ARKANSAS BAR EXAMINATION

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CONTRACTS

Scat Youngen, attorney at law, fresh out of law school, goes to work for Tom Olden, an established personal injury plaintiff's attorney. The way the deal operates is this: Olden will given Youngen a bunch of files to work on, and Youngen gets to keep half of what he makes off the file. Any cases that come in just to see Youngen get the same treatment. In return for the 50% Olden gets from Youngen's work Olden pays all the overhead of the office. Everything was "at will" and if Youngen ever wanted to leave, he had to pay Olden 50% of all recoveries on cases he took with him.

Youngen soon made a name for himself and started getting clients on his own. One day, two years after Youngen joined Olden, a huge case came into the office, just for Youngen. The client said: "I only want you to work on my case. Frankly, I don't like Olden. `Fact o' bidness' is, I almost didn't come to you at all, cause I don't want Olden to get any part of this fee." No problem, Youngen said.

Youngen filed suit (Olden paid the filing fee) and worked the case from Olden's office, then left with all his files one night about six months later. Six months after that, Youngen settled the case for six ka-zillion dollars, of which two ka-zillion was his fee. Olden filed suit for his one ka-zillion dollar divvy, and Youngen answered that the client only wanted youngen to get the fee. Naturally, because this was a deal lawyers made amongst themselves (instead of for other folks) everything was oral. Olden has a memo that he passed out to everybody in the firm a year after Youngen joined which said "It has come to my attention that lawyers have left this firm in the past without listing all the cases they took with them, and that I haven't been getting my half of those settlements. Henceforward, if anyone leaves, they'll have to give me a list and sign a promise to pay over half. If you don't like it, give me your keys today. If any clients want you particularly to work their case, you can check the file out after the client agrees that I have a lien on any fee."

Youngen didn't give the list or sign the promise and his client didn't agree that Olden had a lien.

This case is tried before you without a jury. Write the opinion.

ANSWER

Contracts

Judgment for the Plaintiff, Tom Olden.

This raises questions as to the enforceability of an oral employment at will contract. Plaintiff

seeks to enforce an agreement with the Defendant wherein Defendant is entitled to pay 50% of fees recovered in the cases. The oral contract does not violate the statute of frauds. Contracts that cannot be completed in one year must be in writing. The oral agreement is that if "Youngen" wants to leave he can at any time. Therefore, he could have left in less than a year. Therefore, I will enforce the terms of his employment.

The second issue to decide in this case is what measure of damages should be applied in this case. I feel that Plaintiff is entitled to expectancy damage which I will qualify below.

Youngen used Oldens office space, Olden provided the capital to finance the suit. Olden beared much of the risk and is entitled to the benefit of his bargain. Equity would dictate that Olden be compensated. Therefore, I would award Olden 50% of Youngen's fee. The result would have been different if Youngen had quit the firm prior to accepting the clients case. But, since he accepted the case and was Olden's employee he is entitled to compensation.

The effect of the memo has no contractual significance since there was no meeting of the minds. However, in my decision to enforce the employment contract it serves as notice of the office's policies. If Youngen did not want to accept those terms he was free to leave. The fact that he stayed acts as an implied acceptance of those terms.

There are no defenses that Youngen could raise to prevent the court from enforcing the contract. The terms were freely bargained for and at formation nothing was unreasonable.

In dicta, I would note that the oral contract between Youngen and the client should not prevent Olden from his recovery. This was a contract that at the time of formation was entered into to defraud Olden. Therefore, such a contract would "shock the conscience" and I would declare the portion of the contract as to the fee unenforceable as being unconscionable. The main purpose of the contract was to provide professional services. That is the portion of the contract that will be enforced.

The fact that punitive damages are not available in contract actions, prevents me from awarding exemplary damages on the contract theory.

However, based on Plaintiffs case of action for fraud I would award the 1/2 Defendant's fee to Plaintiff as punitive damages.

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PROPERTY

You have been retained by a large title insurance company to examine an abstract of title on a tract of land showing history of title from the earliest public records to February 1, 1998. The abstract consists of over 400 pages and covers a tract of land to be purchased from Mrs. Z in order to build a large hotel. If approved, the title policy will be issued for thirty million dollars. You have completed your examination and have made the notes listed below on issues that concern you. Succinctly discuss each item as it relates to your title examination and the state of title to the land and indicate what additional documents, materials or information you would need, if any, in order to approve title.

1. Page 3 of the abstract shows a recorded Entry of Mr. A dated November 30, 1839, and recorded in Book 2, Page 282 of the County Records. The abstract shows no record or other evidence of a United States Patent having been issued.

2. Page 67 of the abstract shows a Warranty Deed dated May 16, 1950, from the then record title holder, Mr. B, to Mr. C which is executed only by Mr. B and acknowledged by a Notary Public. The probate records from the year 1958 show that Mr. B died intestate leaving his estate to his 50 year old wife, to whom he had been married for over 30 years, and two daughters.

3. Page 187 of the abstract shows a plat of a subdivision and a dedication of alleys 20 feet in width to the City dated January 23, 1955, that meets all legal and regulatory requirements. The legal description of the property and the plat of survey made by a licensed surveyor on January 25, 1998, includes the 20 foot alley as a part of the property to be purchased. The building plans show that part of the hotel building will be on this 20 foot strip. In the abstract there is shown an affidavit dated January 14, 1998, signed by a number of reputable persons indicating that the alley has never been used by the City and that owners of the property have always claimed and occupied it.

4. Page 251 of the abstract shows a Warranty Deed dated August 15, 1966, covering part of the property. It is properly executed by the persons appearing to be the then record owners of the property but the Notary Public failed to: date her acknowledgment; place her seal on the instrument; and, indicate the date on which her commission expires.

5. Page 295 of the abstract shows a Mortgage dated September 15, 1978, from the then record owners of a part of the property to FirstBancCorp securing a Note of the same date for $300,000 due and payable on September 14, 1988. No release of this Mortgage appears of record.

6. Page 375 of the abstract shows a conveyance by the then record owner dated June 30, 1991, of "all the oil, gas and other minerals lying in, on or under said lands" to X Oil Co.

7. The last transaction described in the abstract is a Quitclaim Deed covering the entire tract dated May 30, 1995, from Mr. Y and Mrs. Y to Mrs. Z, the seller who claims to own the property. In the quitclaim deed Mr. and Mrs. Y each reserved a life estate.

ANSWER

Property

1. There can be no adverse possession of federal land. Therefore, Mr. A did not have title to the

property.

2. A deed need only be signed by the grantor, but it must be acknowledged by two witnesses, by statute. However, Arkansas does accept as valid deeds signed by the grantor and acknowledged by a notary public. Therefore the deed execution is valid.

Under Arkansas intestacy laws, Mrs. B cannot inherit an interest from her husband because he was survived by his children. Also, she does not own the property in tenancy-by-the-entirety as it was acquired solely in Mr. B's name. Had it been acquired in both their names during their marriage (and it was during the marriage) it would be tenancy-by-the-entirety and she would own it outright as the surviving tenant. Failing all of the above, Mrs. B has a dower interest of a 1/3 life estate in the property. The two daughters each inherit one-half of the property as direct descendants inheriting per-capita subject to their mother's dower interest.

3. The building is encroaching on the easement and the city must give its written permission for the owner to use that part of the property. The easement is a prescriptive easement, because it was set forth in the plat and the building plan, although there is no mention in the facts that the easement was in the deed (express easement). The reputable citizens had no standing to abandon the easement. The city could abandon the easement by some act that showed its intent to permanently abandon it. However, the city has not done this. Therefore, the easement is still in force.

4. The deed is improperly executed. The notary may serve as a witness, but not as have acted in her official capacity. She could be liable for her malpractice -- probably being sued on her bond -- if there is damage to the grantees.

5. The lien is perfected. Legal title passed to FirstBancCorp as the mortgagee.

6. Minerals may be separately conveyed. X Oil Co. is the owner of those mineral rights and may lawfully enter on the property to remove those minerals.

7. Mrs. Z has a vested remainder in the surface rights to the property. Her title is subject to all of the foregoing defects, as Mr. & Mrs. Y made no warranties by virtue of their quitclaim deed. The title Mrs. Z passes to her buyers is the remainder interest after the expiration of both life estates of Mr. Y & Mrs. Y. She may convey her interest because it is a vested remainder.

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CONSTITUTIONAL LAW

The General Assembly of the State of Big Brother has passed legislation which creates the Unfair Milk Sales Act providing as follows:

> It shall be unlawful for any wholesaler, with the intent to destroy competition, to sell or offer to sell, at wholesale, milk or milk products at less than the cost to the wholesaler (the "**Statute**").

The Preamble to the Statute states:

> That unfair destructive business practices exist in transactions involving the sale of milk by wholesalers; that the offering for sale of milk below cost by the wholesale distributors with the intent of injuring competitors or destroying or lessening competition is an unfair and destructive business practice; and that it is the policy of the State of Big Brother to promote the public welfare by prohibiting below cost sales made with predatory intent by which fair and honest competition is destroyed or prohibited. Therefore, it is the purpose of the Statute to protect competition in the State of Big Brother.

Mighty Milk, Inc. ("**MMI**"), the largest wholesale distributor of milk and milk products in the United States, just filed suit in federal court to have the Statute declared unconstitutional. In its complaint, MMI argues that the Statute infringes upon its property interests without due process of law and asserts that it should be allowed to sell its milk products at any price (above or below cost). In its complaint, MMI challenges the Statute's constitutionality only under the United States Constitution.

You have been contacted by the State of Big Brother Independent Milk Producers' Association (the "**Association**"), a group comprised of 25 small "mom and pop" wholesale distributors of milk and milk products and asked to represent them in defending the Statute against this constitutional challenge. You are told that MMI's challenge to the Statute puts all the "mom and pop" wholesalers' businesses at risk. Based on MMI's history of selling at a price below cost in numerous other states, the Association's members believe that if the Statute is declared unconstitutional, MMI will sell below cost until all of their "mom and pop" stores have been run out of business. The Association predicts that when the competition is eliminated, then MMI will raise prices to very profitable levels.

The Association's representative has asked that you come immediately to its annual meeting, which is currently in session, and make a limited, 15 minute presentation to them (you have 15 minutes to think on your way over). The Association wants to know if you believe the Statute can withstand challenge under the United States Constitution. You must advise the Association stating what you predict the outcome of the lawsuit will be and why. Your advice should not address application, if any, of the commerce clause of the United States Constitution.

ANSWER

Constitutional Law

The Association will be pleased to hear that this statute should pass constitutional muster.

Under due process law, a statute must pass a specific standard to be deemed constitutional, depending on the type of law it is. For example, if the law deals with a fundamental right, or race or another suspect classification, it will be subject to strict scrutiny - i.e., it must be necessary to serve a compelling state interest. Monopolizing a milk market is not generally seen as a fundamental right, so this will not apply. Also, if a statute affects or involves the legitimacy of children, or gender classifications, it must pass intermediate scrutiny - it must be substantially related to an important government interest. But the Association is not concerned, and probably impatient, with this, as it does not apply here either.

The good news for the Association is this statute will pass under the lowest standard of constitutional, due process scrutiny - rational basis. Almost any statute challenged here passes. The milk statute must simply bear a rational relation to a legitimate state interest.

And here, it certainly does. The interests of the state of Big Brother outweighs M.M.I.'s claimed "property" interest. In fact, as the state is interested in protecting its economy, in the jobs of its milk providers; its citizens, in the costs of milk, and since there is no contradictory federal law which would supercede this, it should stand. Further, this law does not unduly hinder interstate trade or discriminate against out of state milk industry, as it merely outlaws undercutting & gouging, no discriminatory purpose. The law should stand, and perhaps we can have the challenge put away with a motion to dismiss or a motion for summary judgment.

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EVIDENCE

You are a new Deputy City Attorney assigned to try traffic cases in the Municipal Court of Midville, Arkansas.

Officer Poindextor of the Midville Police Department worked the traffic accident which is the basis of your first case. Just before court, Office Poindextor informs you that Victor Victim, your star witness for the case, cannot be found to testify.

In a panic, you question Officer Poindextor and learn that the accident had already occurred when she arrived on the scene. Further, you find that when Officer Poindextor exited her patrol

car Victor Victim, in a very animated state, was shouting at Penelope Perpetrator, the defendant, "You idiot, you could have killed me when you ran that stop sign."

Questioning further, you learn that Penelope Perpetrator made no response to Victor Victim and just turned away, crying.

Just as Officer Poindextor relates this information to you, the bailiff enters the courtroom, followed by the Judge. With Court now in session, the Judge tells you to call your first witness in City vs. Penelope Perpetrator. Gamely, you call your only remaining witness, Officer Poindextor.

After stalling as long as you can asking biographical questions of the Officer, you ask the Officer to inform the Court of the comments she overheard Victor Victim making to Penelope Perpetrator as set out above. The Defense Counsel jumps up and objects. The Judge looks to you to explain how this Police

Officer is going to relate statements made by an individual who is not present for trial.

What do you tell the Judge to convince her to allow Officer Poindextor to testify about Victor Victim's statement to Penelope Perpetrator?

Given the opportunity to respond, what does Defense Counsel say?

ANSWER

Evidence

(1) I must convence the judge that this statement is either not hearsay, or is hearsay but subject to an exception that allows it into court. The strongest argument that I have is that it is not hearsay because it is evidence of an admission by Penelope. Hearsay is an out of court statement that is asserted for the truth of the matter. Victum's statement was made out of court, but not for the truth of the matter is it presented to the court. Silence constitutes admission if in the face of such accusations a reasonable person would have responded in the negative. I will present the statement of the officer to show that Penelope did not respond and that such a statement made to a reasonable person would have illicited a response that denied such allegations. If the court determines that it is hearsay, I would try to make it fit one of the exceptions to hearsay. For an unavailable witness, I would state that the statement should come in the interests of justice under the catch all exception. I would show the court that a 403 weighing of the interests shows that the prejudicial effect is far outweighed in the interest of justice. If that didn't work, I would claim the statement was an excited utterance or a present sense impression. However, my strongest claim is that it is presented as proof of an admission by the Defendant.

In order to get the statements of the witness in, I would try to use the business records exception to enter the police report with the witness' statement in the record.

(2) The defense counsil will argue that under the circumstances surrounding the accident and the statement made by Victum that the reasonable person would not respond and silence is not an admission. Furthermore, having just been in an accident, Penelope wasn't thinking clearly,

was in shock or was discussed to the point by the statement, that she refused to respond and did not intend for silence to be an admission. He would also argue that uder rule 403, the statement (hearsay) by the officer would be far to prejudicial than probative. After hearing such a statement, a jury could look at other evidence in a neutral light and would prematurely draw a conclusion to the detrement of his client. He would also argue that it wasn't an excited utterance because time had elapsed from the wreck and the arrival of the police officer. Furthermore, it wasn't a present sense impression because it wasn't made during the commision of the wreck. He would also argue that the business records exception doesn't apply to witness' statements in police reports under Arkansas Law. He would probably win on that point.

The admission is the best and strongest arguement to let the statement in.

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CRIMINAL LAW AND PROCEDURE

Allen Trusty was a truck driver for Smith Grain Trucking, Inc. He and the owner Hank Smith were the only employees for the corporation. Hank went on vacation for a week and Allen was left to continue to run hauls until Hank returned from his vacation. Hank had filled up the grain truck with diesel fuel before he left. At the end of the week, Allen made a haul to a grain elevator located 400 miles from Stuttgart, Arkansas. Allen had a check made payable to Smith Grain Trucking, Inc. in his possession for $150.00. Allen noticed that he needed to fill the truck with diesel fuel. He endorsed the check "Allen Trusty" and exchanged it for the purchase of 150 gallons of diesel fuel for the truck. When Hank returned, Allen turned in his gasoline receipt and explained that he had cashed a check made payable to the corporation to replenish the fuel. Hank fired Allen for cashing the check and then swore out an affidavit of warrant for his arrest. The local prosecuting attorney issued a warrant for theft of property, a class A misdemeanor, and forgery in the first degree, a class B felony. The warrant was served on June 1, 1995, and the trial was scheduled for July 31, 1997.

1. Discuss the probability of obtaining a conviction on the theft of property and the forgery charges by examining the elements of each offense charged.

2. What procedural defense could be raised by the Defense?

ANSWER

Criminal Law and Procedure

1. THEFT OF PROPERTY - There is a low probability the State will obtain a conviction for theft of property. Theft of property is the acquiring of possession to property of another with knowledge that it is the property of another with the purpose of permanently depriving the true owner thereof. In my opinion, there is a serious question about at least one of these elements: intent to permanently deprive. Allen admittedly received possession of the money. I believe, however, he could argue that he already had possession of the equivalent of the money: the check. With the property element, he received property. And true, he had knowledge that it was the property of another person. He did not, however, have intent to permanently deprive the owner of the property; he used the proceeds of the check to buy gas not for himself but for the trucking company. In conclusion, Allen did not have the purpose of depriving the owner of the property, and he may not have truly acquired property of another.

Allow me to add that even if Allen satisfies the elements, i do not believe the State can secure a conviction because Allen will be able to claim buying the gas was a necessity to return the truck home.

2. FORGERY - There is a low probability that the State can secure a conviction for forgery. Forgery requires the acquiring of title by fraud to property with knowledge that it is the property of another with the purpose of permanently depriving the owner of it. The analysis is much the same as for theft of property. While receiving money may be receiving constructive title, he did not procure it by fraud; he signed his own name. While it is the property of another and Allen was aware of that fact, Allen did not have the purpose of permanently depriving the owner of it; he used the money to buy gas for the company. Therefore, because there is a question about obtaining title by fraud and there is certainly a doubt that he did it with the purpose of permanently depriving the owner of it, the State will probably not get a conviction.

(Again, allow me to add that Allen could probably use the defense of necessity even if the State managed to prove all the elements of the crime.)

2. SPEEDY TRIAL - Allen could raise the defense of failure to give him a speedy trial, provided that the State actually ended up failing to give Allen a speedy trial. Constitutional law requires a speedy trial, and the Arkansas Rules of Criminal procedure require that the State bring the defendant to trial within a year of the date he was charged or date he was arrested, whichever came first. (The state will allow the clock to stop generally for delays brought on by the defendant himself or herself, such as failure to appear at a pretrial hearing without knowledge on the part of the State or defense attorney where he is.) The dates set in the facts violate this rule; the State currently plans to bring Allen to trial over two years after the warrant was served on him.

In conclusion, Allen will be able to raise the procedural defense of failure to give him a speedy trial provided the State does not bring him to trial by June 1, 1996 (assuming no other delays occur).

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TORTS

John, Mary, and their minor son Junior left home to go to Doe's Grocery Store. The parking lot being full, John parked on the street and they followed a path across the vacant property of Smith, (which was located between the parking spot on the street and the grocery store parking lot), to the parking lot of the grocery store. While crossing a foot bridge on this well worn path, a board broke and Mary fell through injuring her leg. The board was obviously rotten. Smith lived in another state and had not visited his property in years. Not realizing the severity of the injury, they proceeded on into the store.

While in the store, Junior was detained against his will by a security guard, who, in a loud voice, shouted: "I caught the little thief." Junior yelled for his parents, and while running to see what had happened, Mary slipped on a mushroom that was located on the floor below the mushroom display on the counter, injuring her back. Picking herself up, she overheard a clerk say to another clerk: "Those dang mushrooms--I bet I've picked up ten from the floor already today." When Mary and John got to Junior, the store manager was present and stated that hidden cameras had revealed another child had taken the missing products and that he was sorry they had detained Junior.

Even though they were very upset, Mary and John finished their shopping and checked out. They had purchased a can of **REALLY GOOD** soup which they heated for dinner. After all had begun eating, Junior noticed worms in his bowl of soup. All three got violently sick from eating the soup. They went to the hospital. Mary was treated for a broken bone in her foot and a pulled muscle in her back. All three were treated for nausea and sent home. They worried that they would not be able to enjoy another meal. The next morning they contacted you, their attorney, to discuss their legal rights and possible remedies against Smith, Doe's Grocery Store, **REALLY GOOD** Soup Company, and anyone else who may be liable to them for damages in the above situation. What issues do you see, and how would you advise them?

ANSWER

Torts

Liability of Smith

Smith is probably not liable to Mary for her injuries.

The issue is whether Smith was negligent in the maintainance of his bridge and whether he had

a duty to Mary and tresspassors to land. Owners have a duty to warn of known dangers on land to tresspassors once they are discovered. Because Smith has lived out of town and has not visited his property in years, he might not know that people are tresspassing on his property in order to get to the store. Since the tresspassors are not known, he does not owe a duty to them. However, if the court finds that this practice has been going on for many years and Smith had notice of the tresspassors, he could be found negligent. Negligence consists of a duty, a breach of that duty, Causation (both actual and proximate) and Damages. If the tresspassors were known, Smith owed a duty to warn of dangers in artificail conditions that are not obvious to the tresspassor. In this case, the bridge was obviously rotten so Smith did not owe a duty to the tresspassor. No need to continue this analysis since Mary can not pass the first requirement of showing a duty owed.

Liability of Doe's Grocery Store

Doe's might be liable to Mary for her injuries sustained on the bridge.

The issue is whether the store owed a duty to Mary on the adjacent property. The court could find that if the grocery store knew and it was a common practice for it's customers to park across the street and use the vacant lot to get to the store, then the store owed a duty to its customers as invites to the land. The evidence shows that the path was well worn which means that the store probably knew of the common practice of its customers using the path. Occupiers of land (the store could be occupying the vacant lot through it's practice of allowing its customers to use it or under adverse possession theories) owe a duty of inspection and a duty to make safe the premises of known defects. If the bridge was obviously rotton, then the store had a duty to repair the bridge. The next element of negligence is a breach of the duty. Since the store did not take such measures, it breached its duty to Mary, the invitee. To determine actual damages, the court will use the but-for test. But for the stores breach of the duty to make safe, the accident would not have occured. Mary passes the but-for test. Now the second step of proximate cause must be looked at. Did the actual cause (not repairing the bridge) the proximate cause of the defendant's injury? Yes, Mary fell on the bridge, that fall caused her injury. The last element is damages. Mary has damages because her leg was injured. She could recover compensatory damages such as medical bills, lost wages, loss of consortum, pain and suffering, etc. Putative damages will not be awarded unless malice is shown. There are no facts to support malice.

The same analysis is used to determine negligence of the store in regard to Mary's slip and fall claim. The store owed a duty to its invitees to make the store safe. It breached this duty if it knew or should have known of a dangerous condidition. The statement by the clerk that she repeatedly picked up mushrooms off the floor is sufficient evidence that the store knew of the dangerous condiditon. The dangerous condiditon was the actual cause of injury and the proximate cause as well. Mary has damages because of her back injury and therefore can recover from the store the same damages previously discussed in regard to the bridge accident.

Doe's probably won't be liable to Juniour for false imprisonment.

The issue is whether the guard grabbing the boy and detaining him constituted false imprisonment. False imprisonment is the unlawful seisure of a person who is knowingly

detained against their will with no known means of escape. Junior seems to meet these elements. However, there is an exception to the false imprisonment crime. This is the shoplifting exception. A store can, upon an articulable suspicion, reasonably detain a customer for a reasonable time in order to varify the suspision. The articulate suspicion is evidience by the camara that showed a little boy shoplifting. The time was reasonable in that the manager immediately came to the seen and took care of the matter. The only question is whether the guard's statement "I caught the little thief" was reasonable. That statement does not negate the shoplifting exception but does perhaps give rise to a cause of action for intentional infliction of emotional distress or perhaps defamation.

The store can not be held liable for the defective can of soup.

The issue is whether products liability extends to the retailer of a product. Retailers have a duty to inspect the goods and are liable for any defect that can be found upon reasonable inspection. Since the can of soup was opaque, a reasonable inspection would probably not disclose such a defect. However, if the can was bloated or dented, perhaps such a finding could be made.

Liability of Really Good

Really Good will be liable for the damages caused by the worms in the soup.

The issue is whether Really Good was negligent under the circumstances. Since really good is a manufacturer, they owe a duty to the customers. This duty is refered to as products liability. Manufacturers of products must warrrant merchantability, fittness for purpose, and safety. products liability can be examined similar to a negligence claim, but are held stricktly liable where the defect was known or should have been known.