Widener University
Commonwealth Law School

Office of Admissions

Memorandum

Date: May 2016

To: TAP Participants

From: Eric M. Kniskern, Director of Admissions

Re: TAP Information

Enclosed, please find a syllabus, instructions for each course and first assignments for TAP. You will not need to purchase any textbooks for TAP.

Orientation for TAP will begin **promptly at 5:30 p.m.** on Tuesday, May 24, 2016 in Room L203 located on the 2nd floor of our Classroom and Law Library Building. A campus map can be found at our website here: (you will be in Building 1)
http://commonwealthlaw.widener.edu/current-students/resources-for-current-students/campus-map/

Attendance at TAP Orientation is mandatory, so please plan to arrive on campus no later than 5:30 p.m. If you have any questions prior to the 24th, please feel free to contact the Admissions Office at (717) 541-3903 or at admitcwlaw@widener.edu.

I look forward to welcoming you on the 24th.

Widener University
Commonwealth Law School

MEMORANDUM

TO: TAP Legal Methods Students - Summer 2016

FROM: Professor Hemingway

DATE: May 3, 2016

RE: Syllabus and Materials for First Class on May 25

Welcome to the Legal Methods component of TAP. There is no required text for the course, but I recommend you purchase and read *Writing Essay Exams to Succeed in Law School* by Professor John C. Dernbach. This book is available in the campus bookstore. Photocopied materials will be distributed in class each week.

The purpose of the Legal Methods course is to introduce you to some of the basic skills needed to read, understand, and use the law to solve a client's legal problem. In other words, you will begin to learn how to "think like a lawyer." You will be instructed on how to describe and apply the law to a client's situation and present your ideas in a clear, well-organized format.

Enclosed is a syllabus for the course, the TAP Legal Methods Course Policies handout, materials on the case method and case briefing, and the Crowe v. J.C. Penney case. Read all of these materials carefully before our first meeting and be prepared to submit your case brief of Crowe at the beginning of class on May 25. I look forward to working with you this summer.

Widener University School of Law, 3800 Vartan Way, P.O. Box 69382, Harrisburg, PA 17106-9382
aphemingway@widener.edu

TAP LEGAL METHODS SYLLABUS – SUMMER 2016

Professor Anna Hemingway
aphemingway@widener.edu
(717) 541-3960

Class 1 – Wednesday, May 25, 2016

- Assignment due for Class 1: Read materials on case briefing, read Crowe v. Penney, prepare a case brief for Crowe and mark the case to indicate where the information in your case brief was found.

- Class Topics: Introduction to legal methods, sources of law, case briefing

Class 2 – Wednesday, June 1, 2016

- Assignments due for Class 2: Read Kmart v. Anderson & Jackson v. Kmart; prepare case briefs for both cases and mark the cases where the information in your case briefs was found.

- Class Topics: Case briefing, case comparisons, working with statutes, articulating a legal rule

Class 3 – Wednesday, June 8, 2016

- Assignments due for Class 3: Complete exercise assigned in Class 2
- Class Topics: Articulating a legal rule, working with statutes, synthesis, counterarguments

Class 4 – Wednesday, June 15, 2016

- Assignment due for Class 4: Complete exercise assigned in Class 3
- Class Topics: Writing a legal memo, CREAC form, organization

Class 5 – Wednesday, June 22, 2016

- Final Exam

TAP LEGAL METHODS: COURSE POLICIES

SUMMER 2016

I. Overview

The Legal Methods component of TAP is designed to engage students in learning how to read, analyze, and write about the law. Classes will be conducted in discussion format and will address various aspects of legal analysis including case briefing, describing and applying legal rules, and synthesis.

II. Format of Papers

All Legal Methods assignments must conform to the attached formatting guidelines.

III. Student Code of Conduct

Your work and conduct in the Legal Methods Program, as in your other courses, is subject to the "Student Code of Conduct of Widener University School of Law." Sections 201(a) and 201(b) are most relevant to your work in Legal Methods and are reproduced below.

> **Section 201. Academic Misconduct Violations.** It shall be a violation of the Code for a student to commit any of the following acts or omissions. Academic misconduct for purposes of this section includes both the curricular and extracurricular, regardless of whether academic credit is awarded.
>
> (a) **Cheating**.
>
> (1) To give or secure any information about an examination or other academic assignment except as authorized by the course professor.
>
> (2) To use, if prohibited by the course professor, any book, papers, notes, other person's work, or other materials for an examination or other academic assignment.
>
> (3) To continue writing an examination answer after the permitted time has expired.
>
> (4) To take, conceal, withhold, destroy, damage, abuse, or deface property without authorization when the act deprives another student of access to or use of the property for an academic purpose, or to otherwise impede the academic work of another student.
>
> (5) To copy, consult, or use, for an academic purpose, the work of another student without the authorization of both that student and the course professor.

(b) **Plagiarism.** To take the written work of another and pass it off as one's own for an academic purpose. The following are examples of plagiarism, but not an exhaustive list of situations in which plagiarism can occur:

(1) To use someone else's words without unambiguous acknowledgement.

(2) To paraphrase someone else's words without unambiguous acknowledgement.

(3) To use someone else's ideas without unambiguous acknowledgement.

The assignments you submit in Legal Methods must be your own work product. Although you may discuss ideas about a problem with your classmates, limit yourself to general discussions. Do not give an outline or a completed assignment to another student. The person who loans the paper and the person who uses it will be equally at fault.

Whenever you use the words or ideas of another writer, you must acknowledge the original source. If you use the exact words of another person, use quotation marks and cite the source. You must cite the original source even if you merely put the source's ideas into your own words. This rule applies to cases and statutes.

Use of Technology. If you have questions about a word processing system or how to meet the formatting requirements for your graded assignments, read the word processing manual, ask a library staff member, or contact your Legal Methods Professor. Do not invite the "appearance of impropriety," and place your fellow students in the awkward situation of determining whether they have witnessed a violation of the Student Code of Conduct, by permitting another student to stand behind you and provide word processing tips to you while your assignment is on the screen.

IV. Grading

Your grade for the Legal Methods component of TAP will be based on the final project: an objective memorandum that will be written during your last Legal Methods class on June 22, 2016. If you arrive late, you will not be given extra time to write the memo. Make-ups will be allowed only in the event of a documented emergency that is entirely beyond your control.

WRITTEN ASSIGNMENTS

A lawyer's work must comply with the rules of the jurisdiction in which she or he is practicing. Most jurisdictions have rules governing the format of written submissions to the court and sanctions may be imposed if a lawyer fails to comply with the rules. In this "jurisdiction," Legal Methods papers are subject to the following rules:

Format

1. Assignments must be typed.
2. Assignments must be set to 8 ½ x 11 inch paper size.
3. The top, bottom, left, and right margins must be set at 1 inch.
4. Assignments must have page numbers centered at the bottom of each page.
5. Assignments must be double-spaced.
6. The text must be in Courier New or Courier font type with 12 point font size (i.e., 10 characters per inch). Do not use other font styles (e.g., bold) unless instructed to do so. Do not embellish assignments with graphics.
7. The text must be aligned to the left only, not the right (i.e., left aligned, not justified).
8. Assignments submitted *electronically* must be Microsoft Word documents (i.e., either .doc or .docx files). If you are not using Word, you should consult your word processor's help file to determine how to save your document as a Word file (note: many word processors have a "Save As" option that allows you to choose the type of file to save). Keep in mind that the computer lab on campus has Microsoft Word, which you can use to create, edit, or verify your file.
9. For *paper copy* submissions of assignments:
    a. Paper copies must be on plain, white paper. Do not use erasable bond, "onion skin," textured paper, or paper with a shiny coating.
    b. Paper copies must be single-sided.
    c. Paper copies must be stapled once in the upper left corner. Do not use plastic or paper covers or any other binding; do not use end sheets.

CHAPTER 8

PREPARING FOR CLASS

Your law school classes will be different than any other class you have taken. Rather than reading textbooks and listening to lectures, you primarily will study judges' decisions in actual cases and will engage in Socratic dialogues about them with your professors and colleagues. This chapter will help unravel some of the mysteries of class preparation and will tell you the best way to prepare for class. In the next chapter, you will learn about the Socratic dialogue and the ways to make the most of your class time.

A. CASE METHOD

During the first year of law school and in many upper-level courses, your professors will use the case method. The assigned readings in your classes will consist largely of cases from the casebook for the course. Rather than reading a textbook description of the law, you will read the opinions that judges have written in actual lawsuits. Although technically the word "case" refers to the lawsuit itself, "case" also is used to refer to the judge's written opinion.

The case method is a reflection of the importance of judicial decisions in the common-law system. A great deal of the law comes from judicial decisions, and decisions in new cases are based on already decided cases. Therefore, learning to read and to analyze cases is essential. But cases teach more than just legal principles. By learning law in the context of actual lawsuits, you learn how disputes arise, the judicial procedures for resolving them, and available remedies. The case method also makes law come alive. Rather than reading pages of abstract statements of law, the principles are presented more vividly by real problems involving real people.

A case is included in the casebook either because it has been important in the law's development or because it is particularly useful in presenting a particular legal issue. The casebook author will include only the portion of the opinion that is relevant to the issue being studied. Sometimes, the opinion will be from a trial court. More often, however, the opinion will be from an appellate court because appellate courts primarily decide issues of law, which are the main focus of your classes. Trial courts, on the other hand, decide issues of fact and of law. Moreover, when deciding issues of law, trial courts are bound by the precedent of appellate court decisions, so trial court opinions less often include an in-depth examination of a legal issue. Finally, state trial court opinions usually are not published and, therefore, are less readily available to casebook authors.

An important lesson you will learn from reading cases is that more than one answer to a disagreement may exist, as demonstrated by concurring and dissenting opinions. In a concurring opinion, a judge agrees with the majority's decision but disagrees with its reasoning; in a dissenting opinion, a judge disagrees with the decision, too. The judges do not disagree because they cannot understand the law. They simply have different perspectives on how the law should apply. Therefore, do not be surprised or concerned if you disagree with the cases you read. To the contrary, independent and creative analyses of cases and of the governing law are important skills.

Beware! Your professors normally will post reading assignments for the first class session. Find out where assignments are posted, and be sure to buy your casebooks in time to get prepared. Although some professors will lecture on the first day of class, most professors will expect you to be prepared to describe the cases included in the reading assignment and to discuss the legal issues they raise. You will learn much more from class if you have done the reading beforehand.

B. READING CASES

Give yourself more time to read the assigned cases than you think you will need. Judicial opinions are not written with law students in mind. They are written for judges and for lawyers. Opinions are filled with terminology and concepts that

will be new to you and may require several readings to understand them. A law dictionary will be an invaluable companion as you puzzle your way through the cases. You also will have to work to determine how each case fits with the other assigned readings. The reason your professor assigned the case may not be readily apparent.

The necessary class preparation time varies from person to person. At the beginning of the first year, everyone will be struggling to make sense of the cases and to keep up with the assigned readings. As you learn to read cases, you will become more efficient and will prepare for class more quickly. Like every other skill, some people will learn more quickly than others. Do not be discouraged if it seems to be coming more slowly for you. If you keep working at learning, you will learn. If you do not keep working, you may not become a lawyer and certainly will not become a good lawyer. If you fall behind in your assigned reading, catch up on the materials you missed only after preparing for each day's classes. Otherwise, you may stay behind for the rest of the term.

When you read a case, the first line will be a caption that identifies the parties to the lawsuit, such as *Shelley v. Kraemer*. In a trial court opinion, the plaintiff's name normally is first, and the defendant's is second. In an appellate court opinion, some jurisdictions put the appellant's name first and the appellee's second; others use the trial court caption. If the case has more than one plaintiff or defendant, the case name still will list only

one party for each side. The "v." between the names is an abbreviation for "versus." Just beneath the case name will be a citation to the court that issued the opinion, the year in which the case was decided, and where it was published.

Usually, the next line will identify the judge or justice who wrote the opinion. For example, it might say: "Mr. Justice Stewart delivered the opinion of the Court." More frequently, just the author's name is given, such as "Zorotovich, J." This does not mean that the author's name is Janet Zorotovich. The "J." is an abbreviation for "Justice" if the opinion was issued by a court of final appeal or for "Judge" if issued by a trial court or intermediate appellate court. Similarly, "Madsen, C.J." refers to Chief Justice or Chief Judge Madsen.

Normally, the opinion then describes the parties to the case, the plaintiff's cause of action, and the relevant facts. Appellate court opinions also describe the lower court(s) decision, the procedural method by which the appellant brought the case to the appellate court, and the grounds for appeal. The court then begins its substantive discussion of the case by stating each legal and factual issue. For each issue, the court describes the governing law, how the law applies to the facts of the case, and its decision ("holding") concerning that issue. After discussing each issue, the court states its final disposition of the case. A trial court opinion describes the remedy, if any, the court is granting; an appellate court decision states whether the lower court decision is affirmed or reversed or whether

the case is being sent back ("remanded") to the lower court for further proceedings.

The best way to read a case is a matter of personal style. Many people read the entire case quickly to get a sense of it and then re-read it more carefully as many times as necessary to fully understand it. You may understand the case after one reading, but that will be unusual during the first few weeks of law school. The opinion often will include unfamiliar words and terms, which you should look up in a law dictionary. Learning the language of the law is like learning any other language. When you do not know a word, look it up! You also should underline or otherwise highlight important passages, such as the court's statement of the applicable law.

Understanding the court's opinion is just the first step. The next step is analyzing its reasoning. Did the court apply the appropriate legal principles to decide the case? Did it properly apply the principles? Is this opinion consistent with relevant precedents? What are the legal, social, and political ramifications of the court's decision? Will it cause inappropriate results in future cases? Where does this case fit with the other cases you have read? Thinking about these questions will enhance your understanding of the case and of the legal process and will prepare you for the class discussion.

After analyzing the case, read the notes following it in the casebook. The notes often include questions about the case and brief descriptions of other

cases that address the same or similar issues. The note cases may reach a different conclusion or may present a twist on the facts of the main case. Because there are so many note cases, you should not take time to find and to read the full opinions for them unless it would help your understanding of the subject or unless your professor tells you to do so. However, you should think about the note cases and attempt to synthesize them with the main case. If they reach a different result, are they inconsistent or are they distinguishable in some legally relevant way? Thinking about the note cases will illuminate new dimensions of the legal principles you are studying and will provide excellent practice at synthesizing cases.

C. BRIEFING CASES

You are now ready to begin a particularly important part of your class preparation. You now should "brief" the main case. A brief is a written summary of the case. To prepare one, you must distill the case's most important parts and restate them in your own words. The effort will provide a variety of important benefits.

First, to describe a case accurately, you must read it carefully and thoroughly. Describing the case in your own words forces you to determine exactly what the court said, which concepts and facts were essential to its decision, and the proper legal terminology and procedures. You do not understand a case simply because you can copy parts of it from

your casebook. On the other hand, if you can describe the concept in your own words, you can feel reasonably confident that you do understand it.

Second, after reading so many cases in each course, your case briefs will help you remember the details of each case for class discussions and exam preparation. Case briefs are a particularly helpful study aid because they cover all the cases you studied in class, whereas most other study aids are not so carefully tailored to your coursework. To be most effective, case briefs must be brief. Otherwise, you will have difficulty discovering the salient points in your brief during class discussions, and you will have far too many pages to read for convenient exam review, because you may brief hundreds of cases each term.

Third, briefing cases exercises skills you will use throughout your legal career. As a lawyer, you will have to read and analyze cases with a careful eye to detail. You also will have to summarize cases when writing legal memoranda, briefs, and other documents and when making oral arguments to courts. Because case briefing is such a valuable skill, the time and effort you spend perfecting it in law school will be repaid many times over.

Because case briefing can be time consuming and difficult, especially when you are beginning, you may be tempted to use commercially prepared case briefs. By all means, resist the temptation. The primary benefit of a case brief comes from prepar-

ing it. The process of writing a brief forces you to exercise your analytic skills and to dig into all the procedural and substantive aspects of a case. Simply reading a canned brief will not provide this valuable exercise. Moreover, you cannot be sure that the canned brief is accurate or focuses on the same aspects of the case as your professor. Besides, canned briefs are not available for most of the cases you will have to read when you are a lawyer!

As you become more experienced at briefing, you will get faster. When you have become adept at briefing, you can consider dispensing with a separate written brief and briefing in the casebook instead. You can make the necessary notations in the margins of the casebook and can highlight key passages. You should keep this possibility in mind when you are deciding whether to buy new or used casebooks, because you will want room for your notations. You also can save time by developing a list of abbreviations. Some common law school abbreviations are "P" or "π" for "plaintiff," "D" or "$\triangle$" for "defendant," and "K" for "contract."

D. CASE BRIEF FORMAT

There are many different ways to brief a case. You should use the format that is most useful for your class and exam preparations. Regardless of form, every brief should include the following information.

1. CAPTION

A brief should begin with the case name, the court that decided it, the year it was decided, and the page on which it appears in the casebook. The court is included to indicate the precedential value of the opinion. The precedential value depends on the court level—trial, intermediate appellate, or court of last resort—and on whether it is a state or federal court. Including the court also will be helpful when you are synthesizing the cases in that section of materials. The year of decision also is included to help assess the opinion's precedential value. Older cases may have been modified or reversed by more recent ones.

2. FACTS

Next, state the facts of the case. This section is necessary because legal principles are defined by the situations in which they arise. For example, assume you are briefing a case in which the defendant was convicted of murder. If your brief only states that killing is a crime without stating the facts of the case, you could mistakenly apply that principle to a case in which the defendant killed in self-defense. Only by stating the circumstances concerning the killing will you have an accurate picture of the law.

Include in your brief only those facts that are legally relevant. A fact is legally relevant if it had an impact on the case's outcome. For example, in a

personal injury action arising from a car accident, the color of the parties' cars seldom would be relevant to the case's outcome. The defendant's liability will not turn on whether the injured party's car was green, rather than blue. Therefore, do not include that fact in your brief even if the court mentions it in the opinion. Similarly, if the plaintiff and defendant presented different versions of the facts, you should describe those differences only if they are relevant to the court's consideration of the case. Otherwise, just state the facts upon which the court relied. Because you will not know which facts are legally relevant until you have read and deciphered the entire case, do not try to brief a case while reading it for the first time.

3. PROCEDURAL HISTORY

With the statement of facts, you have taken the case to the point at which the plaintiff filed suit. The next section of the brief, the procedural history, begins at that point and ends with the case's appearance in the court that wrote the opinion you are reading. For a trial court opinion, identify the type of legal action the plaintiff brought. For an appellate court opinion, also describe how the trial court and, if applicable, the lower appellate court decided the case and why. In addition to setting the stage for the opinion you are briefing, describing the case's procedural history helps you learn judicial procedures.

4. ISSUES

You are now ready to describe the opinion you are briefing. In this section of the brief, state the factual and legal questions that the court had to decide. For example, assume the plaintiff claims that the defendant made a gift of a watch to her but now denies that he made the gift. For a gift to be legally enforceable, the person who claims it (the alleged "donee") must prove that (1) the person who allegedly made the gift ("the donor") intended to make a gift, (2) the alleged donor delivered the gift to the donee in accordance with the legal requirements for a delivery, and (3) the alleged donee accepted the gift. In this case, do not state the issue as: "Does the plaintiff win?" or "Was there a gift?" Instead, include in the issue statement each question that the court had to decide to answer the ultimate question of whether the defendant made a legally enforceable gift. If the court addressed all three requirements for a valid gift, you should include three issues in your case brief:

1. Did defendant intend to make a gift to plaintiff?;

2. Did defendant deliver the watch to plaintiff?; and

3. Did plaintiff accept the gift?

These are the questions the court had to answer to decide who is legally entitled to the watch.

Sometimes students think that they should consolidate all the issues in a case into one large issue.

That is the wrong approach. To analyze a case properly, you must break it down to its component parts. Otherwise, you will have a tangled skein of facts, law, and analysis. Dissecting the case allows you to deal with one question at a time, rather than trying to deal with all the questions at once.

5. HOLDINGS

In this section, separately answer each question in the issues section. For quick reference, first state the answer in a word or two, such as "yes" or "no." Then, in a sentence or two, state the legal principle on which the court relied to reach that answer (the "holding"). To do so, you must distinguish the holding from "dictum" (pl. "dicta"). The holding is the legal principle that was essential to the court's resolution of the issue. Dictum, on the other hand, is any nonessential principle that the court may have included in the opinion.

Dictum is not included in a case brief because it does not have precedential value. Although dictum can provide an insight into the court's thoughts about a related issue, the court is free to ignore it in future cases. Dictum is nonbinding because it was not directly related to the issue that the court had to decide and, therefore, may not have been considered by the court as carefully as a holding. Additionally, neither the plaintiff nor the defendant may have addressed the dictum's relevance and accuracy.

You must state the holdings as accurately as possible, because this section of the case briefs will be particularly important for exam preparation. Check whether your description of a holding is too broad by thinking of any exceptions or qualifications. For example, if you stated the holding as "killing is a crime," that holding would include a person who killed in self-defense. Therefore, narrow this statement of the holding. Similarly, check whether your description is too narrow by questioning the relevance of each part. For example, if the victim in the case was a man, the statement "killing a man without legal justification is a crime" is technically correct. However, no legally relevant reason exists for distinguishing between male and female victims, so broaden this statement. A hornbook or other study aid can help you determine the exact scope of the holding.

6. RATIONALE

You now should describe the court's rationale for each holding. This section of the case brief may be the most important, because you must understand the court's reasoning to analyze it and to apply it to other fact situations, such as those on the exam. Starting with the first issue, describe each link in the court's chain of reasoning. Begin by stating the rule of law that the court applied to decide the issue. Next, describe the facts of the case that were relevant to the court's analysis of that issue. Then, describe the court's holding when it applied the rule

of law to the facts of the case. Repeat the same three-step process for each issue in the issue section.

After stating the court's rationale, give your analysis of it. Does it follow logically from point to point? Does the court assume facts that were not proved in the case? Has the court stated precedent too narrowly or too broadly? Does the court rely on improper analogies? You must be a critical and creative opinion reader. Note your criticisms and questions so that they are readily available during class and during other discussions with your colleagues and professors.

At this point, you also should synthesize the case you have briefed with other cases you have read for the course. As a lawyer, simply describing the holdings in individual cases is not enough. You must be able to give an overview of an area of law. If two or more cases seem inconsistent, perhaps you have stated their holdings too broadly. Check the cases for limiting language that you previously may have missed. Check to see whether the cases are from the same jurisdiction. If not, the earlier case was not binding precedent for the later case because jurisdictions generally are free to develop their own common law. Also check the years the cases were decided. If a substantial time gap exists, the later case may reflect changed societal, political, or legal conditions. Synthesizing the cases will give you an overview of the subject matter and will develop your analytic skills.

HOW TO STUDY LAW AND TAKE LAW EXAMS

IN A NUTSHELL

By

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1996

177 Ga.App. 586

CROWE

v.

J.C. PENNEY, INC.

No. 70994.

Court of Appeals of Georgia.

Jan. 6, 1986.

Rehearing Denied Jan. 28, 1986.

Employee commenced action against former employer, alleging intentional infliction of emotional distress and false impris-

onment, and asserting claim for sick pay benefits. The Fulton Superior Court, Etheridge, J., granted summary judgment for employer, and employee appealed. The Court of Appeals, Deen, P.J., held that: (1) employer's treatment of employee during and after interrogation in connection with theft of store goods did not amount to intentional infliction of emotional distress; (2) interrogation of employee, during which she was not permitted to leave, did not amount to false imprisonment; and (3) employee was not entitled to sick pay benefits for leave of absence requested as result of anxiety she claimed to have suffered as result of investigation.

Affirmed.

1. Damages ⇐54

Employer's interrogation of employee, in connection with suspected theft of store goods, did not exceed bounds usually tolerated by society and its treatment of employee subsequent to interrogation was sympathetic and encouraging, and therefore employer's actions were not so terrifying or insulting as naturally to humiliate, embarrass or frighten employee, so that she could recover for intentional infliction of emotional distress.

2. False Imprisonment ⇐13

Employer had privilege to investigate and reasonably detain employee to question her with regard to possible theft of store goods, where unsolicited statements made by two of employee's co-workers reported that employee was periodically taking store goods. O.C.G.A. § 51-7-60.

3. False Imprisonment ⇐6, 13

Interrogation of employee in connection with possible thefts from store, during which she was not permitted to leave, was not basis of claim for false imprisonment, where two co-workers reported that employee was periodically taking store goods, employee executed form consenting to be questioned, employee did not request during interrogation that questioning be discontinued, and interrogation lasted just over three hours.

4. Pensions ⇐126

Employer's withholding of sick pay benefits from employee, who allegedly took leave of absence as result of anxiety over interrogation in connection with suspected theft of store goods, comported with company policy of not providing such benefits when employee's absence was due to employee's own misconduct, where employee admitted that she had improperly transported goods from one store area to another without authorization.

Scott Walters, Jr., East Point, for appellant.

John F. Wymer III, Ginger S. McRae, Atlanta, for appellee.

DEEN, Presiding Judge.

The appellant, Mary Louise Crowe, commenced this action against the appellee, J.C. Penney, Inc., alleging intentional infliction of emotional distress and false imprisonment, and asserting a claim for sick pay benefits. The trial court granted summary judgment for the appellee, and Crowe appeals.

Crowe testified by deposition that she had been employed by the appellee since 1972, the last six years in the tailor shop. On March 7, 1983, she was summoned to the security office, where from 8:12 a.m. until 11:20 a.m. she was questioned by John Rozar and Lynn Garland, security personnel of the appellee, about reports of theft of certain store goods. The interrogation was not continuous for the three-hour period: Rozar and Garland alternated in questioning the appellant, and there were 3-to-5 minute intervals between the sessions; the appellant took at least 30 minutes to write a statement; at 11:00 a.m., a break was taken for the appellant to go to the rest room (accompanied by a female security officer). Crowe claimed that Garland called her a liar and was particularly offensive, slamming down his hands on the desk and yelling; Rozar had also called her a liar, but she acknowledged that he had

otherwise been courteous. She asserted that when she had asked if she could go fetch her purse, Garland told her that she could not leave the room until they found out what they wanted to know. Crowe, however, admitted that she had not complained to Rozar and Garland that they were upsetting her; that she had not asked to stop the interview; and that she actually had preferred to continue the interview to clear up the matter.

Following the interview, the appellant was sent home, but a few days later she was instructed to report back to work. Upon her return, the company management was pleasant with her, but she was constantly watched by security personnel; she claimed also that her co-workers would no longer speak with her and that her automobile and coat were vandalized by other employees. She worked for approximately two weeks after the confrontation and then requested a leave of absence with sick pay because the incident had made her anxious. The appellee denied the request for sick pay but granted a leave of absence for one month. The appellee paid the appellant for vacation time during part of her absence, and it also granted her subsequent request for an additional month's leave of absence through May 27, 1983; her employment was terminated when she failed to report for work on May 31, 1983.

The evidence presented by the appellee showed that in early February 1983, an anonymous phone caller had reported that the appellant was stealing store goods by concealing them beneath her clothing. This anonymous call was not seriously investigated. In early March 1983, however, two of the appellant's co-workers approached the security office and reported suspicious conduct by the appellant. All of the allegations involved the appellant's suspected removal of store goods by concealing them beneath her clothing, but no one had actually observed the appellant stealing any goods. The appellant had consented to be interviewed on March 7, 1983, regarding these accusations.

Following this interview, the personnel manager stated that the appellant was given a written reprimand for mishandling store property, but was not discharged because the evidence of theft was not conclusive. The appellant's request for sick pay had been denied on the basis that the cause of her absence, i.e., her alleged anxiety, resulted from her own misconduct. Because the appellant had not reported for work on May 31, 1983, and because she failed to contact anyone with the appellee to inform them of any continued inability to return to work (although the appellant claimed that she did contact the appellee), the appellant's employment was terminated for job abandonment, pursuant to the company policy that required such when an employee missed three consecutive work days without notifying the company. Garland and Rozar acknowledged that they had confronted the appellant with the accusations made by her co-workers, but both denied calling her a liar or yelling at her. Both claimed that the appellant had remained calm during the interview and never expressed a desire to discontinue it. Held:

[1] 1. The appellant contends that the manner of her interrogation and the subsequent acts of the appellee constituted an intentional infliction of emotional distress. Georgia recognizes that tort, but recovery for intentional infliction of emotional distress has been authorized only where the defendant's actions were so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff. *Georgia Power Co. v. Johnson,* 155 Ga.App. 862, 274 S.E.2d 17 (1980); *Thomas v. Ronald A. Edwards Const. Co.,* 163 Ga.App. 202, 293 S.E.2d 383 (1982). In the instant case, while the interrogation of the appellant, even accepting the appellant's version of it, could not be described as a shmooz,[1] we

1. See *MCG Dev. Corp. v. Bick Realty Co.,* 140 Ga.App. 41, 42, 230 S.E.2d 26 (1976), and in particular Footnote One.

conclude that it did not exceed the bounds usually tolerated by society.

The appellee's actions following the interview contraindicated an intent to inflict emotional distress. The appellant herself characterized the supervisory personnel as sympathetic and encouraging. The appellee allowed the appellant a two-month leave of absence and did not discharge her until she failed to report back for work upon the expiration of the leave of absence. The only reasonable conclusion was that the appellee's actions were designed to minimize the appellant's distress.

[2, 3] 2. The trial court also properly concluded that as a matter of law the pleadings and the evidence failed to establish a claim for false imprisonment. The unsolicited statements made by two of the appellant's co-workers, reporting that the appellant was periodically purloining store goods, certainly furnished probable cause for the appellee to question the appellant. Under OCGA § 51-7-60, the appellee had a privilege to investigate and reasonably detain the appellant for that purpose. Prior to the interview, the appellant executed a form, consenting to be questioned regarding matters of company business, and at no time did she request that the questioning be discontinued; on the contrary, in her deposition, the appellant indicated that she had not wanted to terminate the interview until the matter was cleared up. Perhaps such questions of whether a defendant acted with reasonable prudence or whether the manner and length of the detention were reasonable are usually matters for the jury, e.g., *United States Shoe Corp. v. Jones,* 149 Ga.App. 595, 255 S.E.2d 73 (1979); *Gibson's Prods. v. Edwards,* 146 Ga.App. 678, 247 S.E.2d 183 (1978); but under the circumstances of the instant case, summary judgment for the appellee was appropriate. See also *Godwin v. Gibson's Prods.,* 121 Ga.App. 59, 172 S.E.2d 467 (1970).

[4] 3. It was uncontroverted that the appellee's company policy did not provide for sick pay benefits where the employee's absence was due to the employee's own misconduct. Although the appellant steadfastly denied having stolen any store goods, she admitted that she had improperly transported goods from one store area to another without authorization. The appellant may very well have experienced anxiety over the appellee's investigation of her conduct, but the appellee's withholding of sick pay benefits certainly comported with the company policy.

Judgment affirmed.

POPE and BEASLEY, JJ., concur.

Widener University
Commonwealth Law School

Memorandum

TO: TAP Contracts Students

FROM: Professor Mary Kate Kearney

DATE: May 3, 2016

RE: First TAP Contracts Class

Dear TAP Students:

I look forward to meeting you and studying introductory principles of Contract law with you. During our first week of class, we will have one schedule change. On the first night of class, Tuesday, May 24th, Contracts will not meet. Instead, you will have Torts with Professor Lee from 6:00 to 9:00 p.m. Then on Thursday, May 26th, Contracts will meet from 6:00 to 9:00 p.m., and you will not have Torts with Professor Lee that night. In preparation for our first Contracts class on the 26th, please read the attached Restatement sections (1, 3, 22, and 24) and the Embry v. McKittrick case. There is no casebook you need to purchase for this class. Do not be deceived by the relatively short length of the assignment. Every sentence must be read closely and will be discussed in class.

Professor Kearney

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TAP
CONTRACTS
Professor Kearney
Summer 2016

Email: mkearney@widener.edu
Office: Room 311 **Telephone: 541-3918**

Welcome to the Trial Admissions Program (TAP) at Widener University School of Law and to the study of Contracts. We will spend the next month together studying both the principles of contract law and the process of analyzing those rules and applying them to new situations. Therefore, the goals of the course are twofold: 1) to teach you the "substance" of contracts and 2) to teach you a method of analysis known as "thinking like a lawyer." Your mastery of both is essential to your success in this course.

You will be assigned readings for each class. The readings will be taken from cases assigned and distributed in class along with handouts taken from the Restatement Second on Contracts. The Restatement contains many of the rules that form the basis of contract law. Each assigned case interprets or explains some aspect of those rules. You should try to figure out where each case fits into the big picture. The reading assignments are not long because you must read the material carefully and critically. You should reach each case several times. You also should read the notes after each assigned case.

As you read these cases, you should ask yourselves the following questions: Who is suing and why? What went wrong in this transaction? What is the position of both parties? What arguments are they advancing? Are those arguments persuasive? What rule or principle of contract law does the court apply? How does the court interpret or explain the rule? How does the court reach its conclusion? (*i.e.*, What is its reasoning process?) Do you agree or disagree with the court's conclusion? On what basis? It is important to ask yourselves these questions as you read the material because these are the kinds of questions that you will be asked in class. Often, the questions are more important than the answers. The process of "thinking like a lawyer" means learning to ask the right questions even if there are no clear-cut answers.

In class, I call on people and take volunteers. When you are not called upon, you should try to answer the questions posed silently to see if you are on the right track. The more that you participate mentally, the better you will learn how to think like a lawyer. After class, you should review and rewrite your notes to make sure that you have understood class discussion. I rely heavily on class notes when writing the test.

I take attendance once at the beginning of class. Please be prompt. I follow the American Bar Association rules for attendance. Students who miss more than 20% of the classes are not eligible to complete the course. Taping of the class is permitted only as an accommodation for a disability and must be authorized by the Admissions Office.

Your course grade will be based solely on a two-hour, closed book exam that is graded anonymously. I look forward to working with you.

RESTATEMENT (SECOND) OF CONTRACTS

§1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§3. Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

§22. Mode of Assent: Offer and Acceptance

(1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.

(2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

§24. Offer Defined

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Embry v. Hargadine, McKittrick Dry Goods Co.

St. Louis Court of Appeals, Missouri, 1907.
127 Mo.App. 383.

GOODE, J. [Appellant's written employment contract with Appellee expired on December 15, 1903. He had been unsuccessful in obtaining a meeting with Appellee's president before the expiration date. On December 23, during peak season, Appellant met with the president, Mr. McKittrick, and, according to his testimony, stated that unless he had another contract for the next year he would "quit" then and there. According to Appellant, the president replied: "Go ahead, you're all right; get your men out and don't let that worry you." Appellant thought that the contract had been renewed and made no further effort to find employment. When his employment was terminated on March 1, 1904, Appellant sued for breach of contract. At the trial, the president denied making the "you're all right" statement and testified that he was pressed to prepare for a board meeting, did not intend at that point to renew the contract and had deferred the renewal issue until a later date.

It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occurred as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of $2,000. * * * [I]t remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry, was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely, did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. The rule is thus stated by a text-writer, and many decisions are cited in support of his text: "The primary object of construction in contract law is to discover the intention of the parties. This intention in express contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom. This rule applies to oral contract, as well as to contracts in writing, and is the rule recognized by courts of equity." 2 Page, Contracts, § 1104. So it is said in another work: "Now this measure of the contents of the promise will be found to coincide, in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promise. But this is

not a constant or a necessary coincidence. In exceptional cases, a promisor may be bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him." Walds-Pollock, Contracts (3d Ed.) 309. In Brewington v. Mesker, 51 Mo.App. 348, 356, it is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secrete intention of the parties, but by their expressed intention, which may be wholly at variance with the form. * * * In view of those authorities, we hold that, though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

The next question is whether or not the language used was of that character, namely, was such that Embry, as a reasonable man, might consider he was re-employed for the ensuing year on the previous terms and act accordingly. * * * Embry was demanding a renewal of his contract saying he had been put off from time to time, and that he had only a few days before the end of the year in which to seek employment from other houses, and that he would quit then and there unless he was re-employed. McKittrick inquired how he was getting along with the department, and Embry said they (i.e., the employees of the department) were very busy getting out salesmen; whereupon McKittrick said: "Go ahead, you are all right; get your men out and do not let that worry you." We think no reasonable man would construe that answer to Embry's demand that he be employed for another year, otherwise than as an assent to the demand, and that Embry had the right to rely on it as an assent. The natural inference is, though we do not find it testified to, that Embry was at work getting samples ready for the salesmen to use during the ensuing season. Now, when he was complaining of the worry and mental distress he was under because of his uncertainty about the future, and his urgent need, either of an immediate contract with respondent, or a refusal by it to make one, leaving him free to seek employment elsewhere, McKittrick must have answered as he did for the purpose of assuring appellant that any apprehension was needless, as appellant's services would be retained by the respondent. The answer was unambiguous, and we rule that if the conversation was according to appellant's version, and he understood he was employed, it constituted in law a valid contract of re-employment, and the court erred in making the formation of a contract depend on a finding that both parties intended to make one. It was only necessary that Embry, as a reasonable man, had a right to and did so understand.

Some other rulings are assigned for error by the appellant, but we will not discuss them because we think they are devoid of merit.

The judgment is reversed, and the cause remanded. All concur.

Torts Syllabus
TAP Summer 2016
Randy Lee

Faculty Member: Randy Lee
Office: L306
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Attendance Policy: Consistent with the ABA Guidelines
Food Policy: Consistent with Campus Policy
Exam: One Question--Closed Book

I. Products Liability Under 402A

- A. Principles underlying the tort, *Yuba* (Packet II)
- B. Elements of the tort
  - 1. Section 402A & Sections 1 & 2 (Packet II)
  - 1. Product (and Sale) *Becker* (Packet I); *Hector* (Packet II);
  - 2. Defect *Rix* (Packet II); & *Friedman* (Packet II)
  - 3. Causation and the plaintiff's conduct *Ford* (Packet II)
  - 4. Interests Protected *Two Rivers* (Packet I)

First Assignment: Please read in this supplement (Packet I) all the materials up to and including, *Becker v. IRM Corp.* Packet II will be distributed during our first class together. I look forward to working with you all this summer

I. What to Expect in Torts

Torts is a course about people injuring other people. Throughout our lives people injure us, and we injure other people. Sometimes this happens accidentally; sometimes it happens on purpose. Most of the time, when someone injures someone else, the people resolve the matter on their own: either one party will apologize and try to right the situation, or both parties will pretend the injury never happened and try to forget about it. When the parties cannot resolve the matter on their own, however, they may take the matter to court. When the parties do this, the judge must decide whether the state should consider the injury a tort.

To decide whether an injury should be considered a tort, the judge must decide whether the injury is the kind of injury, or occurred under the kind of circumstances, which demand that the state intervene. The standard then for something being a tort is not whether someone was wrong, or whether someone was hurt or needs help, or even whether something is unfair. The standard is simply whether this is a situation in which the state should intervene. Some injuries, such as name-calling, may seem severe to the people involved, but they still may not be serious enough to demand state intervention. The state also sometimes hesitates to intervene in certain relationships such as that between a parent and a child and, therefore, judges may not find a tort in the way a parent disciplines a child although they would find a tort in similar actions by an employer toward an employee. Finally, states are more likely to intervene when people hurt other people intentionally or recklessly rather than accidentally. Therefore, judges would be more likely to decide a tort has occurred when a person has intended to hurt another rather than when she does so accidentally.

To decide whether one person has committed a tort against another, the judge will want to answer four questions:

1. Did the defendant have a duty of care to the plaintiff?

2. Did the defendant breach that duty of care?

3. Did the breach of that duty cause an injury to the plaintiff?

4. Did the plaintiff suffer an injury to an interest which the state is willing to protect?

Torts are not crimes. When you are convicted of a crime, you must make amends to the State. When you are found to have committed a tort, the state orders you to make your amends to your victim. Also if you are a victim of a tort, you must pay an attorney to represent you while victims of crimes have no attorney; rather, the state district attorney pursues a conviction on behalf of the state. Finally, although some

torts and crimes have the same names, the law defines them differently. Thus, an "assault" in tort law may not be the same as an "assault" in criminal law.

II. What to Expect in Class

A. Goals of the Course

Torts is a broad area -- it includes all the ways in which people can injure one another. Given the state of human imagination, the course is almost limitless. Thus, we will not be able to learn everything there is to know about torts nor even every rule there is in the field. We will, however, hit the major areas of tort law, and we will study underlying principles in the field so that, as an attorney, you will be able to argue how your apparently "novel" case should be decided.

As hard as it is to believe, despite the coverage and mesmerizing excitement of tort law, some of you may never have a tort case. Despite that, the course still can contribute to your legal career. Like all law courses, a second goal of this course is to help you to understand and communicate the law. To do this, throughout the course, I will ask you to write and talk about the law, and I will give you feedback on your work. In this way, we can monitor and accelerate your progress in understanding the law.

B. Class Preparation

Law students sometimes find law school classes a mystery. Why do they pay thousands of dollars every year to sit nervously in preassigned seats while a professor fires absurd questions around the room seemingly hoping to rob random students of whatever dignity they have left.

One part of this mystery is why the questions. Law school teaches students to analyze problems, and the best tool with which to analyze a problem is the question. When a professor asks questions in class, she is showing students how she would analyze a certain type of problem. When a professor gives an exam, she expects students to analyze similar problems in a similar way; thus, she expects to see in the exam responses similar questions, although not necessarily similar answers, to the ones she would ask. Furthermore, when the student later encounters a similar problem in practice, his professor's questions may offer him one way of arguing the problem.

Students often place too much weight on the answers to these questions. First, students may think all of these questions have objective right answers beyond question. Actually many of them have many subjective answers, and the mark of a good lawyer is to see all of these answers and be able to argue the justifications of each. Second, students may think they have prepared well for class because they can answer the questions. This, however, is not the case. As we noted earlier, law school teaches how to analyze problems with questions. Given the questions, everyone

should have answers. The goal of the law student is to learn to anticipate the best question to ask next.

Another part of this mystery is why do students answer all the questions. Law school classes would proceed more efficiently if professors answered their own questions. Similarly music classes would sound better if only the teacher played, and fewer children would be hurt learning to ride a bike if they learned by sitting on the ground and watching their parents ride. Unfortunately, one learns music by playing and bicycling by riding and law by speaking and writing. If the professor cannot see or hear what the student is thinking, she cannot help the student fine-tune the process. Therefore, hopefully in Torts everyone will get several opportunities a semester to answer.

C. Competition and Cooperation

Competition is a good thing when we allow the accomplishments of others to inspire us to do better ourselves. In this sense, we should compete. We should feel inspired by good comments by classmates and use those as hints to what we too can understand. In this light, we have an interest in everyone in class doing their best so that we can be motivated to achieve more ourselves. To help others to do their best, we must cooperate both by freely sharing ideas and materials and also by supporting and respecting one another.

I look forward to working with you.

Rules to Learn By

1. Whenever possible, an opinion must be read to be internally consistent.

2. Whenever possible an opinion must be read to be an appropriate expression of what judges do.

3. Judges apply rules. They do not determine liability independent of rules.

4. Rules are made up of requirements expressed in words.

5. To interpret rules, judges must define the words that make up the rules.

6. Law students must eliminate all preconceived notions of what words mean. A word means what an attorney can convince a judge a word means.

7. Judges define words in terms of precedent: the way in which judges have defined the words in the past.

8. Judges also define words in terms of certain classes of general arguments.

9. Some classes of general arguments may not be appropriate for judges to consider.

10. The general arguments a judge uses to define a word in one case may imply how the word should be defined in future cases.

ASSIGNMENT

TO: Young Associate

FROM: Senior Partner

RE: Contracts: Intent to Agree: Chaklos v. Webber

Date Assigned: August 15, 1985

Date Due: August 22, 1985

Issue:

Whether Mr. Webber can prevent specific performance of an agreement by claiming that he did not take the transaction seriously.

Facts:

Mr. Walt Webber, our client, has spent the last three years restoring a 1957 Chevy, a project he began with his late father. The restoration is now completed although Mr. Webber still tinkers with the car on weekends.

On a Saturday last June, Mr. Webber was checking on an oil leak when his next-door neighbor Mr. James Chaklos, the plaintiff, came over. Chaklos commented on how well the car had turned out and asked Webber how much he would sell it for. Webber told Chaklos that he too thought it had turned out well and that because of the sentimental value of the car, he could never sell it. He then added that on days as hot as that one, he sometimes did consider trading it for a cold six-pack.

Chaklos went back to his house and returned with a contract, written in pen, which indicated the he would give Webber a six-pack of Iron City Lite for the "1957 Chevy, serial number 57-HC3268519." He then asked Webber to sign the document, but

Webber refused. Chaklos continued to ask about the agreement for another five minutes after which Webber took Chaklos's paper, tore it up, told him that they did not need serial numbers for this kind of dealing, then went into the garage, got an old rag, and wrote on the rag in oil, "Old Drippety-Droppety for a sixer. W.W." He handed the rag to Chaklos who took the rag home and signed his name to it in pen.

Later that day, Chaklos stopped by with a six-pack of beer and said he wanted the car registration. He said he had already taken out insurance on the car so all he needed now to transfer title was the registration. Webber refused to turn it over.

Chaklos has sued for the specific performance of the contract.

a specific portion of a casebook precisely because it demonstrates an aspect of law within the purview of the subdivision heading. The commentary or casenotes immediately after an opinion in a casebook often suggest the legal principle which has just been illustrated. Classroom lectures and discussions with colleagues should also reveal the degree of expertise you have achieved in extracting the legal principle embodied in a case. Finally, many of the casebook opinions are cited in hornbooks, which usually have a *case index*. If the casebook opinion is listed in such an index, you can find the page on which the case was alluded to and for what proposition of law.

Other Examples of Conventional and Capsule Briefs

Because the ability to extract and formulate the legal principle contained in each opinion is the touchstone of the *checklist method*, another example is warranted. It is suggested that the reader try his or her hand at briefing the next case, *before* going over the comments which follow. The following opinion was taken from the Contracts' casebook which I used in law school, *Contracts, Cases and Materials.**

LUCY v. ZEHMER

BUCHANAN, JUSTICE. This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants,

* Jones, Farnsworth, and Young, *Contracts, Cases and Materials*, (Foundation Press, 1965).

to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

The defendants insist that the evidence was ample

to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S. Contracts, § 133, b., p. 483; Taliaferro v. Emery, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Zehmer first said he could not remember about that, then that "I don't think I wrote but one out." Mrs. Zehmer said that what he wrote was "I hereby agree,"

but that the "I" was changed to "We" after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend. . . .

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After

receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.' First Nat. Exchange Bank of Roanoke v. Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendant's evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered

that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74. . . .

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am.Jur., Contracts, § 19, p. 515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement. . . .

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties. . . .

The complainants are entitled to have specific performance of the contract sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Brief

Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954).[1]

Rule: In contracts, if a person's words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.[2]

Holding: Regardless of any hidden purpose, a party has manifested the necessary intention to agree to a contract when he has negotiated for forty minutes, written two drafts of the agreement and delivered the final agreement to the other party.[3]

Facts: Lucy was drinking with Mr. Zehmer at the Zehmer farm although neither man was too intoxicated to understand the nature of their discussion. Lucy offered Zehmer $50,000 for his farm, and the two discussed the offer for over forty minutes. Mr. Zehmer drafted one agreement and then wrote a second to meet requests by Mr. Lucy. Both Zehmer and his wife signed the agreement, and Mr. Zehmer passed it across the counter in front of Lucy. When Lucy put the agreement in his pocket, neither Zehmer asked for it back. Lucy then

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[1]The cite gives the state and year of the decision, and these may provide insight into the social context of the case. Although this memo excludes additional cites, you should include a cite anytime you say a court did something.

[2]The rule is the law the court began with: What legal provision was the court asked to apply.

[3]The holding is the way the court clarified the rule in this context: What new meaning has the court given the rule.

offered Mr. Zehmer $5.00 to seal the agreement, but Zehmer refused the money insisting that there was no agreement because he had been kidding the whole time. Lucy proceeded to make arrangements as though the parties had agreed.[4]

Rationale: Mr. Zehmer's words and actions indicated that he was serious about his agreement, and, therefore, the contract was valid. He argued the terms of the agreement with Mr. Lucy for over forty minutes; he wrote out an agreement and then rewrote it to make it acceptable to Mr. Lucy. Zehmer insisted his wife sign the agreement and then allowed Lucy to take possession of the document. These acts "furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual jesting matter."

Lucy responded seriously to these actions, and this supports the view that the tone of the transaction must have been serious. He arranged with his brother to put up half the money, employed an attorney for a title search, and, when Zehmer refused to sell, insisted they had a deal.

Zehmer tried to argue that he was too drunk to have known what he was doing, but the record did not support

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[4]The brief should include those facts the court applied to the rule and any other facts from the opinion which the reader will need to understand what happened in the case.

this claim so the court did not need to reach the legality of it as a defense.[5]

Personal Analysis:[6]

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[5]The rationale is the logical structure of assumptions and conclusions the court used to decide the case. Tracing the requirements of the rule can help one to piece together this section more easily.

[6]This section reflects the writer's analysis of the court's rationale. It should discuss whether the court's assumptions were valid and whether their conclusions necessarily followed from those assumptions. If the brief is to be used in a research project, this section should indicate how the case affects the fact situation being researched. If the brief is to be used to prepare for class, the section should reflect how this case relates to other cases on the topic in the text and should speculate on ways the professor might vary the facts of the briefed case to test the court's rationale.

MEMORANDUM

TO: Senior Partner

FROM: Young Associate

RE: Contracts: Intent to Agree: Chaklos v. Webber

Date Research Completed: August 20, 1985[7]

Issue:

Whether the words and actions of the parties indicated that they were executing a serious business transaction[8] when the negotiations were brief, one party indicated that he did not want to form a contract, and the document drafted contained vague language and was signed in oil.[9]

Summary Answer:

The agreement should not be enforced because Mr. Webber's words and actions indicated he was not serious about the transaction.[10] To determine the intent of parties to a contract, the court will look to the words and actions of the parties.[11]

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Since Mr. Webber tried to make the negotiations less businesslike by using silly language and rags and oil, the court will view his intent as joking.[12] Mr. Chaklos may argue that the seriousness of his own subsequent actions should indicate that the tone of the exchange was serious; however, since the response of Mr. Chaklos was not reasonable, it should not be weighed heavily.[13]

Facts:

Mr. Chaklos has sued our client, Mr. Webber, for failing to perform his side of an agreement that Chaklos claims the two reached last June. Chaklos claims Webber agreed to trade a fully-restored 1957 Chevy for a six-pack of beer.

Webber was working on the car when Chaklos came over and asked him how much he would sell it for. Webber told him he would not sell the car, a project he had begun with his late father, because the car had great sentimental value.

Responding to a comment that on very hot days Webber did think about trading the car for a cold six-pack, Chaklos went home and drafted a formal agreement to that effect which included the name of a specific type of beer and the serial number of the car. Webber refused to sign it. Chaklos refused to drop the matter so after five minutes, Webber tore up the Chaklos agreement, indicated that serial numbers were not needed in this kind of dealing, got a rag from the garage, and wrote on it in oil, "Old

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Later that day, Chaklos brought Webber a six-pack of beer and demanded the vehicle registration. Chaklos said he had taken out insurance on the car and now only needed that registration to transfer the title. Webber refused to turn it over.[14]

Analysis:

In Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954), the court applied the rule to be applied here: In contracts, if a person's words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.[15] In that case, the court held that regardless of any hidden intent, the contract should be enforced because the parties' negotiations, written agreement, and transfer of the document indicated a serious intent;[16] however, because a reasonable person would view the conduct of the parties

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In Zehmer, Mr. Lucy was drinking with Mr. Zehmer at the Zehmer farm although neither man was too intoxicated to understand the nature of their discussion. Lucy offered Zehmer $50,000 for his farm and the two discussed the offer for over forty minutes. Mr. Zehmer drafted one agreement and then wrote a second to meet requests by Mr. Lucy. Both Zehmer and his wife signed the agreement, and Mr. Zehmer passed it across the counter in front of Lucy. When Lucy put the agreement in his pocket, neither Zehmer asked for it back. Lucy then offered Mr. Zehmer $5.00 to seal the agreement, but Zehmer refused the money insisting that there was no agreement because he had been kidding the whole time. Lucy proceeded to make arrangements as though the parties had agreed.[18]

The court decided that Zehmer's words and actions indicated a serious intent by holding them up to a standard of what a reasonable person would expect to see in "a serious business transaction." The court reasoned that a forty minute discussion of terms, two drafts of an agreement, the second signed by both owners of the property, and the transfer of possession of that document to the other party to the agreement, together sufficed to meet that standard. This view was further supported by Lucy's serious response to the actions of the Zehmers. He arranged with

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his brother to put up half the money, employed an attorney for a title search, and, when Zehmer refused to sell, insisted they had a deal. The court seemed to feel that had Zehmer not appeared serious, Lucy probably would not have invested so much energy.

Although Mr. Chaklos also has invested something in the agreement, Mr. Webber's actions were much less serious[19] than those of Mr. Zehmer, and, therefore, the court will not enforce the contract.[20] In fact, unlike Mr. Zehmer, who tried to increase the serious appearance of the transaction, Webber worked to reduce the seriousness.[21] While Zehmer negotiated with Lucy for forty minutes, Webber twice tried to cut off negotiations with Chaklos immediately: first by telling him he would never sell the car for sentimental reasons and second by refusing to sign or discuss Chaklos's contract.[22] Furthermore, while both transactions involved a second draft written by the "jesting" party, in each case, the jesting party used the redraft for a different purpose. Zehmer used it to make the agreement more acceptable to Lucy and, therefore, lead Lucy to believe they were proceeding seriously toward an agreement. Webber, however, used the redraft to replace a document that reflected a serious business purpose with a less conventional one, and when he did this, he told Chaklos that the

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more serious document was inappropriate for their exchange. By replacing pen and paper with rag and oil, Webber pushed the document away from conventional business practices. Furthermore, by replacing the serial number of the car and the type of beer with "Old Drippety-Droppety" and "sixer," he made the contract harder for a court to understand, and if Webber had been really interested in the contract being enforced, he would have wanted the body that enforces contracts to understand it. Since Webber's actions do not reflect the serious intent of Zehmer's, the court should not treat the cases the same way.[23]

Chaklos did, like Lucy, appear to take the agreement seriously enough to invest energy in performing his side of it;[24] however, appearances can be deceiving.[25] Both men did expend money after the negotiations, Lucy retaining a lawyer and Chaklos buying insurance; yet, while this could suggest that Chaklos viewed his matter as seriously as Lucy did his, it could also suggest that Chaklos was trying to pin Webber into a bad deal with which he knew Webber did not intend to go through. Chaklos gave support to this view when he chose to sign the rag while hidden in his home rather than while in front of Webber, a person whom he had already watched tear up one contract.[26]

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Even if the court were to find, however, that Chaklos viewed Webber's actions as seriously as Lucy viewed Zehmer's, this alone would not support a finding in favor of Chaklos. In Zehmer, the court used Lucy's actions and perceptions only to support its own view that Zehmer's actions indicated serious business. The court did not indicate that if Zehmer's actions, on their face, had not appeared serious to a reasonable person, Lucy could have made them appear serious by his performance alone. Thus, since Webber's actions did not indicate a serious intent, neither Chaklos's actions nor his perceptions could support a finding that Webber was serious.[27]

Therefore, because a reasonable person would not have viewed Webber's words and actions as those of someone interested in a serious business agreement and because the perception of Chaklos alone is not enough to support a finding in favor of Chaklos, the case should be found for Webber and the contract should not be enforced.[28]

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45 F.R.D. 467 (S.D.N.Y.1968). See generally, Phillips, Contribution and Indemnity in Products Liability, 42 Tenn.L.Rev. 141 (1974); Wade, Contribution and Indemnity in Products Liability Cases, 27th Ann.Miss.L.Inst. 115 (1972); Kissel, Contribution and Indemnity Among Strictly Liable Defendants, 15 For The Defense 133 (1975); Annot., 28 A.L.R.3d 943 (1969).

(B) Real Property

BECKER v. IRM CORP.

Supreme Court of California, 1985.
38 Cal.3d 454, 698 P.2d 116, 213 Cal.Rptr. 213.

BROUSSARD, JUSTICE. In this personal injury action plaintiff's complaint asserted causes of action of strict liability and negligence against defendant landlord. Defendant moved for summary judgment urging that a landlord is not liable to a tenant for a latent defect of the rented premises absent concealment of a known danger or an expressed contractual or statutory duty to repair. The trial court granted the motion and denied a motion for reconsideration. Plaintiff appeals.

We have concluded that the trial court erred as to both causes of action.

The complaint alleged that plaintiff was injured when he slipped and fell against the frosted glass shower door in the apartment he leased from defendant. The door was made of untempered glass. It broke and severely lacerated his arm. It is undisputed that the risk of serious injury would have been substantially reduced if the shower door had been made of tempered glass rather than untempered glass.

Defendant's affidavits in support of the motion for summary judgment may be summarized as follows: Plaintiff's apartment is part of a 36–unit apartment complex built in 1962 and 1963 and acquired by defendant in 1974. Prior to the acquisition, two officers of defendant walked through most of the apartments and observed that all of the shower doors were of frosted glass and appeared to be the same. The officials, one of whom managed the property from the time of its acquisition, stated that prior to plaintiff's accident in 1978 there were no accidents involving the shower doors and that they were not advised that any of the shower doors were made of untempered glass. They first learned that some of the shower doors were of untempered glass after the accident. Their inspection of shower doors after the accident provided "no visible difference between the tempered and untempered glass in terms of visible appearance."

Defendant's maintenance man stated that after the accident he examined the glass doors, and that 31 of the doors with untempered glass were replaced by him. He also stated that in looking for the untempered glass shower doors "there was no way that a layperson could tell any difference by simply looking at the shower doors. The only way that I was able to differentiate • • • was by looking for a very small mark in the corner of each piece of glass." • • •

We follow a stream of commerce approach to strict liability in tort and extend liability to all those who are part of the "overall producing and marketing enterprise that should bear the cost of injuries from defective products." [C] The doctrine of strict liability in tort has been applied not only to manufacturers but to the various links in the commercial marketing chain including a retailer, a wholesale-retail distributor [c], personal property lessors and bailors [c], and a licensor of personalty [c]. • • •

We are satisfied that the rationale of the • • • cases, establishing the duties of a landlord and the doctrine of strict liability in tort, requires us to conclude that a landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises when the defect existed at the time the premises were let to the tenant. It is clear that landlords are part of the "overall producing and marketing enterprise" that makes housing accommodations available to renters. [Cc] A landlord, like defendant owning numerous units, is not engaged in isolated acts within the enterprise but plays a substantial role. The fact that the enterprise is one involving real estate may not immunize the landlord. • • •

Absent disclosure of defects, the landlord in renting the premises makes an implied representation that the premises are fit for use as a dwelling and the representation is ordinarily indispensable to the lease. [C] The tenant purchasing housing for a limited period is in no position to inspect for latent defects in the increasingly complex modern apartment buildings or to bear the expense of repair whereas the landlord is in a much better position to inspect for and repair latent defects. [C] The tenant's ability to inspect is ordinarily substantially less than that of a purchaser of the property. [C]

The tenant renting the dwelling is compelled to rely upon the implied assurance of safety made by the landlord. It is also apparent that the landlord by adjustment of price at the time he acquires the property, by rentals or by insurance is in a better position to bear the costs of injuries due to defects in the premises than the tenants.

In these circumstances, strict liability in tort for latent defects existing at the time of renting must be applied to insure that the landlord who markets the product bears the costs of injuries resulting from the defects "rather than the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc., supra* [page 714].)

Defendant argues that a landlord who purchases an existing building which is not new should be exempt from strict liability in tort for latent defects because, like dealers in used personalty, he assertedly is not part of the manufacturing and marketing enterprise. • • •

In several cases, it has been held that a seller of used machinery who does not rebuild or rehabilitate the machinery is not strictly liable in tort. [Cc] Each of these cases relied at least in part on the theory that the used machinery dealer simply by offering machinery for sale

does not make any representation as to quality or durability and thus does not generate the expectation of safety involved in the sale of new goods. [Cc] When the seller of the used goods makes extensive modifications or reconditions, he is treated as a manufacturer—there is an expectation that the safety of the product has been addressed. [C]
• • •

However, a continuing business relationship is not essential to imposition of strict liability. The unavailability of the manufacturer is not a factor militating against liability of others engaged in the enterprise. The paramount policy of the strict products liability rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims of manufacturing defects. [Cc] If anything, the unavailability of the manufacturer is a factor militating in favor of liability of persons engaged in the enterprise who can spread the cost of compensation. [C] Just as the unavailability of the manufacturer does not militate against liability, the absence of a continuing business relationship between builder and landlord is not a factor warranting denial of strict liability of the landlord.

Landlords are an integral part of the enterprise of producing and marketing rental housing. While used machinery is often scrapped or discarded so that resale for use may be the exception rather than the rule, landlords are essential to the rental business. They have more than a random or accidental role in the marketing enterprise. In addition, landlords have a continuing relationship to the property following the renting in contrast to the used machinery dealer who sells. As we have seen, in renting property the landlord, unlike the used machinery dealer, makes representations of habitability and safety.

The cost of protecting tenants is an appropriate cost of the enterprise. Within our marketplace economy, the cost of purchasing rental housing is obviously based on the anticipated risks and rewards of the purchase, and thus it may be expected that along with numerous other factors the price of used rental housing will depend in part on the quality of the building and reflect the anticipated costs of protecting tenants, including repairs, replacement of defects and insurance. Further, the landlord after purchase may be able to adjust rents to reflect such costs. The landlord will also often be able to seek equitable indemnity for losses.

We conclude that the absence of a continuing business relationship between builder and landlord does not preclude application of strict liability in tort for latent defects existing at the time of the lease because landlords are an integral part of the enterprise and they should bear the cost of injuries resulting from such defects rather than the injured persons who are powerless to protect themselves. (*Greenman v. Yuba Power Products, Inc.*, *supra*, 59 Cal.2d 57, 63, 27 Cal.Rptr. 697.)
• • •

[The court also held that the defendant had a duty to inspect under negligence law even though he may not have known about the hazard.]

As to each cause of action the trial court erred in granting summary judgment in favor of defendant.

The judgment is reversed.

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1. The law as to the negligence liability of builders and building contractors has, in general, developed along the same lines as that of the manufacturer of chattels, although it has tended to lag some twenty or thirty years behind it. The law as to the liability of lessors has lagged further still.

2. Among the misbegotten progeny of Winterbottom v. Wright were cases that construed it to mean that there could be no tort liability to any third person for the negligent performance of a contract by a builder or contractor. Included among them were a number of decisions involving mass disasters, such as Ford v. Sturgis, 56 App.D.C. 361, 14 F.2d 253 (1926), where the weight of snow on the roof of a motion picture theater collapsed the beams supporting it and the roof fell in on a theater audience. See also Galbraith v. Illinois Steel Co., 133 F. 485 (7th Cir.1904), where a huge steel water tank collapsed and fell through a building. These are now all overruled.

3. As in the case of manufacturers of chattels, the courts began their retreat from this rule by making exceptions, which gradually accumulated. In time the pressure of the analogy to chattels built up the point where the rule of the *MacPherson* case was accepted and applied to the real estate builder or contractor. Totten v. Gruzen, 52 N.J. 202, 245 A.2d 1 (1968) (all builders and contractors); Littleton v. B. & R. Constr. Co., 266 So.2d 560 (La.App.1972) (attic stairway collapsed—purchaser's spouse was injured); Jacobs v. Martz, 15 Mich. App. 186, 166 N.W.2d 303 (1968) (fireplace collapsed—purchaser of home injured); Cross v. M.C. Carlisle & Co., 368 F.2d 947 (1st Cir.1966) (negligent design).

If a financier becomes an active participant in a home construction enterprise and exercises control, he too may be subject to liability, at least with regard to the purchaser or members of his immediate family. See Connor v. Great W. Sav. & Loan Ass'n, 69 Cal.2d 850, 447 P.2d 609, 73 Cal.Rptr. 369 (1969).

4. Strict liability first entered the picture in the early 1960's when, by analogy to the sale of chattels, an implied warranty of habitability was held to run from the builder or vendor of a newly constructed home to his immediate buyer. See, e.g., Cochran v. Keeton, 287 Ala. 439, 252 So.2d 313 (1971); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Humber v. Morton, 426 S.W.2d 554 (Tex.1968). In some jurisdictions this has included not only personal injury but also damage to the purchased property. See Pollard v. Saxe & Yolles Dev. Co., 12 Cal.3d 374, 525 P.2d 88, 115 Cal.Rptr. 648 (1974); Weeks v. Slavik Builders, Inc., 384 Mich. 257, 181 N.W.2d 271 (1970). On the other hand other jurisdictions have clung to the rule of *caveat emptor* of the common law and refused to imply any warranty. See Welding Prods. of Georgia v. Kuniansky, 125 Ga.App. 537, 188 S.E.2d 278 (1972) (vendor-builder); Thomas v. Cryer, 251 Md. 725, 248 A.2d 795 (1969).

5. Courts have had difficulty applying this new warranty in specific fact situations and, as in the case of products liability, a question has arisen as to

6. *Intervening Negligence of User.* Bystander cases present at least two distinct issues regarding intervening negligence of the user. The first is simply one of cause in fact. A truck injures a pedestrian. Did the driver fail to use reasonable care in applying the brake or was the brake assembly defective? See Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo.App. 99, 517 P.2d 406 (1973). Cf. Landry v. Adam, 282 So.2d 590 (La.App.1973) (did purchaser replace brake hose?). The second is more complicated. Should a product be deemed defective because the manufacturer failed to shield the bystander from the intervening negligent misuse of the product? See infra page 784. See also the note on shifting responsibility, supra page 757.

7. If strict liability has not been extended to bystanders, they still may be allowed to recover in negligence if in the language of the Restatement (Second) of Torts § 395 they would be "expected to be endangered by [the product's] probable use." This extension came not long after the *MacPherson* case. Would a negligence theory help plaintiff in the principal case? Cf. Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky.1973), (five-year-old girl slipped into a corn auger).

8. See generally Noel, Defective Products: Extension of Strict Liability to Bystanders, 38 Tenn.L.Rev. 1 (1970); Notes, 8 Tulsa L.J. 216 (1972), 38 U.Chi.L. Rev. 625 (1971); 23 U.Miami L.Rev. 266 (1968).

5. INTERESTS PROTECTED

TWO RIVERS CO. v. CURTISS BREEDING SERV.

United States Court of Appeals, Fifth Circuit, 1980.
624 F.2d 1242, cert. denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 348 (1981)

THORNBERRY, CIRCUIT JUDGE. This action was brought by Two Rivers Company (Two Rivers), alleging that it purchased from Hi-Pro Feeds, Inc. (Hi-Pro) semen used for artificial insemination of its cattle, and that the semen caused syndactylism in the offspring of its cattle. The semen was marketed by Curtiss Breeding Service, Division of Searle Agriculture, Inc. (Curtiss). Two Rivers' claim for damages against Curtiss and Hi-Pro is based on the doctrines of strict liability and implied warranty.

This appeal arises from a jury verdict in favor of Two Rivers. The jury apparently found that Curtiss was strictly liable for the sale of defective semen and that Curtiss breached its implied warranty of merchantability. The jury also found that Two Rivers was entitled to damages in the sum of $52,900.00. This amount represents the damage to the reputation of Two Rivers' herd of cattle as computed by the loss of the prospective market value of the cattle. The court entered judgment for plaintiff in the amount found by the jury and denied Curtiss's motion for judgment notwithstanding the verdict. We hold that, under Texas law, the district court erred in that Two Rivers is not entitled to a recovery of damages based on either strict liability or implied warranty. • • •

Curtiss markets the semen of many different breeds of cattle, including the Chianina breed. In 1972, Curtiss entered into an agreement with a Canadian firm to market in the United States the semen from a Chianina bull known as Farro AC-35. Before entering into this agreement, Curtiss conducted an examination of Farro's pedigree and of the Chianina breed.

In 1973 and 1974, Two Rivers purchased over one hundred registered one-half blood Chianina heifers with the intention of developing a purebred line of Chianina cattle by artificially breeding successive generations. To accomplish this goal, Two Rivers contracted with Mr. Tony Hall in 1974 to obtain quality semen and artificially inseminate the herd of one-half blood Chianina heifers. • • •

Hall, as an agent of Two Rivers, was given the responsibility of selecting the bull and the semen supplier. He purchased on his own account the Farro semen, which was marketed by Curtiss through Hi-Pro Feeds, Inc., that was used to breed the Two Rivers cattle. When purchasing the semen, he examined a pamphlet entitled the "1974 Curtiss Beef Breeding Guide" which contained a conspicuous disclaimer of any express or implied warranties. After consummating the purchase, Hall transported the semen to Two Rivers and inseminated the cattle. Hall charged Two Rivers a certain amount for each heifer he inseminated.

On July 24, 1974, Curtiss determined that Farro had sired offspring which might have exhibited the genetic abnormality known as syndactylism. Curtiss immediately notified its distributors and informed them that they were recalling the semen. At that time, Two Rivers had already inseminated 64 of the heifers with Farro semen. While some ranchers continued to use Farro semen, Two Rivers decided to switch to another bull. Of the 64 heifers that were artificially inseminated with Farro semen, 22 calves were born alive. Four of the Farro calves were stillborn and exhibited the genetic abnormality known as syndactylism.

Syndactylism is a genetic abnormality that can only appear when both the sire and the dam are carriers of the recessive gene. Therefore, Farro, as well as several of the heifers purchased by Two Rivers, were carriers. Syndactylism is exhibited by the fusion of nondivision of the functional digits of one or more feet of a cow. It is a hereditary genetic trait traced to the recessive gene. It is virtually impossible to detect the existence of a recessive genetic trait such as syndactylism until it is manifested by the union of two carriers of this recessive gene. • • •

The critical question presented in this case is whether Two Rivers is entitled to an award of damages pursuant to the Restatement (Second) of Torts § 402A, the implied warranties of the Uniform Commercial Code, or under both theories. To analyze this issue, it is necessary to distinguish the four types of property loss which are recognized in Texas. A different legal analysis attaches to each type of loss.

The first type of loss involves personal injury to the user (or consumer) or physical injury to the property of the user (or consumer).

It is specifically covered by the language of section 402A of the Restatement (Second) of Torts. • • • Texas courts adopted the language of section 402A in 1967 and have applied strict liability to the case of personal injuries resulting from unreasonably dangerous products, [cc] as well as to physical injuries to a consumer's property other than the product caused by a defective product. [Cc]

The second type of loss, on the complete opposite end of the spectrum, can be classified as economic loss resulting from a product with defective workmanship or materials. This category of loss was examined in Nobility Homes of Texas v. Shivers, 557 S.W.2d 77 (Tex. 1977), where an individual who purchased a mobile home sought to recover damages for economic loss suffered as the result of defects in the product. The mobile home was negligently constructed and was not fit for the purposes for which it was sold. The consumer was awarded $8,750 as the difference between the purchase price and the market value of the mobile home for his economic loss.

The court held in *Nobility Homes* that an individual may not recover for economic loss under section 402A. The court stated that an individual must instead seek damages under the implied warranties of the Uniform Commercial Code and the theory of common law negligence. Strict liability was not extended to instances of economic loss because the distinction that exists between physical damage and commercial loss had to be recognized. The Uniform Commercial Code governs the case of a mere loss of value resulting from the failure of the product to perform according to the contractual bargain and the expectations of the consumer.

A third type of loss consists of "economic loss to the purchased product itself." Mid Continent Aircraft Corp. v. Curry County Spraying Service, 572 S.W.2d 308 (Tex.1978). In *Mid Continent Aircraft*, plaintiff sought damages for physical injury to an airplane (damage to fuselage and wings) and for loss of its use value when it made a forced landing because an individual negligently failed to install a crankshaft gear bolt lock plate. Noting that the explicit language of section 402A applied only to physical harm to a person or his *other* property, the court stated that in a commercial sale, strict liability should not be extended to cover a loss resulting from damage to the product itself. • • • This is because the damage to the product is merely a loss to the purchaser of the benefit of the bargain with the seller.

The fourth type of loss is a hybrid involving physical harm to a plaintiff's *other* property as well as to the product itself. This fact pattern was presented in *Signal Oil* [& Gas Co. v. Universal Oil Products, 572 S.W.2d 320 (Tex.1978)] where a defective isomax reactor charge heater exploded. The explosion and ensuing fire at Signal Oil's Houston refinery destroyed not only the heater, but also a significant portion of the refinery (other property). It is clear that the damage to the refinery presents a strict liability cause of action under section 402A since a buyer is entitled to recover for damage to his other

property. But the court went even further and held that • • • if both the product and other property are damaged, a plaintiff has a cause of action under strict liability and the U.C.C. • • •

Two Rivers asserts a cause of action based on the doctrine of strict liability against Curtiss, alleging that Curtiss sold a genetically defective product that was unreasonably dangerous. Two Rivers sought damages for the loss of the market value of the entire herd and for the value of the four calves born with syndactylism. In assessing Two Rivers' claim, the herd of calves must be divided into two groups: a group composed of those calves that received a gene for syndactyl from Farro semen (including the four syndactyl calves) and a second group composed of those calves that were not artificially inseminated with Farro semen.

Only 22 of the 98 calves born alive were the product of Farro's semen. Two Rivers claims that it is entitled to damages equal to the reduction in the market value of the 76 non-Farro calves (the second group) because of the stigma caused by having as many as 22 carriers in the herd.

After an examination of the controlling Texas case law, it is clear that Two Rivers has not stated a cause of action under strict liability with respect to the second group of calves. If anything, any damage incurred upon discovering and making publicly known a latent physical defect in the herd of one-half blood Chianina heifers purchased by Two Rivers constitutes economic loss governed by the rules of commercial law. A plaintiff in Texas is precluded from recovering for economic loss under strict liability. • • •

The crux of Two Rivers' complaint about the non-Farro calves is that everyone now knows about this potentially deleterious gene and that since it is impossible to distinguish the carrier from the noncarrier calves, the value of all the calves is reduced. This loss in market value due solely to the stigma of an accidentally discovered defective gene is, if anything, a commercial loss that is not cognizable in strict liability.

With respect to the first group of calves (artificially inseminated with Farro semen), the question is much more difficult. These calves were either born with a syndactyl gene or were possible carriers of syndactylism. The damage suffered by Two Rivers does not fit neatly into any one of the four categories discussed above. • • •

Because there are no Texas Supreme Court cases on point dealing with the situation where one product is biologically combined with another to form, by a natural process, a continuation of those products, we must decide whether the Texas Supreme Court would view this case as one that should be governed by the doctrine of strict liability or the rules of commercial law. The theoretical bases and policy rationale of contract law and strict liability have been separated and firmly established. *Mid Continent*, supra, 572 S.W.2d at 311. The Texas Supreme Court noted the distinction in *Nobility Homes* when it quoted the following language of Chief Justice Traynor:

"The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries. • • •

"The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by the defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." 557 S.W.2d at 77, quoting Seely v. White Motor Co., 63 Cal.2d 9, 15, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965).

This case is governed by the rules of commercial law for two reasons. First, even if the bull semen is considered to be defective, it is not unreasonably dangerous. Second, the Texas case law indicates that the policy rationale of contract law is to govern this situation. • • •

Two Rivers may not recover damages under the doctrine of strict liability because the bull semen, as a matter of law, was not unreasonably dangerous. Therefore, this case must be governed by the doctrine of commercial law. But even if the bull semen is deemed to be unreasonably dangerous, this case is still governed by the policy rationale of commercial law. • • •

Strict liability was not designed to govern every sale of a faulty product. *Mid Continent*, 572 S.W.2d at 312. Commercial law governs the case where the purchaser has lost some of the benefit of his bargain.

This is clearly demonstrated in an analogous area involving the sale of seeds that are of inferior quality and seeds that will not germinate. • • •

Essentially, Two Rivers is complaining, as a purchaser of bull semen, that the product did not fulfill its commercial expectations. • • • The presence of the recessive gene meant that the product did not fulfill Two Rivers' commercial expectations. The policy reasons behind strict liability are simply not compelling in the case of a disappointed buyer. • • •

Because this case presents a situation involving the principles of commercial law, the provisions of the Uniform Commercial Code govern the outcome. • • •

Two Rivers pleaded and the trial court found that Curtiss breached its implied warranty of merchantability to Two Rivers by distributing a product that was not fit for the purpose of artificially inseminating cattle. Without addressing the validity of this conclusion, we find that this case may be decided on the issue of disclaimer of warranty. To disclaim an implied warranty of merchantability, the disclaimer must (1) mention the word merchantability and (2) in the case of a writing, must be conspicuous.

Each sale from Curtiss to Hi-Pro included a disclaimer of all warranties, express or implied, • • •. This language appeared in large type on the back of each invoice Hi-Pro received from Curtiss when it purchased bull semen. This disclaimer was also conveyed from Curtiss, through Hi-Pro, to Tony Hall when he purchased the Farro semen. • • •

The only remaining question is whether the disclaimer that was effective against Hi-Pro and Hall could be extended to Two Rivers. While Hall purchased the semen on his own account, he did so for the benefit of Two Rivers. Hall cannot be considered a seller of bull semen. The testimony reveals that Hall merely had the semen billed to his account and that he was later reimbursed by Two Rivers in an amount equal to his cost. At least to this extent, Hall was an agent of Two Rivers. Hall also charged Two Rivers a nominal fee for the services he performed. We hold that the relationship between Hall and Two Rivers requires a finding that the disclaimer effective against Hi-Pro and Hall was also effective as to Two Rivers. • • •

In summary, in Texas the type of loss presented in this case is governed by the U.C.C. and the law of warranty. But Curtiss successfully disclaimed any and all implied warranties in this case. Therefore, the district court incorrectly allowed Two Rivers to receive damages based on the theories of strict liability and breach of an implied warranty of merchantability.

Reversed.

TATE, CIRCUIT JUDGE, dissenting. I respectfully dissent.

The majority's persuasive opinion is thoughtful and scholarly. However, like the district judge whom we reverse, my *Erie* guess is that, in the particular configuration of facts before us, the Texas courts would hold that strict liability recovery is allowable. • • •

Therefore, I would allow products liability recovery at least the damages resulting from (a) the loss of the four calves stillborn due to Farro's unreasonably dangerous semen and (b) the loss in value of the 22 calves due to their being born afflicted by the defect resulting from such semen. Accordingly, I respectfully dissent.

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1. The leading case holding that an action in strict liability does not lie when the product did not perform as expected is Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965) (Traynor, C.J.) (White truck

6. *Intervening Negligence of User.* Bystander cases present at least two distinct issues regarding intervening negligence of the user. The first is simply one of cause in fact. A truck injures a pedestrian. Did the driver fail to use reasonable care in applying the brake or was the brake assembly defective? See Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo.App. 99, 517 P.2d 406 (1973). Cf. Landry v. Adam, 282 So.2d 590 (La.App.1973) (did purchaser replace brake hose?). The second is more complicated. Should a product be deemed defective because the manufacturer failed to shield the bystander from the intervening negligent misuse of the product? See infra page 784. See also the note on shifting responsibility, supra page 757.

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"The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by the defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands." 557 S.W.2d at 77, quoting Seely v. White Motor Co., 63 Cal.2d 9, 15, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965).

This case is governed by the rules of commercial law for two reasons. First, even if the bull semen is considered to be defective, it is not unreasonably dangerous. Second, the Texas case law indicates that the policy rationale of contract law is to govern this situation. • • •

Two Rivers may not recover damages under the doctrine of strict liability because the bull semen, as a matter of law, was not unreasonably dangerous. Therefore, this case must be governed by the doctrine of commercial law. But even if the bull semen is deemed to be unreasonably dangerous, this case is still governed by the policy rationale of commercial law. • • •

Strict liability was not designed to govern every sale of a faulty product. *Mid Continent,* 572 S.W.2d at 312. Commercial law governs the case where the purchaser has lost some of the benefit of his bargain.

This is clearly demonstrated in an analogous area involving the sale of seeds that are of inferior quality and seeds that will not germinate. • • •

Essentially, Two Rivers is complaining, as a purchaser of bull semen, that the product did not fulfill its commercial expectations. • • • The presence of the recessive gene meant that the product did not fulfill Two Rivers' commercial expectations. The policy reasons behind strict liability are simply not compelling in the case of a disappointed buyer. • • •

Because this case presents a situation involving the principles of commercial law, the provisions of the Uniform Commercial Code govern the outcome. • • •

Two Rivers pleaded and the trial court found that Curtiss breached its implied warranty of merchantability to Two Rivers by distributing a product that was not fit for the purpose of artificially inseminating cattle. Without addressing the validity of this conclusion, we find that this case may be decided on the issue of disclaimer of warranty. To disclaim an implied warranty of merchantability, the disclaimer must (1) mention the word merchantability and (2) in the case of a writing, must be conspicuous.

Each sale from Curtiss to Hi-Pro included a disclaimer of all warranties, express or implied, • • •. This language appeared in large type on the back of each invoice Hi-Pro received from Curtiss when it purchased bull semen. This disclaimer was also conveyed from Curtiss, through Hi-Pro, to Tony Hall when he purchased the Farro semen. • • •

The only remaining question is whether the disclaimer that was effective against Hi-Pro and Hall could be extended to Two Rivers. While Hall purchased the semen on his own account, he did so for the benefit of Two Rivers. Hall cannot be considered a seller of bull semen. The testimony reveals that Hall merely had the semen billed to his account and that he was later reimbursed by Two Rivers in an amount equal to his cost. At least to this extent, Hall was an agent of Two Rivers. Hall also charged Two Rivers a nominal fee for the services he performed. We hold that the relationship between Hall and Two Rivers requires a finding that the disclaimer effective against Hi-Pro and Hall was also effective as to Two Rivers. • • •

In summary, in Texas the type of loss presented in this case is governed by the U.C.C. and the law of warranty. But Curtiss successfully disclaimed any and all implied warranties in this case. Therefore, the district court incorrectly allowed Two Rivers to receive damages based on the theories of strict liability and breach of an implied warranty of merchantability.

Reversed.

TATE, CIRCUIT JUDGE, dissenting. I respectfully dissent.

The majority's persuasive opinion is thoughtful and scholarly. However, like the district judge whom we reverse, my *Erie* guess is that, in the particular configuration of facts before us, the Texas courts would hold that strict liability recovery is allowable. • • •

Therefore, I would allow products liability recovery at least the damages resulting from (a) the loss of the four calves stillborn due to Farro's unreasonably dangerous semen and (b) the loss in value of the 22 calves due to their being born afflicted by the defect resulting from such semen. Accordingly, I respectfully dissent.

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1. The leading case holding that an action in strict liability does not lie when the product did not perform as expected is Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965) (Traynor, C.J.) (White truck

The Comparing of the Plates

Once upon a time in a kingdom far, far away, the little king was dying without an heir. The people were kind of bummed about that and wanted to know how they would select their new king. The little king thus proclaimed that the new king would be the person who could convince the bishop that two plates were identical. The king defined identical as having the same size, shape, color, and markings. This would be no easy task since the bishop was blind.

Shortly thereafter, the little king died. The people set aside an appropriate period to mourn his loss (proportionate to his height, of course) and then began the process of finding a new king. Because the little king had established such a difficult test, few of the subjects bothered even to try to be king. In the end, only three came to the royal testing day: Gorgeous, Gratious, and Goofus.

Gorgeous was the first to try to prove that the plates were identical. He came before the bishop and simply described one of the plates. "This plate," he said, "is six inches across. It is round. It is white, and it has a circle, a triangle, and a square on the rim."

Gorgeous smiled as the bishop sat pondering for a moment. Finally the bishop said, "so what? Gorgeous doesn't make any sense. Take him out and dye his hair green. He is not to be our king."

As Gorgeous was led out, Gratious patted him on the back and said, "Tough break old friend, but at least you like green." Gratious then proceeded before the bishop, confidently cleared his

throat, and compared the two plates. "Like the first plate, the second plate is six inches across. Also like the first, the second is round. Furthermore, both plates are white, and both have a circle, a triangle, and a square around the rim."

This time the bishop pondered for an even longer period of time, and Gratious, sensing victory, waved triumphantly to the cheering masses who had come to get an inside track on a cabinet position. Finally the bishop said, "Gratious has shown me that the plates are similar, but I'm not sure that makes them identical. Something is missing so he can't become our king. Still it was a good try so only dye half his hair green."

Now only Goofus was left. Goofus felt more pressured than either of the other two because he hated green. Goofus stared at the bishop for a moment then said, "The two plates are identical. The little King defined identical as 'having the same size, shape, color and markings.' Both plates are six inches across; therefore, they are the same size. Both are round so they have the same shape. In addition, they share a common color and common markings: both are white, and both have a circle, a triangle, and a square on the rim. Since both plates do share a common size, shape, and color and common markings, the plates are identical."

The bishop sat up in his chair. "That's it!" he exclaimed. "Goofus has proved it. He shall be our King." The crowd went wild.

Our story could have ended here had it not been for the presence in the crowd of the hiring partner of a large and influential Pittsburgh law firm. Having heard the amazing

analytical display of Goofus, he immediately offered Goofus a job as a first year associate at twice the salary he could earn as King. Goofus took the position, and then in a strange twist of fate, Gorgeous and Gracious became co-Kings. It seemed that centuries before, a previous King Ivan the Emerald had provided in an obscure decree that in cases of an unfillable vacancy on the throne, all subjects with green hair would share the throne. Since Gorgeous and Gracious were the only green haired subjects, they became the Kings, and everyone lived happily ever after.

Torts
Analysis Example Sheet

I. Moving from Template to Exam Answer

A. Simple Rules
1. Template:

Law	Facts
Product	Saw

2. Exam Answer:
a. Structure: The product was the saw.
b. Explanation: Notice in the sentence we have
1) Conclusion--an indication the element was met
2) Rule--the element we're on (product)
3) Application--the element (product) is jammed against the corresponding facts (saw)

B. More Complex Rules
1. Template:

Law	Facts
Product	

Subtemplate for Product:

Law	Facts
Real Property	House

2. Exam Answer:
a. Structure: The product was the house. Product includes real property, and the real property here was the house.
b. Explanation: Notice in the sentence we have
1) Conclusion--an indication the element was met (The product was the house.)
2) Rule--the element we're on as defined by the courts(Product includes real property)
3) Application--the element, as defined, is jammed against the corresponding facts (the real property here was the house)

C. Ambiguous Rules
1. Template:

Law	Facts
User, consumer	Motorist in the other car

2. Exam Answer:
a. Structure: The user or consumer was the motorist in the other car. User or

consumer includes foreseeable bystanders. This is so to guarantee that people like foreseeable bystanders who cannot protect themselves from defective products can recover from manufacturers who can foresee the bystander and prevent injury to her. The foreseeable bystander here was the motorist in the other car.

b. Explanation: Notice in the sentence we have

1) Conclusion--an indication the element was met (The user or consumer was the motorist in the other car.)

2) Rule
--the element we're on as defined by us (User or consumer includes foreseeable bystanders)
--an argument
*that is based on one of our 402A values and
*that supports our definition of the element
(This is so to guarantee that people like foreseeable bystanders who cannot protect themselves from defective products can recover from manufacturers who can foresee the bystander and prevent injury to her.)

3) Application--the element, as defined, is jammed against the corresponding facts (The foreseeable bystander here was the motorist in the other car.)

TAP Torts
Exam Instructions
Summer Term 2011

Time: You will have a total of two hours for this exam. Please take time to read the question carefully and think about how everything fits together. Don't be alarmed if that process takes twenty or thirty minutes. You may find that you do not have time to say everything on the exam that you may want to say, but remember that everyone has the same amount of time. Just try to do the best job you can in the limited amount of time you have.

Length: The exam has one question, and this question appears on two pages. Before beginning the exam, make sure you have two pages of torts problem. You may also want to make sure that you do not have two of the same page. Also included is one page of instructions. You are reading the instructions.

Materials: During the exam, you may use anything included with the exam, something to write with or maybe erase with, the exam book, and scratch paper. You may not use any brass, woodwind, or percussion instrument.

Anonymity: To preserve anonymity, you are not allowed to put your name anywhere on your exam book, and you may not discuss the exam with me until grades are posted. If you have any problems showing up for or taking the exam, please contact the registrar or the proctor of the exam. I am not allowed to know about these problems until grades are posted.

Literary Inconsistencies: To the extent that you see inconsistencies between this exam and reality, sport, or any popular people, films, plays, books, or television programs with which you may be familiar, assume my version is correct even if you know it is not. The exam is fiction and does not refer to real people!

Confidentiality: Do not discuss the content of this exam with anyone in our section who, for whatever reason, has not taken the exam. In addition, for your own mental health, I would suggest that you not discuss the exam with anybody till after grades are posted.

Format: For both our sakes, please write on only one side of each page and skip every other line. This will make it easier for me to read and easier for you to add something later during the exam if you decide you missed something.

Good luck on the exam. Enjoy the rest of your summer.

The Question

Paula Baer operated a heating and air conditioning business, which sold and installed various types of air conditioning units from small window units to industrial central air units. The business had been in her family for three generations, and although Paula had never gone to any kind of school for air conditioning training, she had become an expert on heating and air conditioning by working in the business her whole life. When a customer came in with a heating or air conditioning problem, Paula would determine the best system and design for their needs. Paula had devised and installed air conditioning systems in everything from playhouses to indoor football stadiums and was considered one of the best climate control minds in the business.

Every year Paula's town would have a two week stretch where temperatures would soar into the hundreds with high humidity. Invariably during this stretch, Walt Russ would call for an estimate for central air for his home. Having preserved Walt's file over the years, Paula would immediately quote him a price of $3000 for an installed system. Walt would linger on the phone and then tell Paula that he would call her back. He never would, at least not until the beginning of the next year's hot stretch.

When Walt called this year, Paula gave him an estimate of $3000, and Walt again lingered on the phone. This time, however, Paula was moved with compassion and inspiration. Paula suddenly said,

> Listen Walt, I know you can't afford the $3000 for central air, but I remember your house from the first time I gave you an estimate, and I don't think you need central air. I think we can cool your whole house with my old Freezy Sneezy wall unit. I've had it for years; it's a great little unit. I just took it out of my house yesterday and was going to use it as a decoration in the store. I really don't need money for the unit itself, but because the installation in your home will be a little tricky, I would need to charge you $300. Still, $300 and you have a working unit in your home, delivered and installed, is a great deal.
>
> And Walt, here's the best part. Obviously I don't stock units here so normally I would have to contact the manufacturer, and we'd have to wait to have a unit shipped here. But I have my Freezy Sneezy sitting on my office floor right now so I could bring it out today and install it for you. What do you think?

Walt was euphoric and thanked Paula profusely.

Paula delivered the unit to Walt's house. As she had indicated, the installation was a little tricky. Paula had to determine where the unit would most effectively be located, and then she had to cut a hole into Walt's house and fit the unit. Paula, however, did an expert and even artistic job, and within a few hours she had the wall unit looking great, and of course since it was a Freezy Sneezy, it was cooling great.

Paula gave Walt some tips on the Freezy Sneezy over lemonade in Walt's kitchen. Paula explained that Freezy Sneezy had been the premier name in air conditioning until the company had decided to close about ten years ago. Walt now had one of the final units that the company

had produced. This model was very reliable, and no problems had ever been reported in any of these air conditioners.

The one thing that Walt did need to be concerned about was the power of the air conditioner. Paula had set the air conditioner on low, and Walt really should be able to leave it on that setting throughout the summer. In fact, Paula, herself, had never used the unit above the low setting. In particular, however, Walt should never run the air conditioner on high. A Freezy Sneezy set on high could turn a room into a tundra. The high setting was normally reserved for specialized industrial uses in areas of particularly high temperatures. Recognizing this, the Freezy Sneezy people had designed a safety gear in the air conditioner: if the air immediately around the unit fell below forty degrees for more than five minutes, the unit would downshift itself from high to low. Paula explained if the unit didn't have this feature, it could run the risk of freezing up, then over-heating, and finally starting on fire. Walt thanked Paula for the advice.

After years of sleeping in heat and humidity, Walt was convinced that no cold could be too cold. Thus, that night when he went to bed, Walt flipped the setting on the Freezy Sneezy to high. A few hours later, a neighbor saw the side of Walt's home with the Freezy Sneezy on fire. The neighbor called the fire department and then rushed into the home and saved Walt. Despite the fire, Walt was suffering from frostbite. Doctors estimated that Walt's skin had been exposed to subfreezing temperatures for at least four hours. They further indicated that the air conditioner was the only item in the home that could have held the air temperature in the home that low for that long.

Investigators were unable to examine the Freezy Sneezy because it was completely destroyed in the fire. Walt, however, told them that he was the only one to touch the unit after Paula left and that all he had done was move the setting to high. Fire investigators were able to determine that the fire started in the vicinity of the air conditioner and that it was not an electrical fire nor a kitchen fire, nor was it caused by any smoldering waste.

Walt would like to sue Paula for the damage to himself and his property. Please analyze each element of a 402A cause of action and determine whether you think Walt would have an action under 402A against Paula. Please explain your answer.