clause of the Eighth Amendment. *Altman* left to the lower courts the task of articulating the appropriate standard for determining excessiveness.

We articulate in this case a proportionality test, for determining whether a civil forfeiture is excessive. After applying the proportionality test to the facts of this case, we affirm the decree and judgment of forfeiture entered by the district court.

Facts

The United States brought this civil *in rem* action in July 1991 against Tract 1 of Little River Farms in Orange County, North Carolina, seeking to take title to the 33-acre property. The property is valued at approximately $500,000 and is owned by Robert H. Crandall, who inherited the property from his mother at the time of her death in 1978. The government alleged in its complaint that the property was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of the Controlled Substances

Act, and that the property constituted proceeds traceable to the exchange of controlled substances, and is therefore subject to forfeiture.

Crandall, who is the sole owner of Little River Farms, intervened and filed a claim to the property in answer to the forfeiture complaint. Crandall alleged that the property did not constitute the proceeds of any drug dealing and that it was not used to facilitate the commission of any violation of the drug laws. In his answer, he specifically denied the government's allegations of his involvement in drug transactions and claimed that he had no knowledge of, and did not give any consent for, the subject real property being used or intended for use to commit or facilitate the commission of a violation of the Controlled Substances Act.

At trial, the government's principal witness, John Baucom, testifying under grant of immunity, stated that Crandall had distributed, packaged, sold, purchased and used controlled substances, including marijuana, cocaine and quaaludes, on Little River Farms. Baucom, who had worked for Crandall at Little River Farms, testified that he was paid in marijuana and cocaine by Crandall for doing maintenance-type work on the property, such as cutting grass, and for doing landscaping and minor carpentry work. He stated that on approximately 30 to 40 occasions, Crandall paid him $100 and a half-gram of cocaine in the basement of the farmhouse. Baucom also testified that he had observed Crandall in the basement with between one and two pounds of marijuana and that he saw others pick up marijuana from Crandall on at least three occasions. Baucom testified that at times, he was instructed by Crandall to serve as a lookout while Crandall consummated drug deals on the farm.

Crandall presented other witnesses, who had been employed on Little River Farms, who testified that they had never seen Crandall give Baucom any drugs. These witnesses also stated that they had never seen Crandall either use or store drugs on the property. Crandall himself took the stand and testified that he had inherited the property from his parents and that he had not engaged in any illegal activities.

At the conclusion of the evidence, the jury found in favor of the United States, concluding that the property had been used to facilitate the commission of violations of the drug laws, that the property was improved by the proceeds of drug exchanges, and that Crandall could not claim a lack of awareness. The court entered a decree and judgment forfeiting the 33-acre farm to the United States subject to prior liens recorded against the property. This appeal followed.

Discussion

The Controlled Substances Act includes provisions for the forfeiture to the United States of property used in or intended to be used in the commission of a violation of drug laws which are punishable by more than one year's imprisonment. The forfeiture proceeding is civil in nature and relies on the nexus between the property and illegal drug activity. Property is subject to forfeiture if it is given in exchange for drugs; if it is "traceable" to a drug transaction; if it is used in committing or facilitating the commission of a drug offense; or if it is intended for such use. The owner of an interest in the property may defend against forfeiture by showing that the offense involving the property was committed without his knowledge or consent. Because a forfeiture action is *in rem*, elements of a claim establishing forfeiture focus principally on the property's role in the offense and not on the owner's guilt.

The procedure governing a civil forfeiture action is that the government may seize property if it can establish probable cause to believe that the property has the statutorily prescribed nexus to illegal drug activity which is punishable by more than one year's imprisonment. It is not an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture. By establishing that the violation occurred without the knowledge or consent of that owner, however, the owner establishes a defense to the forfeiture.

The *in rem* nature of a forfeiture action and the adverse effect on the property's owner of

such forfeiture raises unique questions about the proper application of the constitutional limit of excessiveness, which Crandall claims was exceeded.

In this case, after Crandall made the Eighth Amendment objection and the jury rendered its verdict, but before the court entered the decree and judgment of forfeiture, the Supreme Court decided *Altman*, which held that *in rem* civil forfeiture proceedings are subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

In order to resolve Crandall's Eighth Amendment challenge, we must first discharge the task given to us by *Altman* of articulating the standard under which to determine when a forfeiture is excessive. There are two approaches to an excessiveness inquiry: the traditional Eighth Amendment proportionality principle, and the instrumentality principle.

While we have not addressed the question directly, in light of *Altman*, an inquiry into the proportionality between the value of the property sought to be forfeited and the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture would seem to be in order. We now undertake to state the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for *in rem* forfeitures.

We are guided in part by our decision in *United States v. 38 Sailors Cove Drive* (4th Cir., 1992). We regard *Sailors Cove* as instructive, for it principally used a proportionality analysis in reaching the conclusion that the forfeiture at issue there was not excessive. *Sailors Cove* was a pre-*Altman* case in which we considered the Eighth Amendment contentions of an owner convicted in state court of the narcotics offenses on which the forfeiture was based. The claimant Levin twice sold cocaine inside his condominium to a confidential informant. The quantity totaled no more than 2 1/2 grams; the total sales price was $250. The confidential informant had requested that the first sale take place inside the condominium; the record was unclear as to who had suggested that the second sale take place there. Except for a small third sale that took place outside the condominium, Levin declined to make further sales despite frequent additional requests by the informant. Levin

was eventually arrested by local authorities; he pleaded guilty to a state-law offense and received a sentence of probation and a small fine. A search of his condominium did not turn up any indication of narcotics activity. As a result of Levin's conduct, the federal government commenced an *in rem* forfeiture proceeding against the condominium, whose value was $150,000, and in which Levin had an equity interest worth $75,000. We rejected Levin's arguments that the forfeiture of that interest as punishment for $250 in narcotics sales violated the Cruel and Unusual Punishment Clause of the Eighth Amendment or its Excessive Fines Clause.

We noted that the distribution of narcotics, even in quantities as small as those sold by Levin, is a grave offense, for which a defendant could be fined $75,000 under state law, and $1 million under federal law. We concluded that in light of this range of possible fines, a forfeiture of $75,000 was not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence. With respect to the Excessive Fines Clause in particular, we stated that we need not decide at exactly what point a fine or forfeiture might violate the Excessive Fines Clause, for wherever such a line could be drawn, this forfeiture would be proper.

The ruling of the district court that the forfeiture in the present case did not violate Crandall's rights under the Excessive Fines Clause fits well within this standard. The purchase, distribution and sale of narcotics are serious offenses, and the charges at issue here were sufficient to expose Crandall to very substantial penalties amounting to more than $1,000,000. Certainly considering that in *Sailors Cove* we upheld the forfeiture of a $75,000 interest in real property apparently fortuitously used for two isolated sales of 2 1/2 grams of cocaine for $250, the forfeiture here of property having a value perhaps close to $500,000 as punishment for its intentional and pervasive use to distribute and purchase significant quantities of illicit drugs cannot be regarded as excessive in comparison to the nature of the offense. We note in passing that an additional factor not relevant in this case, but instructive in informing future decisions of district courts, would consider the harshness of the forfeiture on innocent third parties.

We conclude that the district court properly rejected Crandall's contention that the forfeiture of the property violated the Excessive Fines Clause of the Eighth Amendment.

Affirmed.

U.S. v. Metzger
United States Court of Appeals, 2d Circuit (1995)

Marcia Metzger ("Metzger"), the owner of property in Pembroke, New York (the "property"), appeals from a judgment entered in the United States District Court of New York following a bench trial ordering the forfeiture of the defendant property to the United States pursuant to the Controlled Substances Act ("CSA"), as a result of the use of the property by her son Mark Metzger ("Mark") to grow marijuana. On appeal, Metzger contends principally (1) that the district court erred in rejecting her defense that she was an innocent owner, and (2) that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. For the reasons below, we reject her contentions and affirm the decision of the district court.

The land in question, an 85-acre parcel in Pembroke, New York, was purchased by Mark in January 1985 for $26,000 cash; most of that money was supplied by Metzger. In December 1986, Mark conveyed the property to Metzger for one dollar. Between 1986 and 1990, a house was constructed on the land at an estimated cost of $40,000. The property is not Metzger's primary residence; she lives some 10-15 miles away in Depew, New York.

In August 1990, law enforcement agents conducted a consensual search of the property. They found a total of 1,362 marijuana plants growing on and around the farm, 845 of them on the property itself. Mark told the agents he kept some of his marijuana on the adjacent property "because he did not want to get caught with marijuana on his property." Inside a barn located near the house, 183 harvested marijuana plants were found drying along the wall.

Inside the house, the agents found in Mark's bedroom a loaded revolver in a dresser drawer. A film canister containing marijuana seeds was found on top of a second dresser, and an electronic seed separator was found in the closet. In a cupboard accessible from both the kitchen and the dining room, a small cellophane bag containing marijuana was discovered, and inside a hutch in the dining room several packages of cigarette rolling paper and a silver marijuana pipe were found.

Mark was convicted in state court, after a plea of guilty, of criminal possession of marijuana. The United States commenced this action in the district court seeking forfeiture of the defendant property pursuant to the CSA. Metzger filed a claim to the property and contended that the property was not subject to forfeiture because she owned it and was innocent of any wrongdoing. She also contended that a forfeiture of the property would violate the Excessive Fines Clause of the Eighth Amendment.

The district court held a six-day bench trial and heard testimony from Metzger and law enforcement agents. One agent testified that Mark had been arrested in 1980 for growing marijuana while living in Metzger's residence. In connection with that arrest, officers executed a search warrant at Metzger's home; in her garage, they found 1,000 containers of marijuana seeds; in her basement, they found marijuana plants, packaging material, and plant lights. In Mark's bedroom in Metzger's home, they found in plain view, marijuana, marijuana packaging material, scales, photographs of Mark standing next to tall marijuana plants, and books on growing marijuana. Another agent testified during the search of the property at issue here, Metzger told him "that she was aware that Mark had a problem with marijuana, that he had been arrested several years prior for growing marijuana at her house, and she told me that she built the farm so that Mark would have a place to do his farming."

As to the property at issue here, Metzger testified that she visited the farm once a week to cook, clean, and do her son's laundry, but that she did not have knowledge of her son's marijuana farming. Although admitting that she had gone into cabinets and drawers where the police later discovered marijuana, drug paraphernalia, and a handgun, she testified that she did not see those items.

The district court denied Metzger's claim. Crediting the testimony of the law enforcement officers, the court expressly found that Metzger's testimony was not wholly credible. The court concluded that the defendant property was forfeitable, finding that the property had been used to facilitate a narcotics felony, and that Metzger was not an innocent owner.

The district court also rejected Metzger's excessive-fines contention, stating that "this is not a case where a small amount of drugs was found in a discrete part of the defendant property on one single occasion. To the contrary, Mark used the entirety of the defendant property to further his advanced drug enterprise."

On appeal, Metzger argues that the district court erred in rejecting her innocent-owner defense and her Eighth Amendment excessiveness contention. We reject both arguments.

A. The Innocent-Owner Defense

The CSA provides that a parcel of real property that has been used to commit or to facilitate the commission of a narcotics felony is forfeitable to the United States, unless the owner can establish a degree of innocence:

> "no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

Matters of knowledge and willful avoidance of knowledge are questions of fact, and the district court's findings as to those facts may not be set aside unless they are clearly erroneous. Assessment of the credibility of witnesses is peculiarly within the province of the trier of fact and is entitled to considerable deference.

A total of 1,362 marijuana plants were found growing on and around the property, 845 of them on the property itself. In addition, the house was used to store seeds, guns and marijuana; the barn/greenhouse was used to dry and strip the plants, as well as house the pots in which the marijuana grew; larger plants were transported across the defendant property and through a path to several marijuana fields; and guard dogs kept watch over the marijuana fields.

The trial court's finding that Metzger's testimony that she never saw Mark's substantial marijuana crop was not credible was supported by the magnitude of Mark's marijuana growing operation on the property, with some large plants growing within 80 feet of the

house, and by Metzger's own testimony that in cleaning and putting away laundry on the defendant property, she had gone into cabinets and drawers where the police later discovered marijuana and drug paraphernalia. The court's finding that Metzger either knew or deliberately avoided knowing of the unlawful use of the defendant property in 1990 was also supported by the testimony of law enforcement agents, which the court expressly found credible, as to Mark's 1980 arrest for growing marijuana and the items seized at that time from Metzger's house, and as to Metzger's statement at the time of the search of the defendant property that she had been aware of the previous arrest and of Mark's problem with marijuana.

In light of the record and the credibility assessments made by the trial court, we cannot conclude that there is clear error in the court's findings that Metzger either knew of or deliberately closed her eyes to the fact that her son was growing marijuana on the property. Accordingly, we uphold the finding that Metzger was not an innocent owner.

B. The "Excessive Fines" Clause

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Altman v. U.S.* (1993) the Supreme Court ruled that an *in rem* civil forfeiture under the CSA constitutes punishment and, as such, is subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. The *Altman* Court declined, however, to delineate the factors that should inform a determination of whether a given civil forfeiture is constitutionally excessive. Today, we adopt the instrumentality principle and now undertake to state the appropriate standard to be applied in conducting an excessiveness analysis under the Eighth Amendment for *in rem* forfeitures. To do this, we begin by looking more closely at the historical justification for forfeiture and the effect that a forfeiture has on the property's owner.

In rem forfeitures were historically grounded on the fiction that the property itself was considered the "offender" and accordingly, the innocence of an owner was not a defense.

Nonetheless, a forfeiture of property effects punishment on its owner. This appears more clearly so when, as provided in the Controlled Substances Act, the forfeiture law provides an innocent owner defense, implying that some owner culpability is being punished by the Act's forfeiture provisions. Since, however, the property itself is the object of the action, and not its value, the value of the property is irrelevant to whether it is forfeitable. The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense. Any analysis under the Eighth Amendment into excessiveness thus must go to whether the property was an instrumentality of the offense.

It is apparent that Congress, in providing for civil forfeiture of property involved in drug offenses for which punishment exceeds one year, did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was tainted by the offense. Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property or the gravity of the offense.

The question of excessiveness is thus tied to the "guilt of the property" or the extent to which the property was involved in the offense, and not its value. This point can be illustrated by comparing two hypotheticals. Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of $30,000. In both cases, the intuitive excessiveness analysis centers on the relationship between the property and the offense – the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive. When measuring the strength or extent of the property's relationship to the

offense, i.e., its instrumentality in the offense, we would look at whether the property's role was supportive, important, or even necessary to the success of the illegal activity. We would also inquire into whether the use of the property was deliberate or planned, as distinguished from incidental or fortuitous. We would note whether the property was used once or repeatedly, whether a small portion was used, and whether the property was put to other uses and the extent of those uses.

While our aim under this instrumentality test for determining excessiveness is directed at discovering the property's role in the offense, we are also mindful that the punishment effected by a forfeiture is imposed on the owner. Thus, while the extent of the owner's culpability may be of minor relevance to the question of whether a forfeiture can properly be imposed, it becomes more relevant when determining whether the "fine" is excessive. Thus, where the owner's involvement in the offense is only incidental, as opposed to extensive -- e.g., where he is simply aware of the offense but not a perpetrator or conspirator -- this fact will weigh on the excessiveness side of the scales.

Finally, we note that since the property in kind is at stake, and not its value, a judgment of forfeiture is largely an all-or-nothing situation, and an inquiry into excessiveness can determine only on which side of the line the facts place the property. We might very well say that it would be an excessive fine to forfeit a building in which an isolated drug sale happens to occur, but that it would not be excessive to forfeit a building that acted solely as a drug emporium for packaging, selling, distributing, and using drugs. However, a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable.

For these reasons, we now hold, in determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, that a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility

of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense. No one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.

Addressing first the nexus between the property and the offense, Metzger's property served as the situs for a significant marijuana operation comprising cultivation, storage and processing. While it would appear that the farm had some purposes other than serving as an instrument of drug activity, the property nevertheless was an important, if not necessary, instrument for the drug activity, in providing a secluded location.

On the extent of the use of the property for illegal activities, evidence showed not only the large number of plants growing on the property, but also that the use permeated to the barn and the house.

Considering the second part of the test, the role and culpability of Metzger, it can hardly be argued that she was not culpable. Though she was not prosecuted for or convicted of any offense, the court's findings plainly indicated that she had a significant degree of culpability in the criminal use of the property. The court found that Metzger "would have to have been blind not to have been aware of her son's marijuana activities, or would have to have consciously and purposefully ignored signs of such activities," and it found that her testimony that she was not aware was "simply not credible." Those findings are amply

supported not only by the evidence of Metzger's frequent visits to the property, the proximity of numerous plants to the house, and her forays into cabinets and drawers where marijuana and drug paraphernalia were found, but also by the evidence relating to Mark's previous arrest for growing marijuana while living in Metzger's own residence. Just prior to that arrest, the officers had found 1,000 containers of seeds in her garage, marijuana plants growing under strong lights in her basement, and in plain view in Mark's room in her home, marijuana, marijuana packaging material, scales, photographs of Mark standing next to tall marijuana plants, and books on growing marijuana. Admittedly aware of Mark's involvement in growing marijuana, she proceeded to buy him a farm.

Finally, while Metzger has urged that we mitigate the punishment that the forfeiture will impose on her by forfeiting only the areas of the 85-acres where the cultivation occurred, she has provided no evidence that this area is on a separately platted property that could be readily separated. In the absence of such evidence, and in light of the ample evidence in support of forfeiture, the entire 85-acre property, as identified in the warrant for its seizure, may be forfeited.

Judgment affirmed.

Answer 1 to Question PT-B

1)

MEMORANDUM OF POINTS AND AUTHORITIES

The following memorandum seeks to prove two arguments.

The first is that Section 311 of Columbia Civil Forfeiture Act does not violate the Eighth Amendment as applied to Paul Grinnell, because the forfeiture satisfies both the proportionality and instrumentality tests that are used to gauge the constitutionality of such forfeitures.

The second is that Sarah Grinnell's interest in the car should also be forfeited, despite Section 311-2 of the Columbia Forfeiture Statute, because her ignorance of the crime was willful, and she was therefore not an unknowing or innocent owner under the terms of Section 311-2.

Statement of Facts

One night three months ago, Paul Grinnell stayed late at his job at Kroll-Mart to complete a task with a co-worker. They celebrated by becoming intoxicated. At the time he commenced drinking, Mr. Grinnell knew that he was "extremely tired," and moreover that he was drinking on an empty stomach because he had not eaten lunch. Nonetheless, he imbibed what he describes as "a couple of beers." Intoxicated, he got into his car to go home. En route, at about 11:20 that evening, a patrol car pulled him over for weaving across the road. His blood alcohol level was measured at 0.08, which is above the legal limit for a charge of driving under the influence of alcohol ("DUI"). He was thus charged with DUI and pleaded guilty. DUI carries a potential fine of $1,000.

Pursuant to this charge, the car that the defendant drove to commit his crime, a 2003 Honda Civic, was seized and impounded. The vehicle is registered in Columbia, and title is in the name of Paul Grinnell and Sarah Grinnell, his wife.

Although Ms. Grinnell was not in the car at the time of the crime, she was aware of the circumstances that led to its perpetration. She received a phone call from Paul at 4:30 that afternoon. Paul told her that he and his co-worker would finish their task at 10:00 that night. He also told her that they planned to celebrate by stopping at the Roadhouse Bar and Grill. In addition, Paul informed Sarah that he had not eaten any lunch. Sarah knew that he was extremely tired, because he had been working so hard. She was thus aware of all of the elements that led to Paul's inebriation. She knew, moreover, that he planned to drive home afterwards. Nonetheless, despite the high apparent risk of intoxication before driving, Sarah did nothing to prevent Paul from becoming intoxicated and then committing DUI.

Argument

(A) THE FORFEITURE OF PAUL GRINNELL'S INTEREST IN HIS AUTOMOBILE DOES NOT VIOLATE THE EIGHTH AMENDMENT, BECAUSE IT IS NOT DISPROPORTIONATE TO THE CRIME COMMITTED UNDER THE TRADITIONAL PROPORTIONALITY TEST, AND THE PROPERTY IS SUFFICIENTLY RELATED TO THE OFFENSE TO SATISFY THE INSTRUMENTALITY TEST[.]

The seizure of Paul Grinnell's interest in the automobile under the Columbia Forfeiture Act does not violate the Eighth Amendment under either a proportionality or instrumentality test.

The Eighth Amendment provides that excessive fines shall not be imposed for criminal activity. In Altman v. US, the Supreme Court held that this provision applies to in rem civil forfeitures, because such forfeitures constitute punishment. Section 311 obviously allows for such forfeitures, and thus comes under the purview of the Eighth Amendment's "excessive fines" clause. Section 311 of the statute states, in relevant part, that a civil action may be commenced by the Property Clerk against a criminal defendant (such as Paul Grinnell) to seize any property that constitutes the "instrumentality of the crime." Section 311, therefore, is clearly a forfeiture statute, and is thus "punitive" under Altman. The Altman Court declined, however, to delineate the factors that should inform a determination of whether such a given civil forfeiture is constitutionally excessive under the Eighth Amendment.

In the absence of the Supreme Court's deciding the appropriate standard, two alternative standards have emerged among the circuit courts to gauge constitutionality.

The first is a traditional proportionality test, adopted by the Fourth Circuit Court of Appeals in US v. Crandall. Under this test, the court conducts an inquiry into the proportionality between the value of the property sought to be forfeited, and the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture.

The second test is the instrumentality test, adopted by the Second Circuit Court of Appeals in US v. Metzger. Unlike the proportionality principle, the instrumentality test examines the degree of relatedness between the property seized and the crime committed.

No matter which of these principles the Columbia courts apply, the seizure of Paul Grinnell's automobile should be held constitutional as to his interest, because the forfeiture satisfies both tests. Each test will be discussed in turn.

(1) THE VALUE OF THE FORFEITED AUTOMOBILE IS NOT DISPROPORTIONATE TO THE AMOUNT NEEDED TO PUNISH AND DETER THE DEADLY CRIME OF DRIVING UNDER THE INFLUENCE[.]

The first possible test is under the traditional proportionality principle. Again, as articulated by the Fourth Circuit in Crandall, the proportionality principle compares the property seized to the amount needed to effectuate the legitimate punitive and remedial purposes of the forfeiture. In Crandall, for example, the government seized $500,000 of real property to punish the property's use in illicit drug sales. Despite the high value of the property, the court found the seizure nonetheless appropriate, considering not only the degree of potential fines, but the harms that the government sought to prevent with this punitive measure. The court relied in large part on its prior decision in Sailors Cove. In that case an equity interest of $75,000 was seized in connection with a drug sale valued at $250. Despite this disparity, the court found the seizure proportional, in part based on the seriousness of the offense of selling drugs.

Similarly, in the case at hand, the proportionality of the punishment and offense must not only be gauged by the amount of the proper fine, but by the seriousness of the offense committed. The crime of DUI carries a potential fine of $1,000. Despite this, however, it is a consistent killer of innocent victims, including many children. It results in thousands of dollars of property damage per year and thousands of lives lost. Despite its relatively small fee and misdemeanor status, therefore, DUI is an extremely serious offense, that carries a high risk of innocent death. When balanced against this high risk of death, and the city's legitimate interest in preventing and punishing such dire results, the seizure of a $15,000 automobile hardly ranks as "grossly disproportionate" to violate Mr. Grinnell's rights under the Eighth Amendment.

(2) THE FORFEITED AUTOMOBILE SATISFIES THE INSTRUMENTALITY PRINCIPLE, BECAUSE IT PLAYED A CRUCIAL ROLE IN THE OFFENSE, ITS OWNER WAS HIGHLY CULPABLE, AND THE PROPERTY CANNOT BE EASILY DIVIDED[.]

The second test that the court may use to gauge the constitutionality of the forfeiture is the instrumentality principle. As articulated by the Second Circuit in Metzger, the instrumentality principle judges the connection between the property seized and the offense committed. The question under the instrumentality principle, therefore, is not how much the confiscated property is worth, but whether the confiscated property had a close enough relationship to the offense to justify its seizure. The operative measure, in the words of the Second Circuit Court of Appeals, is not the measure of the property value or even the offense, but rather the "extent of the taint."

Using the instrumentality test, the court will use a three-part test to gauge the "taint" of the property seized. This test considers (a) the nexus between the offense and the property and the extent of the property's role of the offense, (b) the role and culpability of the owner, and (c) the possibility of separating offending property that can readily be separated from the remainder.

(a) THE AUTOMOBILE BEARS A SUBSTANTIAL NEXUS TO THE CRIME[.]

The first prong of the test is the nexus, or connection, between the property and the offense. There is no doubt in the case at hand that there is a very close nexus to the crime of DUI and the car that was used to perpetrate that crime. More specifically, the Fourth Circuit enumerated several factors that will help prove the item's instrumentality. The first is whether the use of the property in the offense was deliberate and planned, as opposed to merely incidental and fortuitous. There is little doubt in Paul's case that the use of the car was deliberate and planned. His celebration by getting drunk on an empty stomach was also deliberate and planned. Although he did not intend to be pulled over for DUI, all of the actions that led up to his capture, and constituted his offense, were deliberate choices that he made. A second consideration is whether the property was important to the success of the illegal activity. Undoubtedly, the seized car in which Paul committed the crime was essential to the commission of a crime which requires driving. Third, the court will examine the time during which the property was illegally used and the spatial extend [sic] of its use. In Paul Grinnell's case, although the car of course had other uses, it was used in its entirety on this occasion to commit the crime of DUI. The court will fourth examine whether this illegal use was an isolated event or had been repeated. This test admittedly favors the defendant, as this is his first DUI offense. Nonetheless, the seriousness of his act, and the punitive interests of the state, still justify the finding, on balance, of a substantial nexus between the property and the crime. Fifth and finally, the court will examine whether the purpose of acquiring the property was to carry out this offense. Again, this factor favors Paul. However, the first three factors of the Fourth Circuit's test do not. The car was highly connected to the infraction, and the activity leading up to it was deliberate and planned. On balance, therefore, a substantial nexus must be found.

(b) PAUL GRINNELL WAS HIGHLY CULPABLE BECAUSE HE KNOWINGLY AND WILLINGLY INTOXICATED HIMSELF BEFORE DRIVING[.]

The second prong of the instrumentality principle is the role and culpability of the owner of the property forfeited. In the case at hand, there is no doubt that Paul is highly culpable. He pleaded guilty to drunk driving, and knowingly became intoxicated while highly tired and hungry before operating his car. Paul's culpability is therefore undisputed.

(c) THERE IS NO POSSIBILITY OF SEPARATING THE "OFFENSIVE" PART OF PAUL GRINNELL'S FROM THE "INNOCENT" PART[.]

The third factor that the instrumentality principle examines is whether a complete forfeiture can be avoided by dividing the property, and effecting only the forfeiture of the implicated part. As discussed above, Paul undoubtedly used the entirety of the car when he drove it under the influence of alcohol. The entire car thus bears the crucial "taint" of his offense. As a result, it should be forfeited in its entirety.

CONCLUSION: PAUL GRINNELL'S EIGHTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED BY THE FORFEITURE, UNDER EITHER A PROPORTIONALITY OR INSTRUMENTALITY TEST[.]

The inevitable conclusion of the above analysis is that no mat[t]er which test the court decides to employ, Paul Grinnell's Eighth Amendment Rights under the Federal Constitution have not been violated, because the forfeiture was not grossly disproportionate to the state's punitive interest, and the car undoubtedly was a crucial and indivisible instrument of the crime.

(B) SARAH GRINNELL'S INTEREST SHOULD ALSO BE FORFEITED DESPITE SECTION 311-2 OF THE FORFEITURE STATUTE, BECAUSE HER ACTIONS CONSTITUTED WILLFUL IGNORANCE OF THE HIGH RISK OF THE OFFENSE OCCURRING[.]

The next major issue is whether Sarah Grinnell, as a self-claiming "innocent owner," should have her interest forfeited under the forfeiture statute. The conclusion is inevitably that she should, because ultimately she was not an innocent owner under a reasonable interpretation of the statute as guided by Metzger.

(1)SARAH GRINNELL HAS NO CONSTITUTIONAL CLAIM UNDER A LONG LINE OF SUPREME COURT JURISPRUDENCE [.]

Before addressing the specifics of Section 311-2, it is useful to realize that Sarah Grinnell, unlike her husband, does not even have a potential constitutional claim against the forfeiture. In Bennis v. Michigan, the Supreme Court refused to protect a wife against the abatement of her interest in a car, because she was not aware of the fact that her husband had used it to sleep with a prostitute. Despite her claims of ignorance and innocence, Ms. Bennis' interest in the car was abated. The Supreme Court justified its decision by pointing out that the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense. It further pointed to Calero-Toledo, in which an innocent owner of a yacht had his property interest abated on account of a crime in which the company was in no way involved.

The lesson of these holdings from the High Court is clear. Even if Ms. Grinnell were an innocent owner, she would have no Constitutional right to demand the restitution of her interest. She must therefore rely entirely on the defense mechanism of Section 311-2 of the Columbia Forfeiture Statute.

(2) SARAH GRINNELL IS NOT AN INNOCENT OWNER UNDER THE FORFEITURE STATUTE, BECAUSE HER IGNORANCE OF THE CRIME AMOUNTED TO WILLFUL IGNORANCE[.]

Again, in the absence of any possibility of a legitimate constitutional claim, Sarah Grinnell must rely on the statutory defense of Section 311-2 of the Forfeiture Statute. That section reads, in relevant part, that property shall not be forfeited to the extent that it is owned by an owner who did not know of or consent to the crime (emphasis added). Sarah thus argues that because she was not in the car at the time of the offense, and because she did not consent to Paul's driving under the influence of alcohol, she is an innocent owner under the statute whose interest should be preserved.

This conception of innocence, however, is too narrow to be upheld. While it is clear under Altman that the trial judge has discretion to consider "alternatives to abating the entire interest in the vehicle" (see Bennis), it is also clear under that same decision that the presence of a defense such as Section 311-2 is a strong indication that this is a punitive statute. As such, the strong punitive interest of the city must be taken into account. Indeed, the city has a strong punitive interest in punishing not only the perpetrators of DUI, but also those who know that a DUI offense is about to occur, and who fail to act. The city thus has a strong interest in punishing the "willfully ignorant" such as Sarah Grinnell.

This was the approach taken by the Second Circuit in US v. Metzger. In that opinion, Marcia Metzger's land was seized for the drug violations of her son. She claimed innocence, alleging that she had no knowledge of his illegal use of the land. The court rejected her arguments, because it agreed with the district court that her ignorance was willful. Metzger made frequent visits to the property, where her son had planted multiple marijuana plants in close proximity to the house. She forayed into cabinets where he kept his drug paraphernalia. And she knew of her son's previous arrests for drug possession, and even admitted on prior occasion that she knew he had a marijuana problem. The Metzger majority thus held that blinding oneself to the clear truth, or high probability of an infraction, does not count as "innocence" or "lack of knowledge."

The same can be said of Sarah Grinnell. Before her husband committed the crime of DUI, he called her from work. He told her that he would be using the car that evening to get home, after an alcoholic celebration with his co-worker. He further revealed that he would be drinking on an empty stomach, and Ms. Grinnell knew that her husband had been extremely tired from working so hard. Nonetheless, she did not encourage him to take a taxi, or not to drink, or offer to have a friend pick him up. Mrs. Grinnell may not have been in the car during the accident, but her silent response to a clear likelihood of DUI rendered her complicit to its perpetration. Thus, she cannot be said to have suffered a forfeiture as an owner who "did not know of" or "consent to" the crime. In some ways, under the standard articulated by Metzger, Ms. Grinnell was as culpable as her husband.

Sarah Grinnell will counter by drawing the distinction that Mrs. Metzger knew of her son's systematic drug problem, whereas Mr. Grinnell had no such problem with alcohol or DUI. This distinction is unimportant. The sole basis of Mrs. Metzger's culpability was her willful ignorance. Such willful ignorance is the same act if executed once (as in the case of Ms. Grinnell) or multiple times (as in the case of Ms. Metzger). This distinction, therefore, will

not establish her innocence or non-consent.

Sarah Grinnell will also counter by pointing to the dicta of the Metzger decision, stating that forfeiture of an entire asset may be "excessive" when one owner's involvement is merely incidental, as opposed to extensive. This includes situations where that owner is simply aware of the offense, but not a perpetrator or conspirator. Ms. Grinnell will thus rely on this dicta to claim that the forfeiture of the entire car is "excessive" under the standard articulated in Metzger's dicta.

Yet this argument ignores the equally important qualifying dicta later in that same opinion. The court went on to say that this concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from non-implicated property. As discussed above, the Grinnells' car, in its entirety, was used in committing the crime, and unlike a piece of land, it cannot be broken up, separated, or sold in pieces. Therefore, the means to temper such theoretical "excessiveness" is impossible, and the entire automobile should be seized.

CONCLUSION: SARAH GRINNELL IS NOT ENTITLED TO A DEFENSE UNDER SECTION 311-2 BECAUSE HER IGNORANCE WAS WILLFUL[.]

The city's penal interest in punishing drunk driving extends not only to the perpetrators of that crime, but those who learn of its immediate perpetration yet do nothing to stop it. Because Sarah Grinnell was effectively advised by her husband that there was a high likelihood that he would drive under the influence of alcohol, she does not qualify as a "non-consenting," "unknowing" or "innocent" party under the language of Section 311 of the Columbia Forfeiture Statute.

Answer 2 to Question PT-B

1)

Memorandum of Points and Authorities

Statement of Facts

The Property Clerk of the City of Madison instituted an action under Section 311 of the Columbia Civil Forfeiture Act for the purpose of causing the automobile belonging to Paul and Sarah Grinnell to be forfeited as the instrumentality of a crime in response to Paul Grinnell's plea of guilty to Driving Under the Influence of Alcohol (DUI).

The stipulated and uncontested facts show that on April 29, 2005, Mr. Grinnell went to the Roadhouse Bar and Grill at about 10:00 p.m. Mr. Grinnell admits that he was tired after a long day of work, had not eaten lunch or dinner, and had a couple of beers on an empty stomach. He proceeded to drive home in his 2003 Honda Civic and was stopped by the Madison Police Department for weaving on the road. The police officer performed a breathalyzer test. Mr. Grinnell had a blood alcohol level of 0.08 percent, which is above the legal limit, and was arrested for DUI. On July 18, 2005, Mr. Grinnell pleaded guilty to the misdemeanor offense of DUI and was fined $500 (the maximum fine is $1000), had a 90-day restriction placed on his driver's license, and was ordered to attend DUI school.

The Property Clerk began this civil forfeiture proceeding against the 2003 Honda Civic automobile that Mr. Grinnell was driving on the night he was arrested for DUI. The automobile is jointly owned by Mr. Grinnell and his wife, Sarah. It has a fair market value of $15,000. The car is the only one owned by the Grinnells. Additionally, the Grinnells have a two[-]year[-]old baby daughter, Cammie. Mr. Grinnell works as an assistant manager at Kroll-Mart and makes about $24,000 annually. Ms. Grinnell works 15 miles away in Greenfield as a receptionist and makes about $18,000 per year.

Typically, Ms. Grinnell drives the Honda Civic and drops off Mr. Grinnell at Kroll-Mart on her way to work. On the evening of his arrest, Mr. Grinnell drove the Civic because he had to work late. At the hearing, Ms. Grinnell admitted that on the night Mr. Grinnell was arrested for DUI, she was aware that he was tired, had not eaten all day, and was planning to go out for drinks late in the evening. Ms. Grinnell admitted that she knew Mr. Grinnell planned to drive home in the Honda Civic after drinking at the Roadhouse Bar and Grill. Ms. Grinnell admitted that she is aware that Mr. Grinnell drinks about once per month.

Argument

I. The Forfeiture of Paul Grinnell's Honda Civic Automobile under the Columbia Civil Forfeiture Act ("CFA") is Not an Excessive Fine Prohibited by the Eighth Amendment[.]

Mr. Grinnell asserts that the forfeiture of his 2003 Honda Civic automobile used while he was arrested for DUI constitutes an "excessive fine" prohibited by the Eighth Amendment to the United States Constitution. On the contrary, courts have held since 1827 that forfeiture of property used in the commission of crimes is valid and constitutional. Bennis v. Michigan. We show below that the forfeiture of Mr. Grinnell's car is fully consistent with the United States Constitution and appropriate case law.

A. The CFA permits the Property Clerk to seize and initiate a forfeiture action against the Honda Civic automobile used by Mr. Grinnell in the commission of the crime of DUI.

The Columbia Civil Forfeiture Act ("CFA") permits the Property Clerk to institute a civil action against a criminal or non-criminal defendant to seize and forfeit property that is, inter alia, the "instrumentality" of a crime. CFA Section 311-1. The forfeiture is civil in nature and is not a penalty of a criminal forfeiture. CFA S. 311-1. The action may be instituted against a criminal defendant, defined as one who has been convicted of a crime. CFA S. 310-8(a). Mr. Grinnell's plea of guilty to misdem[e]anor DUI constitutes such a conviction of a crime. CFA S. 310-6.

Mr. Grinnell's 2003 Honda Civic is subject to forfeiture because the CFA applies to "instrumentalities of a crime," meaning vehicles whose use contributes directly and materially to the commission of the crime. CFA S. 310-4. Since the crime of DUI requires driving an automobile, it is without question that the car Mr. Grinnell was driving on the evening of his arrest (the 2003 Honda Civic at issue) is an instrumentally of a crime and is subject to forfeiture.

B. The Eighth Amendment prohibition against Excessive Fines applies to the CFA only if the forfeiture of Mr. Grinnell's automobile is "punishment" for the crime of DUI.

The United States Supreme Court in Bennis v. Michigan reaffirmed that forfeiture actions are "too firmly fixed" in the jurisprudence of this country to be displaced. For over 175 years, courts have approved forfeiture of property as deterrent action to prevent further illicit use of the property. Bennis.

In Altman v. U.S., the Supreme Court stated that to the extent that a civil forfeiture serves as punishment for the owner, the Eighth Amendment prohibition against "excessive fines" may play a role, but the Court did not adopt a test to establish when forfeiture becomes a punishment.

(i) By its terms, CFA 311 does not impose a penalty on Mr. Grinnell and the Eighth Amendment does not apply to the CFA.

CFA Section 311-1 states that the forfeiture will not be deemed a "penalty" for any purpose. It is a civil, remedial action against the property used in the crime. Therefore, a court looking to the plain language of the statute should find that the CFA is intended not to punish offenders but simply to remedy the problems caused by their crimes. The forfeiture of Mr. Grinnell's car is simply a method to ensure the safety of other drivers on the road. To the extent that the car's forfeiture is not a penalty, the Eighth Amendment does not apply to this action. Accordingly, the plain language of CFA S. 311 suggests that the court reject Mr. Grinnell's assertion that the forfeiture violates the Eighth Amendment.

(ii) Even if the Eighth Amendment applies to the CFA, the forfeiture of Mr. Grinnell's car is not an "excessive fine."

The Supreme Court has stated that the Eighth Amendment may apply to some forfeiture statutes. Bennis; see also Altman v. U.S. One piece of evidence that the statute is penal is whether it allows an "innocent owner" defense. Altman. Indeed, CFA Section 311-2 is such a defense to a civil forfeiture action. Although Altman does not hold that such a defense is dispositive on the issue, it may indicate a punitive component to the CFA. However, even if the Eighth Amendment excessive fines clause applies to the CFA, the forfeiture of Mr. Grinnell's car is not an excessive fine under any of the two tests adopted by other courts. See U.S. v. Crandall and U.S. v. Metzger.

(a) The forfeiture of Mr. Grinnell's car is "proportional" to his crime and therefore is not "excessive."

In U.S. v. Crandall, the 4th Circuit articulated a "proportionality test" to establish whether a civil forfeiture is excessive under the Eighth Amendment. See also U.S. v. 38 Sailors Cove Drive. In Crandall, the court affirmed the forfeiture of a 33 acre farm worth $500,000 since the property was traceable to the proceeds of criminal drug dealing. The court held that there was a "nexus" between the property and the crime. A "nexus" can be established if the property was given in exchange for the criminal proceeds (drugs), or the property was "traceable" to the crime, or it was used in committing the crime or was intended for such use. Crandall.

Once a "nexus" is established, the court adopted a test such that the forfeiture was constitutional if it was "proportional" to the gravity of the crime as measured by the potential punishment under state and federal law. Crandall. In this case, the forfeiture of the $500,000 property was proportional because the defendant's punishment could be up to $75,000 under the state law or $1,000,000 under federal law. Crandall. Courts can also look into the seriousness of the offense. Crandall.

The forfeiture of Mr. Grinnell's car satisfies the "proportionality" test. First, there is a "nexus" between Mr. Grinnell's crime – DUI – and the property subject to forfeiture – the 2003 Honda Civic he was driving while intoxicated, since he was using the car while committing the crime. Second, the amount of the forfeiture is "proportional" to the gravity of the crime. Mr. Grinnell's car is worth about $15,000. The maximum fine for DUI is $1000, less then the value of his car. Although this factor weighs against proportionality, the gravity of the crime compensates. Driving while intoxicated is a very serious crime that can lead to tragic consequences such as the death of innocent persons. The City Attorney has implemented a "Zero Tolerance on Drinking and Driving" initiative to combat the seriousness of the offense. Removing Mr. Grinnell's car from the road substantially furthers this policy as Mr. Grinnell will not be able to commit the offense of DUI without his only car.

For these reasons, the forfeiture of Mr. Grinnell's car is not grossly disproportionate to the gravity of possible death caused by DUI, and the forfeiture satisfies the Crandall court's proportionality test.

(b) The forfeiture of Mr. Grinnell's car is valid since it was the "instrumentality" of his crime[.]

The Second Circuit in U.S. v. Metzger characterized forfeiture as an "in rem" action against the property itself as the "offender" rather than as punishment for the owner. The action is against the property itself, so the Metzger court held that the value of the property is irrelevant as to whether the forfeiture is an excessive fine. To determine whether the forfeiture is an excessive fine under the Eighth Amendment, the court adopted the three-part "instrumentality" test. A court considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating the offending property from the remainder. Metzger.

In Metzger, the Second circuit affirmed the forfeiture of an 85[-]acre farm owned by the mother of a son convicted of growing marijuana. The court found that the marijuana was grown on the mother's property and was a substantial and meaningful instrumentality in the commission of the son's crime.

Forfeiture of Mr. Grinnell's car satisfies the "instrumentality" test.

First, there must be a "nexus" between the property and the crime. The Metzger court listed five nondispositive factors to be used in deciding the strength of the nexus. Applying these factors, it is clear there was a nexus between Mr. Grinnell's car and the crime. (1) Mr. Grinnell's use of the car was deliberate and planned since he intentionally drove the car after drinking at the bar. (2) The car was important to the success of the crime – in fact, Mr. Grinnell could not be convicted of DUI without having used the car. (3) The car was being driven and used while Mr. Grinnell was intoxicated. It is irrelevant that in the morning when he drove to work that he was sober since he was over the legal limit on the drive

home. The first three factors strongly favor the government. (4) Mr. Grinnell is being charged only with using the car once for DUI. There is no evidence of a pattern of DUI with the car. The factor favors Mr. Grinnell. (5) The car was not acquired to carry out the DUI. This, too, favors Mr. Grinnell.

On the whole, it seems that the factors favoring a nexus between the car's use in the DUI outweigh the factors that its use was merely incidental. The nexus factor is established.

Second, Mr. Grinnell was the sole driver of the car on the night in question and there is no question as to his culpability. In fact, Mr. Grinnell pleaded guilty to the DUI charge on July 18.

Third, the property is inseparable. The court cannot "partition" the car and the entire car must be forfeited.

Therefore, under the Metzger test, Mr. Grinnell's car was the "instrumentality" of a crime and is subject to forfeiture without being an excessive fine under the Eighth Amendment.

(c) Under either the proportionality test or the instrumentality test, the forfeiture of Mr. Grinnell's Honda Civic is not an excessive fine under the Eighth Amendment.

In conclusion, regardless of which test this court adopts, the forfeiture of Mr. Grinnell's automobile is a remedial action to prevent further instances of drunk driving. See Crandall and Metzger. The action is not a further punishment for Mr. Grinnell but is to serve as a deterrent. See Bennis. It is not an excessive fine under the Eighth Amendment (Altman) and the car's forfeiture is constitutional.

II. Mr. Grinnell's Interest in the 2003 Honda Civic Automobile Is Subject to Forfeiture Under the CFA.

Ms. Sarah Grinnell argues that CFA Section 311-2 establishes an "innocent owner" defense that precludes the forfeiture of her one-half interest in the 2003 Honda Civic. For over 75 years, courts have authorized forfeiture actions against even "innocent" owners. See Bennis v. Michigan. Ms. Grinnell's argument must fail.

A. For over 75 years, courts have rejected the "innocent owner" defense.

Forfeiture actions serve a deterrent purpose distinct from punitive purposes. The United States Supreme Court has on at least two occasions affirmed that the innocence of the owner of the property subject to forfeiture has "uniformly been rejected as a defense." Calero-Toledo v. Pearson Yacht Leasing Co. The fact that the owner did not know her car was being used in illegal activity and was subject to forfeiture does not give her a protectable interest under the Fourteenth Amendment Due Process clause. Bennis.

Even if Ms. Grinnell is entirely innocent in Mr. Grinnell's DUI actions, courts have rarely

accepted her "innocent owner" defense.

B. CFA 311-1 allows the Property Clerk to seek forfeiture of Ms. Grinnell's interest in the Honda Civic[.]

CFA 311-1 allows the forfeiture proceeding against a "non-criminal defendant" who is a person who possesses an interest in the instrumentality of the crime. CFA 310-9. Ms. Grinnell is the joint owner of the 2003 Honda Civic and the Clerk may seek the forfeiture of the car from her. She was properly joined in the action.

B[sic]. Even if an innocent owner defense applies under CFA 311-2, Ms. Grinnell's actions on the evening of Mr. Grinnell's arrest for DUI show that she knew of his driving under the influence of alcohol.

CFA 311-2 is the "innocent owner" defense. A person who "did not know of, or consent to" the acts constituting the crime is not subject to the civil forfeiture provisions. Ms. Grinnell states that she should be subject to Section 311-2 because she did not know that Mr. Grinnell ever used the car while intoxicated. Her assertion is contradicted by the stipulated and uncontested facts.

First, Mr. Grinnell should be charged with "knowledge" of her husband's DUI. On cross-examination during the hearing today, Ms. Grinnell admitted that she knows that her husband sometimes drinks[.] She also admitted knowing that on the day her husband committed the DUI that he was going to use the car. Mr. Grinnell called her at 4:30 to tell her to find another ride home. She knew he was going to work late and then go to the Roadhouse Bar and Grill to celebrate. Ms. Grinnell knew that her husband was tired, and had not eaten lunch or dinner. Therefore, the evidence shows that Mr. Grinnell "knew" of the facts relating to Mr. Grinnell's drinking the evening of his arrest.

Second, she should be charged with "consent." Ms. Grinnell did not caution Mr. Grinnell not to drink and drive and did not suggest that he simply come directly home from work if he was so tired. Therefore, Ms. Grinnell effectively consented to Mr. Grinnell's actions that night.

Since Ms. Grinnell "knew" and "consented" to Mr. Grinnell's actions that evening, she is not an "innocent" owner and the CFA S. 311-2 anti-forfeiture provisions do not apply to her.

Ms. Grinnell is similar to the mother in the Metzger case. In that case, the mother purchased a farm for her son even though she knew he had grown marijuana in the past. The court rejected the mother's innocent owner defense. Metzger. Likewise, Ms. Grinnell knew at 4:30 pm, before the DUI occurred, that her husband was going out drinking that night on an empty stomach and in a tired mental condition. Therefore, she should not be allowed to invoke the innocent owner defense.

C. The Honda Civic should be forfeited even though the forfeiture will be harsh on Ms. Grinnell.

Ms. Grinnell is a sympathetic victim in this case. However, the gravity of the drunk driving problem requires that harsh measures sometimes be taken. The Crandall court, in *dicta*, suggested that the harshness of forfeiture on third parties should be considered. However, as discussed above, Ms. Grinnell bears some culpability for her husband's actions that night. Should an innocent person have been killed or maimed by Mr. Grinnell's drunk driving, the court would not shirk from forfeiting the car. Simply because the police did their job first, Ms. Grinnell should not benifit.

Conclusion

The harshness of the forfeiture is fully justified in this case. Ms. Grinnell is not an "innocent owner" and her inter[e]st in the car is fully subject to forfeiture under CFA 311-2.