ARKANSAS BAR EXAMINATION

JULY, 2000

2 Pages

30 Minutes

TORTS

I. Discount Store opened for business at 8:00 a.m. At 10:00 a.m., Paul Peevey, a shopper, rounded the corner of an aisle and slipped and fell. Lying on the floor, he could see some clear gel smeared on the tile where he slipped, and also saw some gel on the bottom of his shoe. At trial, Wanda Williams, a former employee who was working for Discount at the time of the accident, testified that Peevey fell near where the company sold hair products, including styling gel. She also testified that she was unaware of any written policies requiring employees to be on the lookout for spills or debris on the floor, and that the store did not have an employee whose job it was to assure that the aisles were free of debris and fallen objects. She testified that the store usually stayed a mess. Plaintiff submits evidence of $5,000 medical expenses and $10,000 lost wages, and rests his case. Discount moves for a dismissal as a matter of law ("directed verdict"). You are the judge. What is your decision on Discount's motion and why?

II. Davis tells Parker that he wants to buy Parker's land ("Blackacre") for $100,000, and Parker agrees to sell it to him at that price, but Davis never signs a written contract to do so. Davis, in fact, does not intend to buy the property. Davis just wants Parker to think that he (Parker) has a chance to unload Blackacre at a good price (it's only worth $75,000), and that way Parker might not press Davis to collect on an old $5,000 loan that is just about to be barred by limitations. Davis is very careful not to mention anything about the loan in the transaction, and in consequence the topic is never brought up by either party. After the limitations period has passed, Davis tells Parker that he doesn't want to buy the property after all. Parker learns from Wilson, Davis' best friend, that Davis told everyone at the club that he never had any intention of buying the property. Parker sues Davis for fraud alleging every one of the foregoing facts in his Complaint, and asking for either $25,000 damages (the "Blackacre" loss) or $5,000 damages (because he desisted in suing for the $5,000 note). Davis files a Rule 12(b)(6) motion to dismiss for failure to state facts constituting grounds for relief. What is your decision on Davis' motion, and why?

ARKANSAS ESSAY

ANSWER

TORTS

July, 2000

I. The motion should be denied. The issue here is negligence and the duty a shopkeeper has to his invitee customers.

For a claim of negligence, there must be a duty, breach of that duty, causation, and resultant damages. A shopkeeper has a duty to invitee business customers to warn of all dangers, and a duty to maintain the premises for the safety of his patrons. This is the highest duty required of a landowner.

Here, the facts show this is a store that is open for business, and that Peevey was a customer. He was in the store during the hours they were open for business and was in an aisle of the store where customers were expected to be. Additionally, he was in an aisle where it would be foreseeable that the products could end up on the floor by spilling out of a container or by another customer dropping products out of their containers as they open them to smell the contents or check the consistency. Thus the store could reasonably foresee an accident on that aisle, and should have, in the regular maintenance of the store, have periodically checked the aisle for spilled products, this would have been under their duty to maintain the premises in a safe condition.

The store breached its duty of care by not cleaning up the spilled gel. The accident occurred at 10 am, but the store opened at 8 am. There were 2 hours during which an inspection of the floor would have yielded information of the spill. Here, the store would argue there was no breach, as the spill could have occurred minutes before the accident, yet Wanda's testimony that the store was always a mess, and that there were no policies in place to assist with customer safety could be an argument against a recent spill.

Peevey can prove causation, which but for the gel in the floor, he would have been injured, so this element can be satisfied. And Peevey has provable damages of $5000 medical expenses and $10,000 in lost wages, which presumably are accurate as the facts do not indicate otherwise. Plaintiff has the evidence of a case of negligence sufficient to go to the jury and so the motion should be denied.

II. The motion should be granted. The issue is whether fraud occurred and this is based on a discussion for a land sale contract. However, this is exactly the sort of case that was contemplated in enacting the Statute of Frauds. The statute precludes upholding a contract for the sale of land that is not in writing, and while this is a tort case, there must first have been an enforceable contract for Parker to rely on for there to have been a claim for fraud. Fraud requires reasonable reliance on a statement made with the intent to deprive one of ownership of title. Here, it would not have been reasonable to rely on an agreement that is not a legally binding one. It is noted that Davis did not mention the loan in the transaction, and it was never a part of the supposed deal. Thus, Parker should have kept up with the loan himself, either by denying to enter an agreement until it was paid by Davis or by making it part of the agreement such that there would be no agreement without imposing repayment on Davis as an element. So while Davis acted wrongfully in not disclosing his motive for this deal, it is more unreasonable that Parker would bring suit on the grounds that a non-element to a void contract deprived him of his property and gave rise to damages. This motion is a valid one and should allow the action to be dismissed.

ARKANSAS BAR EXAMINATION

JULY, 2000

2 Pages

30 Minutes

CONSTITUTIONAL LAW

The Acme County School District (assume that it exists) is a political subdivision of the State of Arkansas, responsible for the education of 2000 students located within Acme County, Arkansas. The Acme County School District operates one high school, one junior high school, and one elementary school. Since certain vocal residents of Acme County let it be known that they wanted prayer at all Acme County School District football games, the Acme County School District enacted a policy concerning prayer at football games. The school district attempted to enact a policy that would permit, but not require, prayer initiated and led by a student at home football games.

The prayer policy was enacted over the summer of 1999 in time to be implemented for the 1999/2000 school year. The Acme County School District policy provided as follows:

Prayer at Football Games

> The board of the Acme County School District has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal, to elect by secret ballot whether a prayer shall be a part of the pre-game ceremony at the beginning of all Acme High School football games. If the majority of students vote to have prayer as part of the pre-game ceremony, the senior class shall then elect, from a list of student volunteers, students to deliver a nonsectarian, nonproselytizing prayer as part of the pre-game ceremonies. The prayer, if given, will take place immediately preceding the singing of the National Anthem and may be delivered over the stadium public address system.

Pursuant to this policy, five student volunteers were duly elected to give the prayer at all home pre-game ceremonies. All five students were members of various Christian denominations, which share the specific belief that Jesus Christ is the Son of God. At the first home football game of the year, one of the student volunteers gave the pre-game prayer over the public address system, in which she prayed as follows: "In the name of Jesus Christ, our Lord and Savior, from Whom all blessings flow, please protect all players from injury, and make us better Christians. Amen." In attendance at the first football game were three senior students who did not belong to a Christian church or denomination. One student believed in Judaism, the second student believed in Islam, and the third student was an atheist. These three students and their respective parents (hereinafter the "plaintiffs") were offended and upset by the pre-game prayer and they believe that their constitutional rights have been violated. The plaintiffs have decided to sue the Acme County School District. The plaintiffs want to file a law suit in the United States District Court seeking a restraining order to prevent any future occurrences of prayer as part of the pre-game ceremony.

Putting aside any personal feelings that you may have on this issue, as lawyers often must do,

what is the best constitutional argument that you can make, which would support the plaintiffs' contention that the challenged school policy and resulting pre-game prayers violate the United States Constitution? State fully the legal and factual basis for your opinion; and rate the plaintiffs' chances of success on your legal theory, (i.e. strong chance of success, some chance of success, or small chance of success).

ARKANSAS ESSAY

ANSWER

CONSTITUTIONAL LAW

July, 2000

The best constitutional argument that can be made that this school policy violates the Constitution is on First Amendment grounds. The plaintiffs should argue that this policy is tantamount to the establishment of religion by the government, represented here by the school district.

The First Amendment to the Constitution provides both that the government shall not establish a religion nor hinder free exercise of religion. It has long been held in this country that to satisfy the "no establishment" language does not require hostility toward any religion, only that laws must be neutral toward religion and generally applicable.

The plaintiffs in this case, who have standing to sue here because of their taxpayer status and the government's use of tax money to support these public schools, would argue that this Acme School District Policy violates the "no establishment" language. The policy here allows students to vote on whether they want a prayer at pre-game ceremonies, and if so, vote on who will give such prayer. The policy states that the prayer would be nonsectarian, but this still allows the prayer to be theistic. Therefore, if the majority of students vote on a prayer and elect someone to give it, it will obviously be a prayer that the majority faith supported.

This would result in a publicly funded school using its power to make students of all faiths listen to a prayer they do not believe in. The Supreme Court in Lemon v Kurtzman set forth a 3-part test to determine if such policies were violations of the Establishment Clause - the Lemon test focuses on whether there is a legitimate secular purpose behind the policy, whether the policy has the primary effect of advancing or inhibiting religion, and whether administration of the policy would require excessive government entanglement.

The Acme policy fails the first part of the Lemon test because there is no secular purpose at all behind this policy. It is specifically created to allow prayer, and even though the prayer is nonsectarian, it is theistic.

The Acme policy also fails the second part of the Lemon test because the primary effect of playing a prayer over the school's public address system is definitely seen as an advancement of the religion spoken of and an inhibition of minority religious views.

Finally, the Acme policy violates the last part of the Lemon test because the policy could so

easily be converted to force the majority religious views upon the minority, thus creating a need to constantly monitor the prayers.

I believe the plaintiffs have a strong chance of success on this First Amendment challenge for the simple reason that the First Amendment is intended to erect a "wall of separation" between church and state - when a public school allows students to elect by majority vote who's religious views will be played over the school's public address system, it is essentially the government forcing the minority views to listen. This violates their right to a neutral government that does not prefer one religion over another.

ARKANSAS BAR EXAMINATION

JULY, 2000

1 Page

30 Minutes

EVIDENCE

Carol Cautious was driving alone on Arkansas Highway 15, a two lane road, at about 7:45 A.M, when she saw an approaching car veer into her lane of traffic. Thinking that the approaching car was crossing to the shoulder of the road, Cautious swerved into the lefthand lane to avoid an accident. The approaching car then crossed back into the lefthand lane. The two vehicles collided in the lefthand lane, and Randy Reckless, the driver of the approaching car, who was also alone, was killed.

The widow of Reckless, on her own behalf and as representative for the Estate of Reckless, has sued Cautious in a wrongful death action in circuit court in Arkansas.

At the trial of the case, the lawyer for Cautious seeks to introduce into evidence the following:

(1) Testimony from a witness that Reckless regularly weaved back and forth over the centerline of the road because he delivered newspapers in his vehicle, and, as he was throwing papers, he sometimes crossed the centerline of the road;

(2) Testimony from a witness that she had seen Reckless drive on this stretch of Highway 15 a dozen times, and that Reckless was speeding half of those times; and,

(3) Testimony from Cautious that immediately following the accident, Reckless' widow had visited Cautious in the hospital where Cautious was recovering from her injuries, and Reckless' widow had offered to pay the medical and hospital expenses incurred by Cautious.

How should the Court rule on the admissibility of the testimony in (1), (2) and (3) above, and why?

ARKANSAS ESSAY

ANSWER

EVIDENCE

July, 2000

1) If the regularity of the weaving is such that it rises to the level of habit, then the evidence can come in. In Arkansas, habit evidence must be shown to be almost unconscious and automatic response. The proffered evidence does not appear to rise to such a level because he only "sometimes crossed the centerline of the road." "Sometimes" does not equate to "unconscious and automatic," so under Arkansas law, this evidence would not come in as evidence of habit.

As character evidence it doesn't come in either. Specific acts evidence of this type cannot come into evidence to show that the person acted in conformity with that character on the time in question.

Accordingly, the testimony that Reckless regularly weaved back and forth over the centerline while throwing papers should not be allowed. This evidence is inadmissible, unless the court finds it is admissible habit evidence.

2) His tendency to speed also does not come in. Testimony that Reckless speed six out of the twelve times that witness saw him does not rise to the level of habit evidence. Half the time is not a repeated almost automatic response.

It is also impermissible character evidence. The testimony may not be used to infer that Reckless must have been speeding on the day in question.

Also, it doesn't appear to be relevant unless Cautious is asserting that Reckless was speeding. The facts state she saw it veer into her lane, but doesn't mention at an increased rate of speed.

Also, any relevance it may have is outweighed by its prejudicial effect on the jury - he's a reckless driver, so he must be at fault here.

3) The offer to pay medical expenses does not come in either. For public policy reasons, we want to encourage people to pay medical expenses, so the Rules of Evidence make such testimony inadmissible .

Had the offer been accompanied by an admission of her husband's culpability, the admission would come in but not the offer to pay the expenses.

The Rules of Evidence exclude from admissibility offers to pay medical expenses when used to prove negligence of the party. Here, the only relevance the evidence would have would be to show that Reckless was negligent and was responsible for his own injuries and those of Cautious.

Cautious needs to find someone who witnessed Reckless cross the centerline on this occasion or hope the jury believes her rendition of the truth because the evidence proffered in (1)-(3) are inadmissible under the Rules of Evidence.

ARKANSAS BAR EXAMINATION

JULY, 2000

2 Pages

30 Minutes

CRIMINAL LAW & PROCEDURE

In early May 1999, Roger decided he needed money and asked David to be his driver. Knowing that Roger had served time in prison on two prior battery convictions and too afraid of Roger to refuse, David followed directions and drove Roger to a liquor store in Pulaski County. While David waited in his car, Roger entered the store. With his hand in his pocket, Roger told Owen, the owner, to empty the cash register or he would "blow his head off." Owen, believing that Roger had a gun, did as he was told. After taking the cash of $550, Roger got back into David's car. As they drove away Owen copied down David's license plate number and immediately called the police.

The detective assigned to the case was busy and was unable to conduct his thorough investigation until two weeks later. When he determined that the perpetrators were Roger and David, they were arrested and charged. Later, in November of 1999, the detective retrieved a photograph of Roger from police files and showed it to Owen. Owen identified Roger as the person who took the case.

The detective did not inform the Prosecutor of Owen's identification, and the Prosecutor did not serve Roger's counsel with notice of the photo identification.

After a pretrial hearing, the Court granted Roger's motion precluding the Prosecutor from questioning Roger regarding his two prior convictions if Roger chose to testify.

After jury selection, Roger's attorney learned of Owen's photo identification of Roger. At trial, Owen testified regarding the circumstances, and the Prosecutor asked Owen if he could point out the person who had taken the cash from him.

Roger's attorney immediately objected and moved to preclude identification testimony by Owen. The Court denied the motion on the ground that failing to make a pre-trial motion to suppress Owen's identification, Roger had waived his right to challenge such testimony. (Ruling 1). Owen identified Roger.

After completion of Owen's testimony the prosecution rested. Roger's attorney moved to dismiss the charge on the ground that the Prosecutor had failed to prove that Roger had displayed a firearm during the incident. The Court denied the motion. (Ruling 2)

The next afternoon Roger took the stand and testified that the incident was all David's idea. After the Prosecutor finished cross-examining Roger, David's attorney began to question Roger regarding his prior convictions. Roger's attorney immediately objected on the grounds that the Court's prior ruling at the pre-trial hearing precluded David's attorney from cross-examining Roger about these convictions. The Court reserved decision on the objection and adjourned the case until Monday. Over his attorney's objection, the Court directed Roger not to discuss his testimony with his attorney over the weekend recess because he was still under oath. (Ruling 3)

- Discuss the appropriate felony charge(s) for Roger and David and any defense(s) to either of the charge(s).
- Were the numbered rulings 1, 2, and 3 correct? Explain your reasoning.
- How should the Court rule on the objection to the cross-examination of Roger regarding the prior convictions?

ARKANSAS ESSAY

ANSWER

CRIMINAL LAW & PROCEDURE

July, 2000

(1) Roger should be charged with aggravated robbery and David should be charged with the same offense. Roger has no viable defense, but David may try to prove duress.

Aggravated robbery is the unlawful taking and carrying away the personal property of another with the intent to permanently deprive the person of the property. Roger intentionally took $550 cash. Another element of the crime of aggravated robbery is that it is done with force or the threat of force. In this case, Robert put Owen in fear of death or serious bodily harm when he pretended to have a gun in his pocket. Words alone do not create a threat, but Roger said he would "blow his head off" while he had a gun in his pocket. The combination of these two creates reasonable fear in a person.

Roger may try to convince 6the jury that he did not have a gun, therefore, it was impossible to put Owen in fear of his life. This factual impossibility, intended to negate the "aggravated" part of robbery will not be a good defense, as discussed above.

David should be charged with the aggravated robbery because he was an accomplice. Accomplice liability attaches when one knowingly aids, encourages, supports, or helps one commit a crime. In this case, David drove the get-away car. He very much assisted Roger commit the crime.

Another possible charge would be accessory after the fact. Unlike accomplice liability, which makes the assistant liable for the committed crime, the common law accessory after the fact is a separate crime involving helping someone escape or hiding someone.

David's defense could be duress. That is where one is forced to commit a crime because of fear of an immediate threat. In this case, since David suspected Roger may be committing a crime, David might convince the jury he felt he had no choice. However, the facts indicate no threat of immediate bodily injury.

David and Roger may have been denied their right to a speedy trial.

(2) Rulings one and two were correct. Ruling three was not correct. An in-court identification is acceptable. In this case, the in-court finger pointing was based on Owen's personal, long-time observation of the defendant during the crime. This independent basis is not connected with the

photo shown earlier. There is no right to counsel at a photo line-up.

Ruling two is appropriate because the prosecution must prove every element of the crime, but the presence of a firearm is not an element of aggravated robbery. Similar to assault, the intent to create a reasonable apprehension is sufficient.

The third ruling was incorrect because the Sixth Amendment to the Constitution gives a defendant the right to counsel and the courts have held that this includes overnight recesses. Harmless error may be shown on appeal, since the denial of right to counsel was not technically during trial.

(3) As far the cross-examination of Roger objection, the court should deny the motion. The pre-trial hearing concerned the prosecutor's refraining from questioning Roger, not David's attorney. The two defendants should have been given different trials.

ARKANSAS BAR EXAMINATION

JULY, 2000

2 Pages

30 Minutes

CONTRACTS

Situation 1: Jack owned two houses in Little Rock, one in West Little Rock valued at $100,000 and one in the downtown area valued at $30,000. Jack had decided to sell the downtown property. On the elevator at work he was overheard by Jill telling someone that he was going to sell "my house." Jill, being familiar only with the West Little Rock property, said: "I would like to buy your house, and I will pay $90,000 cash for it." Even though Jack knew that Jill was thinking about his other property, he said: "sold." A written agreement was signed that contained the legal description of the downtown property, and stated the price as $90,000. When the agreement was delivered to Jill she signed it. At closing she first became aware that she had made the offer thinking about the wrong property. Jack told her that was too bad as she had signed a written agreement describing the downtown property, and he thought she wanted it badly, thus the high offer. Jill said that she did not read the agreement, and certainly would not pay nearly that much for the property had she known. When she refused to close, Jack sued. What defenses will Jill assert, and what position will Jack take?

Situation 2: Jack then decided to sell his West Little Rock property. He knew that there was a storm sewer running under the house on the property. He also knew that the city could remove the house if necessary to repair or replace the sewer line, which would render the house valueless. Since the sewer line had been in place since the 1800s, there was no evidence of it in the records on file in the Courthouse. However, the location of the sewer line was on file in the sewer commission office, and reflected on the sewer line plats. Jack orally agreed to sell this property to Phil. Phil gave Jack an earnest money check with the notation "For Purchase of Jack's West Little Rock Property." Jack deposited the check. At no time was the location of the sewer line discussed. Phil did not ask about it and Jack did not volunteer the information. At

closing, Phil became aware of the location of the sewer line and told Jack that he was not going to go through with the purchase since Jack had failed to disclose a fact that was material to the transaction. Jack responded that Phil could have discovered the fact with proper due diligence since the location was a matter of record in the sewer commission office, and he would have told him the truth if asked. Jack filed suit against Phil for specific performance. Phil filed a counterclaim seeking repayment of his earnest money deposit. What issues would Phil raise, and what will be Jack's position on those issues?

ARKANSAS ESSAY

ANSWER

CONTRACTS

July, 2000

Situation 1: Jill will assert the defense of unilateral mistake. This is a defense to formation of the contract. Here, Jill will say that she was mistaken as to which piece of property Jack was talking about when he originally said he wanted to sell "his house." Normally, a unilateral mistake is not grounds for rescission of an otherwise valid and enforceable contract. However, it will be a defense if the mistake goes to the essence of the contract, and the nonmistaken party knew or should have known of the mistake. Here, the facts state that Jack knew Jill was mistaken & went through with the sale of the downtown property anyway. Therefore, Jill's mistake, if she is allowed to present evidence on it, will probably result in a rescission.

Jack will say that their written agreement was intended to be a final and complete integration of the parties' intentions, and that the parol evidence rule precludes Jill from introducing evidence of prior statements or actions that contradict the terms of the writing. Jack will say that any mistake Jill might have been operating under before the written agreement became binding on her when she signed a written agreement that incorporated the legal description of the property.

Jill will then raise the position that evidence of a mistake in reducing the parties' original agreement to writing will not be kept out by the parol evidence rule.

It is likely that Jill will be able to rescind the contract. The defense of unilateral mistake will be effective here because Jack knew she was making the mistake. The parol evidence rule will not apply to these facts, because it keeps out prior words and conduct of the parties, and prior written agreements, not prior states of mind and mistaken assumptions of the parties. Therefore, Jill should be able to present evidence of her mistake, and should be able to rescind on that basis.

Situation 2: This fact pattern involves issues regarding the Statute of Frauds, seller's duty of disclosure, and seller's duty to produce marketable title at closing.

Phil will first say that his oral contract with Jack regarding the sale of the land was not enforceable, because it is within the Statute of Frauds. The statute provides that contracts for the sale of an interest in land, among others, must be in writing. The writing must set forth the essential terms of the contract, and it must be signed by the party to be charged. Here, the only

writing is the earnest money check. Assuming Phil signed the check, the next question is whether the words "for purchase of Jack's West Little Rock property" are sufficient to satisfy the statute. A legal description of the property is not necessary. If Jack only owns one piece of West Little Rock property, this description will be sufficient. But the contract also must set forth the consideration paid or agreed on, and the earnest money check does not satisfy this requirement. Therefore, the contract is probably unenforceable due to the Statute of Frauds.

Even if the contract is enforceable, Phil will say that Jack had the duty to tell him about the location of the sewer line. At common law, Jack had no duty to do so, because of the principle of caveat emptor "buyer beware." Most modern jurisdictions though, impose on sellers of land the duty to disclose nonobvious or concealed defects or conditions about which they know, and which the average buyer would not discover upon a reasonable inspection. Here, the location of the sewer line is certainly nonobvious and concealed, assuming it is underground. The question is whether a reasonable buyer would check only the courthouse records or also the sewer commission office's plats. Most courts hold that checking the status of the title in the courthouse is enough to constitute a reasonable inspection, but it would be a question of fact. If Jack had the duty to disclose, then Phil does not have to purchase the property and is entitled to return of his earnest money.

Finally, Phil will say that Jack, as the seller, has breached his duty to provide marketable title at closing. Every contract for the sale of land contains this implied duty unless provided otherwise. Marketable title means that the buyer should be assured that he is buying title to the property, not the threat of a lawsuit. The seller need not provide perfect title but the buyer needs to be free from substantial threats of litigation. The buyer is responsible, during the time between agreement and closing, for determining whether title is marketable. Here, somehow, Phil has discovered the location of the sewer line before closing. If the location of the line prevents title from being marketable, then Phil is relieved of his duty to perform and is entitled to return of his earnest money. It is likely that the sewer easement held by the city, given the power to completely render the house valueless, is a significant enough encumbrance on title to render it unmarketable. Therefore, under one of the three possibilities outlined above, Jack will probably lose his suit for specific performance, and Phil will probably win his counterclaim for the earnest money.

ARKANSAS BAR EXAMINATION

JULY, 2000

1 Page

30 Minutes

PROPERTY

Joe Goodacre and Jane Seizin, longtime residents of Hot Springs, Arkansas, acquired a tract of land in Jonesboro, Craighead County, Arkansas, on March 15, 1982. They both shared equally in the purchase price. The granting clause of their Warranty Deed, duly recorded on the date of purchase with the Circuit Clerk and Recorder of Craighead County, stated that the Grantor did

"grant, bargain, sell and convey unto Joe Goodacre and Jane Seizin, his wife..." The habendum clause stated, "to have and to hold unto Joe Goodacre and Jane Seizin, his wife, their heirs and assigns forever with all appurtenances thereunto belonging."

Several years after they purchased the property, Joe and Jane discovered that they were not legally married and separated in September, 1989. During the period of separation Jane deeded the property to Dan Developer by Special Warranty Deed in an arms-length transaction for a fair and valuable consideration. Joe was not aware of this transaction and did not sign the deed. Dan obviously did not check the status of the title but he did at all times act in good faith. Subsequently, Joe and Jane reconciled, were legally married on March 1, 1990, and lived together until Joe died suddenly on December 31, 1999, intestate, leaving two children from a prior marriage, Jill and Tim Goodacre, surviving him. Jane regrets that she never had the courage to tell Joe that she signed the deed to Dan and received the consideration for this property.

The transaction from Jane to Dan Developer was closed on January 15, 1990, and the Special Warranty Deed was duly recorded on the closing date with the Circuit Clerk and Recorder of Craighead County. Dan immediately commenced to build a shopping center on the property and eight months thereafter leased the suites to tenants Grocer, Haberdasher and Hightech. In June of this year Dan Developer and Connie Contiguous discovered that the rear fifteen feet of the buildings Dan had built were innocently but erroneously located on the adjoining lands owned by Connie.

Concisely address the status of the title to the property and the rights and interests of all the parties.

ARKANSAS ESSAY

ANSWER

PROPERTY

July, 2000

In 1982, Joe and Jane held the land they acquired as tenants in common. In Arkansas, when a married couple takes title to land, they automatically hold as tenants by the entireties, unless they intend otherwise. This would mean that each party owns an undivided share of the property, which they cannot unilaterally sever their joint interests during lifetime or by will. They also share a right of survivorship, and upon death of one, the survivor succeeds to ownership of the entire land interest. This conveyance requires the unities of time, title, interest, possession, and marriage. Because, however, Joe and Jane were not legally married at the time they took title and because the deed did not specifically refer to the right of survivorship inherent in a joint tenancy with right of survivorship characterized by the unities of time, title, interest and possession, rights of survivorship, and the disability or unilateral intervivos severance/testamentary devise, by default, then, Joe and Jane took title as tenants in common, each owning an undivided ½ of the property, each able to dispose of his/her share at will, without permission of the other party.

In 1989 Dan Developer succeeded to Jane's interest in the land and became a tenant in common with Joe. Jane's special warranty deed was only good to transfer ½ of the property without Joe's signature. Jane only covenanted that she had done nothing herself to encumber title. Jane did not need Joe's permission to sell her ½ of the property. Had Dan checked the title, he most certainly would have discovered the problem and avoided the sale or gotten Joe's signature as well. Despite his good faith, he still holds a concurrent estate with Joe. Their subsequent 1990 marriage does not change title. In 1999 Jane would be entitled to both a dower interest and intestate share of Joe's estate, because of their 1990 wedding. Because Joe has surviving descendants, Jane's dower interest would be 1/3 life estate in his real property and 1/3 fee simple in his personal property. Dower interests exist in all property Joe was seized of an estate of inheritance during their marriage. This includes the property in this question. Jane is also entitled to her intestate share of Joe's property because he died without a will, in addition to any homestead and personal property exceptions applicable. Jill and Tim will take whatever is left over out of Joe's estate. At this point, Jill, Tim, Dan and Jane own the land all as tenants in common, as well as Jane's life estate interest in the land.

In 2000 Dan, Jill, Tim and Jane also now own in fee simple the extra 15 fee they have acquired from Connie by adverse possession. In order to adversely possess land of another, one must occupy (with color of title and payment of taxes) land owned by another openly, continuously for the statutory period of 7 years, exclusively, as the owner would, adversely as against the true owner without permission and notoriously (or hostile). Dan et.al. have met these requirements. The building has encroached significantly for almost 10 years without interruption by Connie. They have acted as the true owner, developing the land for commercial purposes by building on it without permission of the true owner, Connie. I am assuming that they have also been paying taxes on the land as well. Dan, et al owns the extra 15 feet, all as tenants in common, subject to Jane's life estate.