1)

Don and Marta's rights and rememedies will be determined by whether they each may have breached their contractual obligations to eachother, and if so, whether those breaches may have been excused.

Governing Law

A contract is a legally enforceable agreement between parties. Contracts for services are governed by the common law. Contracts for goods are governed by Article 2 of the Uniform Commercial Code ("UCC"). Here, the contract is for a new bait cooler, which is a tangible moveable good, so the UCC will apply. Under the UCC, special merchant rules apply to to parties who regularly, commercially deal in the matter at hand. Marta operates a fishing shop and is buying a bait cooler, so she is a merchant. Don't status as a merchant is unclear, though it is mentioned that he is buying the cooler from a "supplier" indicating that he is a middleman, and hence also a merchant.

Valid Contract- Statute of Frauds

A valid contract is formed by offer, acceptance, and consideration. Not all contracts need be memorialized in writing to be enforceable, except in certain instances including those that cannot be performed within a year, and surety contracts. Under the UCC, contracts for the sale of goods over $500 must be in writing. In the instant case, the goods are worth $5,500 so a writing is required, but the facts state that a "valid written contract" thus this contract is validly formed and enforceable at the outset, February 1.

Time of the Essence Clause

Here, Marta needed a new bait cooler to be in place by May 1 for the first day of fishing season. Usually, performance of a contract is due within a reasonable

time. Even if a date for performance is noted in a contract, such as the April 15th deadline here, courts will usually allow some leaway for the parties to perform within a reasonable time of performance due. Although it is stated that Marta needed a new cooler in place by May 1 for the first day of fishing season, the contract itself merely states "delivered no later than April 15th".

In a later phone call, Marta "reminded" Don that meeting the April 15 deadline was "imperative", which implies that he already had reason to know the the due date was very important to Marta, and why it was so important (beginning of the fishing season). So it seems as though Marta had at least verbally told Don that the performance due date of April 15th was highly important and material. Marta's later statements to Don regarding the delivery date, explaining why it was so important in spite of the fact that fishing season didn't start until May 1, do help her case somewhat. However even then Don believed her worries were "overblown", which shows there was never really a meeting of the mind on the time of the essence materiality.

It is a close call whether this is a valid time of the essence clause, the breach of which would consistute a material breach. On balance, a court would probably find in favor of Don, since Marta did not include any detail other than "no later than April 15th" in the original contract itself.

Anticipatory Repudiation

On February 15th, Don called Marta to explain that he was having trouble procuring the Bait Mait cooler. Where one party anticiparily repudiates their performance of a contract, the other party may 1) treat this repudiation as a material breach and sue right away, 2) wait until the performance is due and then sue, 3) or urge performance. However in order for these to apply, the repudiating party must communicate an unequivocal, firm determination they will not perform. Don was merely expressing, 2 months prior to performance being due,

that he was having trouble. This is not firm enough to be an anticipatory repudiation so Don did not breach the contract at this point and Marta was not entitled to treat the call as an anticipatory repudiation.

Modification

When Don called Marta on February 15 to express that he was having trouble procuring a Bait Mate cooler, Marta followed up the phone call with a fax that she was "worried [he] will not deliver a bait Mate cooler by April 15th". Under the UCC between merchants, a modification to a pre-existing contract does not need new consideration (bargained-for legal detriment). Oral modifications to UCC contracts between merchants are also acceptable. However, if a contract is required to be in writing under the statute of frauds as this one was (discussed above), modifications need to be in writing to be enforceable. The modification would have to align with the formalities of the statue of frauds. Namely, that the material terms be in writing and signed by the party to be bound. If Marta made a valid enforceable modification to add the timing of the essence clause, then Don's ultimate delivery of the cooler one day late would be considered a material breach.

Marta's fax

Marta's fax urging Don's performance could be considered a writing. However since it is not signed by Don, the party Marta would be seeking to bind to the agreement (and Don did not respond), it does not satisfy the statue of frauds and therefore the time of the essence clause was not added to the contract as a valid condition subsequent (the failure of which would excuse the other party, Marta, from performing).

Marta's fax could conceivably be a merchant confirmatory memo. These are enforceable as contracts to satisfy the SOF even if they are not signed, if they

contain the material terms. However, this writing would not satisfy as a merchant confirmatory memo because it was not extensive enough on its facial terms.

Breach- Refusal of Delivery

Merchant's may refuse non-conforming goods under the UCC. If imperfect goods are delivered, the seller is usually allowed a reasonable time to cure by delivering conforming goods. However in this case, Don attempted to deliver a Bait Mate cooler and there are no facts to indicate there was anything wrong with the cooler, so Marta was not entitled to refuse delivery.

Therefore, by failing to take delivery of the cooler on April 16th and compensate Don the contract amount due of $5,500, Marta breached by failing to perform at the heart of the contract. Don has a valid breach of contract cause of action against Marta and may be entitled to damages.

Don's Remedies

Damages for breach of contract must be definite, certain and foreseeable.

Expectation damages seek to put the party in the position they would have been had the other party not breached. If the court determines that Marta has in fact materially breached the contract, Don would need to be made whole.

Duty to mitigate- A non breaching party to the contract has a duty to mitigate their damages. If Marta materially breached by refusing performance, Don would have to try to sell the cooler to someone else. He would then be entitled to collect from Marta the difference between the contract price and the amount he got for the cooler on the market (assuming he was able to sell it for less than the con tract price). He would also be entitled to the incidental, directly-related costs of reselling (ie. shipping to someone else).

Specific performance would not be an appropriate remedy for Don, since a court would not likely force Marta to purchase something against her wishes, especially since here the remedy at law (money) is adequate. There may also be issues with specific performance due to the ambiguity regarding the contract terms.

Marta's Remedies

See rule for damages above. If a court find that the the time of the essence clause was an enforceable condition subsequent, Don's failure to perform by that date would excuse her performance and entitle her to remedies for Don's material breach.

If Don did breach by failing to perform a valid time of the essence clause, Marta would be entitled to be made whole for her loss, ie. the $5,500 she expended on a replacement cooler. However she would not be entitled to the $2,000 premium unless it was foreseeable at the time of contract formation. Given that this premium is almost half the cost of the cooler itself, it does not seem reasonable and it was doubtedly foreseeable.

Don's Defenses

Promissory Estoppel- Don may argue that he be compensated due to his performance. Since he detrimentally and reasonably relied on Marta's promise to pay him, Marta should be estopped from not performing.

Impossibility, Frustration of Purpose, and Impracticability

Don's performance by April 15th was not objectively impossible, since obviously someone was able to give the Bait Mate cooler to Marta on that date. Don could

not argue frustration of purpose since he did not fail to deliver the cooler by April 15th due to its destruction.

His strongest argument, other than asserting that the time of the essence clause was not an enforceable condition of the contract (discussed above), would be Impracticability where a party is excused from performing where performance became unforeseeably and unavoidably difficult. He would support this defense by showing that he had difficulty attaining the cooler on time. However ultimately there are not enough facts to support impracticability.

Question #1 Word Count = 1541

75/83

2)

Interstests in Blackacre

Joint Tenants

A joint tenancy is created with two or more parties are deeded real property 1) at the same time, 2) same title, 3) same interest, and 4) same possession rights. Right of survivorship must be expressly stated in the deed. When one joint tenant sells their interest in the property, the time, title, interest, possession requirements are disturbed and the joint tenancy is thus converted to a joint tenancy in common. The key difference between a joint tenancy with right of survivorship and a tenancy in common is that upon death of a joint tenant in common, their interest in the property passes by devise or intestate instead of automatically going to the other joint tenant.

Here Amy and Bob owned Blackacre in fee simple absolute, which is the greatest ownership right, and is freely devisable. Amy was entitled to gift her interest in Blackacre to Cathy. (There is a form of joint tenancy, tenancy by entirety, which is similar to a joint tenancy with right of survivorship but where a tenant may not sell her interst without the other tenant's permission. Tenancy by entirety is not applicable in California and probably does not apply here as the facts do not state that Amy and Bob were married, and tenancy by entirety tenants must be married.) Therefore when "Amy and Bob" sold all of "their interest" by quitclaim deed to David, they ostensibly were only deeding him with a joint tenancy in common.

Race Notice statute, Cathy vs. David

In a race-notice jurisdiction, a bonafied purchaser for value will take a property if they have no notice of prior conveyance, and they are first to record their own interest. David purchased his interst in Blackacre, whereas Cathy was merely

gifted with her share. Since David bought the property via quitclaim deed (and not general warranty deed), he took it as it was. Since Cathy had not recorded her interest, David was not on record (constructive) notice of her interest in the property. There are no facts to sustain that David was on actual or implied notice either, since Cathy was not on the property and David was never told of her interest. Since David was a purchaser for value and recorded prior to Cathy, he retains the estate in fee simple. Cathy has no tenancy/ownership rights in Blackacre.

Lease to Ellen

A lease is an agreement whereby a party takes possession of an owner's property subject to certain terms and conditions. David's lease of Blackacre to Ellen was for 15 years so it is a lease for a fixed term. Therefore Ellen is reponsible for rent to David for 15 years, and the lease will end on its own terms at 15 years unless it is expressly renewed.

Assignment to Fred

A lessee of property may assign or sublease their interests to a third party. If they assign part of their interests, then the third party becomes a sublessee and the sublessee and landlord are not in privity. If the lessee leases all of their interest in the property, the assignee takes possession of the property with privity of estate with the original landlord. The assignor, original lessee, remains in privity of contract with the original landlord.

Here, Ellen is the original lessee of David's property. She assigned "all of her remaining interest" in Blackacre to Fred, so Fred and David are now in privity of contract, and David is responsible for any contract terms that run with the land.

Since David is in privity of estate with Fred, and privity of contract with Ellen, he

could potentially sue either one for each of their failures to comply with the express covenant in the lease contract. It would be more appropriate for David to sue Fred first, since they are in privity of estate.

Therefore, at the time the building is destroyed, Cathy has no interest in Blackacre, David owns black acre in fee simple absolute, Ellen is an assignor in privity of a contract lease with David and fred is an assignee in privity of estate with David.

David v. Fred

If David wishes to seek a remedy at law for the breach of the covenant (money damages) then he would sue for breach of covenant. If David wishes to get an equitable remedy, an injuction, then an equitable servitude would be the appropriate theory to sue under. Since the building has been destroyed by fire, an affirmative injunction requiring Fred to obtain hazard insurance and to then use its proceeds on the already destroyed property does not make sense, so David will seek to enforce his lease provision to require insurance as a covenant.

Covenant- burden

For a burden of a covenant to be enforceable on future parties, the covenant must 1) touch and concern the land, 2) there must be a writing, 3) there must be intent for the covenant to run with the land, and there must be 4) horizontal and 5) vertical privity, and there must be 6) notice.

The facts state that the lease between Ellen and David is "valid". A valid lease for real property for a term of 15 years must be in writing, so we can infer that this lease is in writing satisfying this prong of the test for the burden of a covenant to run and be applicable to Ellen. There was intent that the term to run with the land, since it states expressly that it applies to Ellen's "assigns, and

successors and interests". Horizontal privity is where the parties have some relationship outside of the contract itself. Vertical privity is a non hostile nexus. These prongs are also satisfied. At the onset of the contract, Ellen and and David had horizontal privity as lessor and lessee. There is vertical privity between David and Fred since they are in privity of estate at the time of the fire.

Fred will argue that he did not have notice of the lease terms requiring insurance, therefore he should not be bound to them. This argument will likely fail, however, since Ellen recorded her lease with David. Though the facts do not indicate that Fred had actual notice of the covenant, and he would not be responsible for inquiry notice because an insurance term would not be discernible from inspecting the property, Fred does have record (constructive) notice due to Ellen's recordation of her lease.

The prong that requires the most examining is whether the term "touches and concerns" Blackacre. The term states that the hazard insurance is specifically to cover any damage to the property itself, so its purpose intertwined with the property. The term also states that the proceeds from the insurance will repair the damages of the property. Again, this is tied directly to the land. It protects David's interest in the land and, had it been followed, it would have worked to ensure that the land would be repaired following an act of God.

Therefore, this covenant touches and concerns the land, and Fred had inquirty notice, so it should run to Fred and be enforceable on him as a burdened covenant.

Covenant- benefit

Alternatively, David could seek to enforce the terms of the lease as a covenant benefit. Analysis would be roughly the same as the burden above, except horizontal privity and notice would not be required. Since the requirements for a

burden include all requirements for a benefit, and the burden runs, then it would also run as a benefit.

Equitable servitude

An equitable servitude would run with the land upon 1) notice, 2) a writing, 3) intent, and 4) touches and concerns the land. As discussed above, all of these elements are met. However David does not want an injunction so he would not seek to enforce as an equitable servitude.

Waste, Negligence

Alternative theories for David's suit against Fred include waste, and negligence. A tenant may not commit waste on a landlord's property, defined as action that diminishes the value of the property (unless it is amelioritive waste, not applicable here). The fire on David's property has certainly dimished its value. However since the destruction was caused by an act of God and not Fred directly, David would probably have a stronger case for negligence against Fred.

Negligence is defined as 1) duty, 2) breach, 3) actual and proximate cause, and 4) damages. If David could show that Fred breached his duty of due care owed to David by failing to obtain hazard insurance, then he could possible argue that that failure actually and proximately caused David's damages. The stronger argument though, is that Fred breached the covenant.

David v. Ellen

Since David remains in privity of contract with Ellen, he could alternatively sue her for her failure to comply with the lease terms as a covenant.

Covenant- burden (and benefit)

The analysis here would be roughy the same as against Fred, except David and Ellen's current vertical privity is privity of contract (not estate, as David and Fred). The rest of the analysis would be the same, because the insurance term 1) touches and concerns the land, 2) there was notice to Ellen (to Ellen the notice was express, as it was in the lease she recorded, 3) intent, and horizontal and vertical privity.

Therefore David could also collect from Ellen for her failure to comply with the covenent. Note, there would not be a case against her for negligence or waste as there may be for David v. Fred.

Question #2 Word Count = 1582

3)

Did the court err in granting Diana's motion to order a) the physical examination [of Phil]?

The purpose of civil litigation discovery is broad fact finding. Requested information need not be directly admissible in court or even directly relevant, so long as it could reasonably lead to the discovery of relevant evidence. This is a broad standard, hence there are not many areas that are protected from discovery. Even attorney client privileged information may be discoverable, if it is substantially important and the requestor has no alternative ways of getting the information. Parties may not utilize discovery requests to harass the other party or for another improper purpose or ulterior motive.

Here Phil is suing Diana for negligence and seeking damages for a physical injury. Although in court in some jurisdictions, information exchanges between doctors and patients would be considered privileged information, Phil is putting his physical state at issue by suing for physical injury.

Phil could argue that it violates his privacy and autonomy to subject him to a physical examination. This argument would fail. Without a physical examination to objectively assess the damages that Phil is suing for, the case is essentially dead in the water.

Therefore, the court propertly granted Diana's motion to order the physical examination.

Did the court err in granting Diana's motion to order b) the mental examination of Phil?

A mental examination of Phil is another matter. There are no facts to indicate that Phil's mental state is relevant to the proceedings. Neither are there facts to

indicate that Diana would be trying to harass or unduly burden Phil with her request for a mental examination. Maybe Diana has some justifiable purpose for requesting the mental examination. On the facts given, Phil's mental state is not at issue and therefore not relevant. It does not seem likely that a mental evaluation would lead to anything relevant either.

Therefore, the court did err in granting Diana's motion to order the mental examination of Phil.

Did the court err in permitting Diana to depose Laura?

Depositions are another discovery tool whereby parties collect information. A deposition is essentially an interview by either party's counsel, and they are frequently extensive in order to aid in the general fact finding purpose of discovery. Hearsay rules and other in court testimentary protections do not apply in depositions as in a court room. One being deposed must generally answer all questions asked, however objections can be made to certain questions, for the record. If an objection is not made, that objection is deemed to have been waived for trial purposes. In order to depose a party, either side may subpoeana that witness with a date and time to appear for deposition.

In the immediate case, Phil is arguing that 1) Laura could not be deposed because she was not a party, and 2) deposing her would violate physician-patient privilege. The court properly overruled both of these objections.

As to the first point, one need not be a party to the litigation to be served with a subpeona to be deposed. Depositions fall under the broad umbrella of discovery and if a witness' depositions would be relevant or likely to lead to relevant evidence, they may be deposed.

Phil has a stronger argument on his second point, but the point still fails. Laura

must show up for her deposition and be diposed. If she is asked particularly about physician-patient privileged information, Phil's attorney may move to strike that information as privileged. Phil's attorney could argue that Phil carries the privilege, as Laura's patient, and may use it to keep her from testifying. Irrelevant medical information, told by Phil to Laura for the purposes of medical treatment for a medical condition not at issue in the immediate case (for example a foot disease or bladder infection) could probably be properly excluded for admission into evidence at trial as client physician privileged information. Even then, as discussed above, Laura would probably have to answer questions over Phil's attorney's objections, and they would then be excluded from evidence as privileged. However, Phil's physical state cause by the accident is at the heart of this case. Further, Laura is presumably the doctor that the court ordered Phil to see, with the express purpose of determining his physical condition after the accident.

Therefore, the court did not err in permitting Diana to depose Laura.

Did the court err in granting Diana's motion to strike Phil's demand for a jurty trial?

Under the 6th amendment, defendants have a a right to a trial by a jury of their peers if they are facing a potential sentence of 6 months of longer of incarceration. In the immediate action, Phil is not a defendant, nor is he facing any jail time (on a counter claim from Diana). Therefore Phil is not necessarily entitled to a jury trial under the 6th amendment.

Judges in federal civil courts may properly make findings of fact absent a jury. Phil will argue that his rights were impeded when his demand for a jury trial was "immediately" struck, which implies there was not much deliberation over the court's decision to exercise its discretion in excluding a jury.

However, as Phil was not entitled to a jurty trial, the court did not err in granting Diana's motion to strike Phil's demand.

Question #3 Word Count = 887

END OF EXAM

4)

Valid Contract

Belle can reasonably seek both equitable and legal remedies in the immediate case, because she has a valid, legally enforceable land sale contract with Steve for the purchase of Parcel 1.

A contract is a legally enforceable agreement between parties, formed through offer, acceptance, consideration (a bargained-for mutual legal detriment), the breach of which will entitle the non-breaching party to relief.

Statute of Frauds

Contracts must not necessarily be in writing to be legally enforceable. However there are several exceptions to this rule. Contracts that cannot be performed in less than a year, surety contracts, and contracts for the sale of goods in an amount over $500 must all be in writing and signed by the party to be bound to the contract. Also, contracts for the sale of real property must be in writing under the statute of frauds.

Here, the facts state that the parties "executed a contract" for the sale of Parcel 1, and we are told several material provisions of the contract. As "executed" is typically used to refer to a signed contract we can assume the contract has been signed by Steve and Belle.

Contracts for land sales must also specifically identify the real property being sold, and identify the price and the date of conveyance. This contract is for Parcel 1, including five 100-year-old oak trees and an easement across Parcel 2 (express affirmative easement appurtanent).

Mistake

Steve is now orally asserting that the contract is not enforceable because the wrong road was described in identifying the easement in the contract. Steve's argument will not hold, because the mistake in the contract was a mutual, innocent mistake. Top Road is actually a nearby road, so Belle would be able to show that the parties intended to reference the road that is adjacent to Parcel 2. It would probably not make sense for the land sale contract of Parcel 1 to include an easement to a road that is "nearby" but not connected to Parcel 2.

Reformation

Reformation is available to alter an otherwise enforceable contract to conform it to the actual intent of the parties, where there was a mutual mistake in drafting the contract. Steve and Belle both were mistaken about the true name of the road adjacent to Parcel 2. They had a valid meeting of the minds regarding the road they were referring to, they just failed to memorialize this term in writing as an easement to "Lake Drive". Thus the contract can be reformed to fix the mutual mistake and it will not invalidate the contract.

Therefore, Steve has anticipatorily repudiated the valid contract he executed with Belle, and she is entitled to sue now for remedies (she could also wait until performance is due to sue, or urge Steve's performance since he has not yet sold the parcel to Tim, or treat the contract as rescinded and get her money back.)

Since Belle has a valid land sale contract with Steve for Parcel 1, she is the owner of the land and Steve is merely holding title in trust for Belle until the conveyance date of April 1. Belle should sue Steve's immediately at this juncture and consider equitable remedies to prevent immediate harm.

<u>Equitable Remedies</u>

It is currently March- conveyance of the property to Belle is due April 1, but Steve is saying that a) "in April" he plans to cut down the five 100-year-old trees that were included in Belle's landsale contract, and b) he plans to sell the property to Tim in "mid-April". Belle is entitled to equitable remedies for both of these actions.

Temporary Restraining Order

Belle can request a temporary restraining order (TRO) to prevent the cutting down of the trees and the conveyance of the property to Tim. A temporary restraining order will be granted to a party ex-parte (outside a formal proceeding) if the requesting party can show 1) irreparable harm will be caused otherwise, 2) they are likely of succeeding on the merits of their ongoing claim. A temporary restraining order is meant to be used in extreme circumstances where the party faces imminent and irreversible harm, and lasts for less than a month.

Belle should seek a TRO to prevent Steve's cutting of the oak trees. The Oak trees are 100 years old, they are valuable and cannot easily be replaced on the property. Belle could also argue for a TRO to prevent the conveyance of the property to Tim, but the more immediate harm is the trees. The conveyance will probably be impeded by Steve and Belle's contract regardless, since if it was validly recorded, and Tim runs a title search as he should do, he would see the encumbrance and have difficulty going through with the purchase himself.

Preliminary Injunction

A preliminary injunction would be granted for similar reasons as the TRO, but since a preliminary injunction will last up until disposition of the case itself, the court would also balance the harm and benefit to each party before granting one.

Here Steve does not have pending harm from being ordered not to sell the trees. If he actually won this case, he could always cut down the trees at a later date. Therefore a preliminary injunction should be granted to prevent Steve from cutting down the trees.

(Negative) Injunction

An injunction is a permanent order by a court to force a party to do or not do something. Negative injunctions are more favored by the court, as affirmative injunctions are difficult and infeasible for a court to enforce.

A permanent injunction will be granted where there is 1) inadequacy of a legal remedy (cash money damages, 2) a property right, 3) feasibility of enforcement, 4) balancing of the parties' interests, and 5) no colorable defenses.

Here, cash damages would not adequately compensate Belle for the cut down trees or the property. Courts generally regard real property as unique enough that money cannot adequately compensate for its loss. There is a property right here, the right to the trees and Parcel 1. As discussed above, the injunction to not cut down the trees or not convey the land to Tim would be feasibly enforceable as an order to Steve not to do something. The court would not have to become embroiled or entangled in the business of the parties in order to enforce the injunction.

(Alternatively, Belle could be asking the court for an affirmative injunction, to have Steve convey the property to Belle. This would be more appropriately analyzed as a specific performance because it would be asking a party (Steve) to specifically comply his conduct in accordance with a contract- see discussion of specific performance below.)

In balancing the parties' interests, the court would likely find in favor of Belle

because. Although courts do regard ownership in land estates as freely alienable, Steve had an enforceable contract with Belle and should not be allowed to breach just because someone else is now offering him more money.

Finally, Steve does not have colorable defenses, such as laches or unclean hands. Assuming that Belle does not wait a harmful and unreasonable amount of time to bring her case, laches would not apply. There is also no evidence of unclean hands on Belle's part (those there is arguable some on Steve's part because he willfully "decided to breach his contract").

Therefore the court should grant Belle a permanent injunction to prevent

Specific Performance

Specific performance is a contract remedy and can be sought where 1) there is inadequacy of legal damages, 2) there are definite and certain terms of the contract, and adequate consideration, 3) feasibility in enforcement, 4) mutuality, and 5) no colorable defenses.

1), 3) and 5) have been discussed above under injunction.

Steve would argue there the contract terms are not definite and certain due to the mistake regarding the easement. This would not be a successful argument, since the easement was not a material term to the contract and, as discussed above, was a simple memorialization mutual mistake. There is mutuality here, because Steve could enforce the contract back on Belle if she failed to tender the contract price.

Therefore, Belle could succeed on a specific performance remedy to aquire Parcel 1.

Given the circumstances, Belle's best remedies would be an injunction to prevent the cutting of the trees, and specific performance to convey the land to her on April 1 as the parties agreed.

Legal Remedies

If Steve actually succeeds in cutting down the trees or conveying the land to Tim, Belle could retroactively seek legal remedies. Expectation damages seek to put the party in the position they would have been in had the contract gone through as planned. She could seek restitutionary damages in the amount of the value of the trees cut down, for Steve's waste on her legal property, so that she was made whole again. And if Steve was successful in conveying the land to Tim, Belle could try to seek the difference in the value of the property at the time of breach and the contract price.

However, given the special nature of the land and the trees, Belle's highly preferable remedies would be equitable remedies.

Question #1 Word Count = 1529

5)

Andy v. Sam

Defamation

Here Andy has written a false story about Sam's use of performance enhancing drugs. Sam has sued Andy, Ruth, Molly, TBA, and Baseball Stories (BS) for libel. Libel is the written form of defamation (slander is the spoken form). In order to assess Sam's case against the aforementioned parties, there must be legal grounds for defamation. Sam should not have a diffucult time showing that libel has occured based on the facts given.

Defamation occurs where one party uses 1) defamatory language, 2) of or concerning plaintiff, 3) that is published, and 4) there are damages. If the matter involved is of public concern, malice must also be proven as part of the prima facie case in order to show defamation. In a libel cause of action, where the defamatory language has been printed, damages are presumed. Damages are also presumed where the plaintiff is a private party and the defendant acted with malice.

The allegation of using performance enhancing drugs is defamatory language, because it would cause a reasonable person to dissassociate or carry a lesser opinion of Sam. It was clearly and expressly about Sam so the court need not assess based on colloquium or innuendo. The publishing prong is a low standard which can be met by telling one or a few people, and here it was published in a newsletter so it is met. There are damages because Sam's major league contract was terminated.

Andy could argue that he was merely expressing his first amendment right to say what he wanted, and that as a reporter he should be entitled to freedom of the press. He could say that Sam's use of the drugs is a matter of public concern

because, as a major league baseball player, Sam is a public figure. But reporters do not inherently enjoy any free speech rights above and beyond those of a non reporter. And even if Andy was successful in this argument that this was a matter of public concern, he still committed libel because he wrote his story with actual malice. Actual malice exists where there is reckless disregard for the truth, or knowledge of falsity. Andy knew this story was true and wrote in anyway because he "disliked Sam".

Therefore, Andy as an individual is liable for libel against Sam. However Andy may try to assert that he is not personally liable for the libel because he is protected by his corporation, BS.

Sam v. Computer Store

In addition to Andy as an individual, Sam is suing Andy's corporation, BS. Andy conducts all of his business via BS, a closed corporation of which he is the only employee. A closed corporation is similar to a regular corporation in that it files articles of incorporation with the state, stating its business purpose which puts the public on notice that they are dealing with a corporation and therefore the individual board members or share holders may not be personally liable for their actions. Closed corporations are generally not publicly traded and there are less shares, but a validly formed de jure closed corporation will insulate its directors from liability in most instances.

Piercing the Corporate Veil

Directors, board members, and shareholders of a corporation are generally sheilded from liability for good faith acts performed in the regular course of their business dealings for the corporation (business judgment rule). However courts will allow third parties to reach these individuals personally where they are essentially using the corporation as a sheild for their improper actions.

Specifically, courts will assess whether there has been 1) fraud, 2) alter-ego, and 3) under capitalization.

Andy will argue that he wrote the story for his newsletter. He will argue that the purpose of Baseball Stories, Inc. is to produce stories about baseball, and his writing the story about Sam, though untrue, was not an ultra vires act to open him to personal liability.

Although Andy has acted in bad faith by committing libel against Sam, he has not engaged in fraud because he has not lied with the intent and result of having a third party detrimentally rely upon his misrepresenations. There is evidence, though, that Andy is essentially using his corporation as a liability sheild and not as a proper corporation. We are not told about any corporate formalities that Andy may be engaging in, however since he is the only employee it is hard to imagine that he can reasonably be holding regular board meetings and he certainly cannot be voting on fundamental changes to the corporation (if he is, alone, it is a farce).

Therefore, Sam can pierce the corporate veil of BS and sue Andy individually for the libel.

Sam v. Ruth, Molly, and TBA

A partnership is where two or more parties carry on a business for profit. Where no formalities have been followed, such as filing documents with the state, a general partnership is presumed. In a general partnership, the partners all equally share the profits of the business. They also equally share the liabilities and are equally responsible for the liabilities of the partnership, including lawsuits for which they are jointly and severally liable. Further, they are vicariously liable for the acts of other partners performed in furtherance of the business.

Here, there are no facts to indicate that the parties even attempted to incorporate their business. They simply agreed to publish a monthly newsletter. They divided their responsibilities, with Ruth maintaining the subscriber lists, Molly providing necessary equipment, and Andy writing the stories. They also agreed to equally divide net profits. This is a partnership.

Vicarious Liability

Partners in a business are vicariously liable for torts committed in furtherance of the business. Andy, as a partner to TBA. exposed Ruth and Molly to liability by committing libel in his story. Sam would argue that since Andy's job at TBA was to write stories, and the libel was directly, actually, and proximately caused by Andy's writing of the story, Ruth and Molly should also be held accountable. Sam would argue that Andy wrote the story within the scope of his partnership and employment duties with TBA.

Ruth and Molly would argue that Andy is a freelance journalist, and that he even owns his own corporation for the purpose of conducting all of his "business activities". However there is no argument that Andy is an independant contractor because he is a partner and is sharing TBA's profits and losses.

Ruth and Molly would argue that Andy's malice in committing libel put his act of writing the story about Sam outside of the scope of his partnership duties with TBA, so they should not be vicariously liable. Sam would have a stronger argument here if Andy had been merely negligent in his libel of Sam. However since Andy's libel was willful and malicious, Ruth and Molly have a strong argument that Andy should be responsible as an individual and TBA, and Ruth and Molly, should not be responsible.

Sam may counter that as partners of TBA. Molly and Ruth are uniquely situated to prevent this type of harm, and that their failure to research or account for the

credibility of the stories in their newsletter shifts liability to them.

This is a close call, but ultimately, since Andy's actions were expressly willful and malicious, TBA and Molly and Ruth would probably be able to avoid personal liability for Andy's actions. If Sam were successful in a suit against Molly and Ruth as partners of TBA, they would be jointly and severally liable. They would then successfully seek indemnification from Andy.

Computer Store v. Ruth, Molly, Andy and TBA

As a general partner of TBA, Andy purchased a computer for TBA from The Computer Store. The store sent a bill to Molly, but she refused to pay it. The question is whether the general partners are liable for this debt.

As discussed above, general partners are personally and equally responsible for debts and liabilities of the partnership. Andy uses his computer to perform his role as journalist for TBA, and it broke as he was writing a story for TBA. Further, he purchased the replacement "for TBA". This act was an appropriate action in furtherance of his duties and role with TBA, and all TBA parners should be jointly and severally liable for it.

Ruth and Molly may argue that they should not be responsible for this business expense because Andy was committing a tort outside the scope of his employment, namely defamation, which broke his computer. However, Andy could have been writing anything for TBA on his computer when it broke. It was only coincidental that he was writing something defamatory, the defamatory nature of the article did not cause the break which necessitated a replacement.

Thus TBA is reponsible for the debt to Computer Store, and Molly, Andy and Ruth are jointly and severally liable for it.

Question #2 Word Count = 1482

6)

The rights of all parties involved in this matter will be determined by the validity of the instruments executed by Tess and Greg.

The 2011 Will

Testamentary Trust

In 2011, the facts state that Tess created a "valid will". A valid attested (formal) will requires that a testator with 1) intent and 2) capacity (18 years old, knows the extent of her property, the natural objects of her bounty, and understand the legal ramifications of the will she is executing) adheres to 3) will formalities, which includes signing the will in the presence of two disinterested witnesses who understand the nature of the document they are witnessing, who then must also sign to acknowledge aforementioned facts. Since we are told this will is valid, we can assume that Tess has adhered to the formalities and that Tess has capacity at this time.

A testamentary trust is created on these facts, whereby a valid will expressly creates a trust to be formed upon death of the testator/settlor. A valid trust requires 1) settlor with capacity, 2) a beneficiary, 3) res (property to be transferred), 4) a trustee, 5) intent, and 6) a proper purpose for the trust. Capacity to form a trust is the same as for a will, except there is no requirement in California that the settlor of a trust be 18. Tess is 85 so this is met regardless. The beneficiary here is Greg and Susie, Tess' grandchildren. The res is the income from the trust, to be distributed to the grandchildren then living, annually. This is a valid honorary trust and valid purpose, to give annual income to Tess' granchildren after her death.

This trust does not express who the trustee will be. However, courts will not

allow otherwise validly formed trusts to fail for lack of a trustee, they will simply appoint one.

Rule Against Perpetuities

The Rule Against Perpetuities (RAP) prevents the "dead hand" from controlling property indefinintely- specifically, ownership interests in property must vest, if at all, within 21 years of a life in being (measuring life). Tess' 2011 testamentary trust would form automatically upon her death, pursuant to her will. At the death of the last grandchild, remaining assets would go to the Zoo for the purpose of caring for "its elephants". On its face, this clause may appear to violate the RAP because the funds would go to grandchildren "then living" so the class would close at that time, which means the rights to the zoo may vest more than 21 years after a life currently in existence. Further, where there is a charitable trust formed, the RAP does not apply. Charitable is defined as a purpose that helps the public generally. Zoos exist for the benefit of the public so this term does not violate RAP.

Therefore, as of 2011 there is a validly formed will and valid testamentary charitable trust.

The 2013 Will

Conservatorship

In 2013, Tess' grandchild Greg was appointed by the court to be conservator for Tess due to Tess's failing mental abilities. With the court's express authorization, Greg made a new will for Tess. A court may authorize a conservator to make a new will for a testator where they feel that it would be in the testator's best interest, and where the conservator would be well suited to execute the intent of the testator.

There are several issues with Greg's actions here. Greg drafted the new will himself, without consulting at all with Tess. Further, he devised the entire estate outright to himself and Susie, Tess' other grandchild. This contradicts Tess' express intent in her previous 2011 document, whereby she left the residue of her estate to the zoo upon her grandchildren's death. A conservator may redraft the will of a conservatee, but they must seek the conservatee's input and they cannot be interested in the transaction.

Capacity

In extreme cases the conservator may override the intent of the testator, if it is in their best interests and would reasonably reflect their intent if they were of sound mind. However given Tess' previous and subsequent capacity, the facts do not indicate that she lacked capacity to create her own will and trust documents. Capacity is only determined by whether someone understands their estate and the natural objects of their bounty (their relatives), and whether they understand the legal ramifications of the will/trust. Even if Tess were mentally unsound generally, she may be able to validly execute a will or trust during a lucid time period.

There are no facts here that show that Tess lacked any of these requirements, so Greg's 2012 will is voidable for lack of Tess' intent.

The 2014 Will and Trust

With the help of her lawyer, Tess properly executed and had witnessed a new will in 2014, cutting Greg out of her estate entirely. This was her prerogative.

Zoo's Petition

Cy Pres

Zoo has petitioned the court to modify the trust to provide for the care of its animals generally. This is because the trust expressly states in a residual clause that the residue of Tess' estate upon Susie's death goes to Zoo "for the care of its elephants." Using the doctrine of Cy Pres, courts will sometimes interpret a generally charitable devise to go towards another similarly situated charitable purpose, where the original specific purpose does not exist anymore (for example if the testator intended to support homeless people and the original devisee was a homeless shelter that since went out of business, the court may award the reside to another homeless shelter in the area).

Here, upon Tess' death in 2015, and the only remaining elephant died that same year. However, animals at Zoos die and are frequently replaced by others. Further, since Susie is still alive, the Zoo's interest hasn't vested yet. Upon Susie's death, the Zoo may have elephants again. And even if they did not, the court may utilitize Cy Pres to justify leaving the residue of the estate to the Zoo if they thought that Tess would intend to benefit the Zoo as a whole or Zoos generally.

Conclusion

Therefore, Susie takes as beneficiary of the trust, with the court appointing a trustee to distribute income from the trust and manage the trust. Greg takes nothing and the Zoo takes the reside upon Susie's death whether or not they have elephants at that time.

Question #3 Word Count = 1059

END OF EXAM

1)

MEMORANDUM

TO: Dario Machado, Managing Partner
FROM: Applicant
SUBJECT: Richard Burnsen and B-G Investors
DATE: February 24, 2015

You requested that I research ethical and fiduciary issues raised by Chris Conner's actions in relation to a stock purchase deal he is in the middle of closing for our clients, Richard Burnsen and Burnsen-Goldman Investors ("B-G"). Conner must decide immediately whether to close the deal and transfer the stock certificates. The seller is trying to revoke, and and his counsel insists that Conner has become the escrow holder of the transaction. His counsel also says that if Conner does not return the stock certificates, the seller would sue Conner and our firm.

I have researched relevant statutes and case law. Please find my analysis regarding your enumerated questions below.

Part I - Ethical / Fiduciary Issues.

A. Did Conner become an escrow holder for all the parties?

Conner's categorization as an escrow holder in his transactions with his client B-G and their deal with Jordan Virta is a key threshold issue that will determine Conner's and the firm's liability and best course of action. Despite Conner's statement that he doesn't understand how he could be an escrow agent since he "didn't volunteer to be there agent", the courts have inferred escrow agent status even where it was not expressly and voluntarily undertaken. There is statutory and case authority that will help us in determining Conner's legal status, but we

must first closely examine the facts at hand and Conner's involvement.

Conner was involved in a transactional deal between B-G, his client, and their former employee Jordan Vita. Vita had orally agreed to transfer his 2,000,000 shares of BTI stock, which is the company where Vita previously worked with Richard Burnsen, founder and chair of BTI. Vita agreed to sell the shares to Burnsen-Goldman Investors, a company that Burnsen formed with Gerald Goldman, ostenstibly for the purpose of generating enough revenue to purchase the stocks for $1.50 per share. The deal that Conner initially worked out with Steven Dunn, Virta's attorney was as follows: the deal would only close after the stock purchase agreement and promissory note were signed, and after Virta acknowledged receipt of the down payment of $500,000.

After closing, Virta's signed share certificates would go to BTI's transfer agent to be reissued in B-G's name and the shares would then go into an escrow account at Columbia State Bank and Trust Company, as security for the note, and thereafter be distributed by the Trust Company to B-G only as it paid for the shares according to a 2 year payment schedule. There is a dispute as to the due date for the down payment, where Virta argues it was February 18th and our clients, B-G, insist that this date was never firm.

In any case, on February 17th, Virta fulfilled his initial obligations by tendering the purchase agreement and promissory note to Conner. Conner gave these items to Burnsen for him and Goldman to sign, and on the 18th and 19th of February it become apparent that they had not done so as Virta was contacting Conner inquiring why the deposit had not yet been made. Though Burnsen and Goldman did eventually sign the stock purchase agreement and promissory note on February 23rd, they are now insisting that there was no Which brings us to Conner in possession of the documents, fully executed by all parties. Taylor is insisting that a letter sent by Virta on February 22nd revoked the contract for the transaction and he wants the stocks returned to him. Our clients B-G want the

certificants sent to the BTI transfer agent. Taylor is now communicating to Conner that he (and the firm) will be liable for conversion if Conner does not return the stocks, so Conner is holding onto them for now.

Attorneys as Escrow Agents

Statutory Authority

Columbia code Section 17003 defines escrow as "any transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument... or other thing of value to a third person to be held by that third person until the happening of ... the performance of a prescribed condition, when it is then to be delivered by that third person to the grantee...".

Though "escrow agent" is not specifically defined, its definition of escrow implies that an escrow agent would be one that facilitates the above. As the transaction in the statute is broadly written and on its face, appears to define Conner as an escrow agent in this matter. Conner has a valid argument that in holding documents that all parties must sign, he is performing duties typical of a transactional attorney. Additionaly, there was an actual bank account set up for escrow in this case, so becoming an escrow agent was clearly never Conner's intention. Attorneys are fiduciaries of their clients and are held to strict ethical codes of conduct in their practice of law. If it is possible to define them as an escrow agent would also subject them to the required duties of an escrow agent, which sets up another layer of duties in addition to possible conflicts. So we must look to case law to clarify the definition of "escrow agent", particularly in regards to an attorney involved in a transaction.

In Wasman v. Seidan, an attorney handling a marital dissolution was entrusted with a deed that he was only to deliver subject to a condition (delivery of cash

money from one party to the other). When that attorney failed to hold the deed until the condition was satisfied, opposing counsel sued him for malpractice. The court found that, although the attorney's conduct would not rise to the definition of malpractice, it could be construed as negligence or conversion. The court reasoned that it was proper for opposing counsel to "infer acceptance of the entrustment [of the deed] from the attorney's failure to reject or otherwise respond to the deed's delivery" even though there was no "allegation of an express undertaking" by the attorney (Seidan). Thus, it appears that an attorney's status as an attorney does not inhibit a court from inferring that they are an escrow agent based upon their actions.

Since Conner in possession of the certificates, and since he was holding them pending performance of his clients, he was in a position similar to the attorney in Seidan whereby he was entrusted with valuable goods pending a finalized performance of a business transaction. Therefore, Conner is most likely properly defined as an escrow agents and not sheilded from his responsibilities as such by simple fact that he is also an attorney with independant duties.

B. If Conner acted as an escrow holder, was it proper for him to be an attorney for one party and an escrow holder for all parties?

As I will discuss in response to question I.C., it was not mutually exclusive for Conner to be a responsible escrow holder and serve his client's interests. The court in Seidan specifically addressed that they did "not intend to discourage attorneys from facilitating transactions or settlements". Thus it was probably proper for Conner to be both, if he thought he could perform both duties reasonably and had been more diligent in his capacity as escrow agent.

C. If Conner acted in his dual capacity, does it restrict his ability both to advise his clients and to follow their instructions?

The court in Seidan weighed the attorney's duties to his client with his duties as one who had been entrusted with escrow responsibilities. They held that the opposing party had "reasonably relied on Seidan [the attorney] because of his professional status and role as attorney" and that if he didn't want to be entrusted with that responsibility, he "should have promptly returned [the deed] to [the opposing party]." A similar argument could be made here, that Conner did not have to take possession of the documents in this case- he could have insisted that his clients receive them directly, if the thought that his responsibility to hold the documents compromised his ability to zealously advocate for his clients.

D. If Conner is an escrow holder, what are his duties to the opposing party?

The court in Seidan held that the attorney who breached opposing counsel's trust by delivering a deed without regard to a condition could be liable for negligence or conversion. The court specifically "rejected the theory that attorneys owe a duty of care to adverse third parties in litigation", particularly in light of the fact that that agreement was made through an "arm's length negotiations between counsel acting to protect their respective clients' interests."

This is analagous to Conner's case. Therefore, Conner's duties were merely to act reasonably (so as not to rise to the level of negligence) as an escrow agent and did not owe a particular duty of care to the opposing party.

Part II - Options.

Conner and the firm have several options before them at this time. I will analyze the consequences and legal exposure resulting from each option. Please note, that as Conner is the firm's agent, his interests and the firm's interests align.

1. Complete the purchase and forward stock certificates for transfer.

In the case Diaz v. United Columbia Bank, the bank went through with closing a transaction where they served as escrow agent, even though there were serious questions as to the validity of the transaction terms they were given. Conner should probably not go through with the purchase and would be better to consider an interpleador.

2. *File an interpleader action against our clients and the seller.*

Conner amounts the filing an interpleader to "suing" his clients. However in Diaz, where a bank failed to interplead when it could have and went through with closing a transaction where there lingered considerable material questions, the court stated that the due were not the same at all. The court stated that since parties in escrow "tend to be predisposed to resolution", it is far favorable to interplead and allow the parties to resolve their disputes that way, instead of closing a deal and forcing a lawsuit, whereby one party is inherently in a better position than the other. They distinguished a lawsuit from interpleader further by stating that there is a "difference in the tenor of the litigation", and the bank "did not have a right to ignore these options [interpleador] and blindly close the escrow without making a reasonable effort to determine the correctness of the instructions prepared by it...".

Conner and the firm could argue that the bank in that case had expressly agreed to be an escrow agent, therefore owed a higher duty to all involved parties and were better situated to file an interpleador. Unlike attorneys, they would not have one-sided duties to clients on only one end of the involved transaction. However this argument is yet unsupported by relevant case law.

3. *Do nothing immediately and retain possession of the stock certificates, until seller sues or parties work out a settlement.*

As the Diaz court reasoned, it is better to interplead and force parties to negotiate from that more equal footing, then to force a transaction that is heavily disputed and then force a lawsuit. However as Conner's clients are the ones that would be arguably on the more favorable side in the event of a lawsuit (we have the stocks), the firm and Conner could argue that it would be their job as zealous advocates of their clients to wait for a lawsuit from Virta.

Question #1 Word Count = 1934

END OF EXAM

1)

STATE OF COLUMBIA

v.

CHRISTOPHER DANIEL

Criminal Division

CASE NO. 2014-2341

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

1. GLORIA DANIELS' HEAD MOVEMENTS TO OFFICER TYLER JAMES WERE NOT INTENTIONAL AND THUS IRRELEVANT TO THESE PROCEEDINGS

Within an hour of Gloria Daniels' (GD) alleged assault at her home, police officer Tyler James attempted to questions her about who had assaulted her. GD subsequently moved her head, which the officer and the paramedic Kevin Robert interpreted as nonverbal communication equivalent to an express statement "yes".

However, GD's doctor Nancy Donahue who has extensive firsthand experience

rehabilitating brain injury victims, treated GD directly has stated in her affidavit that "it was very unlikely that [GD] would have any memory of the event that caused the injury. In fact Donahue stressed that "[w]ith such a serious brain injury, it was extremely unlikely, if not impossible, that [GD] could have remembered the event that caused the injury." Donahue made this statement after reviewing the statements of police and first responders and spending over six months treating GD.

Given Donahue's extensive background experience working with victims of this exact type of assault, and given her direct experience in assessing the nature of a brain trauma victim's "erratic movements", it is fair to rely on her expertise in assesing that GD's head movements following her injury were not expressive conduct at all. A lay person who has not treated brain injury victims or spent time with GD herself might interpret GD's head movements differently. This issue could prejudice Defendant and confuse the jury, who would have less direct experience, education and expertise on these matters than Dr. Donahue. Therefore, evidence regarding the movements should be excluded as irrelevant under Columbia Rule of Evidence (CRE) 401.

2. IF GLORIA DANIELS' HEAD MOVEMENTS WERE MEANT AS A NONVERBAL ASSERTION, THEY SHOULD BE EXCLUDED AS HEARSAY NOT WITHIN AN EXCEPTION

Hearsay

Under Columbia Rule of Evidence 801, testimony from either James or Robert regarding this alleged conversation would be hearsay because the District Attorney is offering it to prove the truth of the matter that the declarant, GD, allegedly asserted. CRE includes "nonverbal conduct" in the rule of hearsay if it is intended by the person as an assertion. According to James and Robert, when asked if "Christopher" had "done this", GD nodded her head "yes".

The District Attorney has statements from James and Roberts and will offer their testimony as relevant evidence under CRE 401 to prove that Christopher killed GD. Hearsay is inadmissible in Columbia persuant to CRE 801 and thus any testimony from Robert of Tyler regarding GD's movements are inadmissible.

Excited Utterance

If the court finds that GD's movement was in fact a nonverbal assertion, the District Attorney will assert that GD's movement to James should be admissible as an exception the hearsay rule as an excited utterance. CRE 803(8) defines an excited utterance as "A statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition." The Supreme Court narrowed this definition in People v. Jackson, where a defendant had allegedly run over his girlfriend Gadia with a truck. The court found that "a statement made in response to an inquiry" well after the exciting incident could be found to be an excited utterance. If GD's statement is found by this court to be a nonverbal assertion, the victim's "statement" was certainly testimonial (as will be elaborated below). However in Jackson, the victim expressly elaborated her experience in verbal statements. Further, Jackson was not an unavailable victim. She was subject to cross examination by the Defandant in that case, which would lend her statements more credibility than GD's alleged statements because she had to account for them at trial.

So while a testimonal statement may be an excited utterance, GD's movements were not an excited utterance because they were likely involuntary.

3. IF GLORIA DANIELS' MOVEMENTS TO THE POLICE WERE VOLUNTARY EXPRESSIVE STATEMENTS, ADMITTING THEM AS EVIDENCE VIOLATES DEFENDANT'S CONSITITUTIONAL RIGHTS BECAUSE HE CANNOT FACE HIS ACCUSED.

CRE 104.b articulates that in deciding upon the admissibility of evidence, the court "is not bound by the rules of evidence except those with respect to privileges. Therefore, even if the court finds that GD's movements may be admissible as an excited utterance, the court must consider the U.S. Constitution's Confrontation Clause (CC) and not admit this evidence.

In Crawford v. Washington, the Supreme Court expanded on the importance of excluding evidence that violates the Confrontation Clause (CC). In that case, the Defendant had allegedly stabbed a man for raping his wife, and the state sought to introduce a tape-recorded statement made to police from the wife that was made several hours after the stabbing. The court found that "testimonal hearsay" should be excluded if it violated the confrontation clause, even where that same evidence would be admissible under a state's hearsay exception statue.

The court in Crawford defined "testimonial", or those who "bear testimony" as "typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. In that case, the "testimony" had been elicited from a declarant in much the same manner as the police officer elicited a response from GD. The court in that case found the declarant's recording to be testimony because it was not elicited for the purpose of responding to an ongoing emergency, but rather for the purpose of determing guilt of the Defendant after the fact. This is exactly analogous to the immediate case. GD was injured, PD was dead, and the assailant, whoever he or she was, was clearly not on the scene.

Further, the court articulated that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law. Where testimonial evidence is at issue, however, the Sixt Amendment demands... [that] unavailability and a prior opportunity for

cross-examination."

In the immediate case, Defendant does not have and will never have the opportunity to confront GD. Therefore, the court should exclude this evidence and preserve Defendant's consitutional rights to confront his accuser on testimonal evidence.

4. THE 911 OPERATOR THAT SPOKE TO PD WAS AN OFFICER FOR PURPOSES OF THE CONFRONTATION CLAUSE, THUS THE CALL WAS TESTIMONIAL IN NATURE AND ADMISSION WOULD VIOLATE THE CONFRONTATION CLAUSE

In Davis v. Washington, the Supreme Court heard a case where they dealt with the issue of whether a 911 call was testimonial in nature, for the purposes of examination under the Confrontation Clause. In that case, the court found that statements "are non testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." They went on to find that the statements in question in that case were violative of the confrontation clause because they were testimonial, as they were made to a 911 operator after the crime had been committed and the Defendant was fleeing from the victim. The court also held that statements to a 911 operator could just as likely be "testimony" as statements made to an officer, as GD's statements were. The court expressed that "we consider their acts to be acts of the police", referring to 911 operators.

Here the victim declarant PD expressed that the assailant had just "drove off". The operater's further inquiries into the identify of the assailant were not made for purposes of assisting in an ongoing emergency, they were made to find out who had done it and were meant to elicit incriminating responses.

Therefore, as in Davis, this court should exclude the victim's 911 call.

CONCLUSIONS

All documentary or testimonial evidence regarding the statements by the two decedents, PD and GD, should be excluded in this case. GD's statements were involuntary and if they were not, were inadmissible hearsay. More importantly, admitting the statements of PD and GD would violate defendant's constitutional rights under the 6th amendment right to confront one's accusers, and this court should excercise its discretion in determining the admissibility of preliminary evidence by exluding them.

Question #1 Word Count = 1364

END OF EXAM