California Bar Examination

Performance Tests and Selected Answers

February 2002

FEBRUARY 2002 CALIFORNIA BAR EXAMINATION EXAMINATION PERFORMANCE TESTS AND SELECTED ANSWERS

Published by the Committee of Bar Examiners of the State Bar of California

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

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

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INSTRUCTIONS AND FILE

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Estate of Keefe

INSTRUCTIONS

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

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

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

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

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

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

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

McIntyre, Yost and Amrein, LLP

MEMORANDUM

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

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

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

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

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

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

McIntyre, Yost and Amrein, LLP
INTERNAL MEMORANDUM

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

DECLARATIONS

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

Declarations must:

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

MEMORANDUM OF POINTS AND AUTHORITIES

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

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

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

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

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

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

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

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(555) 267–0001

Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

In re ESTATE OF SANDRA KEEFE, Deceased.
_____/

MASON FINCH,

Plaintiff,

vs.

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

Defendant.

_____/

Case No. 171757

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

I. INTRODUCTION

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

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

II. DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

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

III. ARGUMENT

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

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

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

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

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

Columbia Probate Code §150 provides as follows:

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

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

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

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

IV. CONCLUSION

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

Dated: February 21, 2002

Respectfully submitted,

HIMMLER & MATZEN

By_____
PAUL PRICE

Attorneys for Defendant

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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

In re ESTATE OF SANDRA KEEFE, Deceased.
_____/

Case No. 171757

DECLARATION OF GRANT KEEFE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MASON FINCH,

Plaintiff,

vs.

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

Defendant.

_____/

I, Grant Keefe, declare as follows:

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

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

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

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

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

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

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

8. Sandra Keefe died on August 26, 1999.

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

_____

Grant Keefe

TRANSCRIPT OF INTERVIEW WITH MASON FINCH BY ATTORNEY GRETCHEN PRONKO

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

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

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

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

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

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

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

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

Q: How was their health?

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

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

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

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

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

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

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

Q: How was your financial situation?

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

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

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

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

Q: How long did this arrangement continue?

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

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

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

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

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

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

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

Q: How long did you care for Sandra?

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

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

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

Q: So Sandra gave you $50,000?

A: Yes.

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

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

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

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

Q: When did Sandra die?

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

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

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

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

A: No, not that I ever saw.

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

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

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

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

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

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

TRANSCRIPT OF INTERVIEW WITH MILDRED FOWLER BY INVESTIGATOR CHARL MALONE

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

Ms. Fowler (A): Sure.

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

A: Yes, that's right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q: Do you recall when she first mentioned it?

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

Q: This would have been in what year?

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

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

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

Q: Did Sandra mention anything about the office building?

A: No.

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

A: Yes, I certainly will.

TRANSCRIPT OF INTERVIEW WITH TORI PHILLIPS BY INVESTIGATOR CHARL MALONE

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

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

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

A: Yes, I understand.

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

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

Q: When were you hired?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: No, she didn't.

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

A: No.

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

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

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

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

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

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

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

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

February 23, 2002

Dear Ms. Pronko:

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

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

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

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

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

Thanks,

Mason Finch

TUESDAY AFTERNOON
FEBRUARY 26, 2002

California
Bar
Examination

Performance Test A

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ESTATE OF KEEFE

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RIGANTI v. McELHINNEY

Court of Appeal of Columbia (1967)

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

KENNEDY v. BANK OF COLUMBIA

Court of Appeal of Columbia (1965)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HORSTMANN v. SHELDON

Court of Appeal of Columbia (1962)

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is affirmed.

ANSWER 1 TO PERFORMANCE TEST A

DECLARATIONS

Declaration of Mason Finch

I, Mason Finch, declare as follows:

1. I am the Plaintiff in this action.

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

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

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

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

rent free and use the office space rent free.

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

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

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

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

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

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

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

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

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

Declaration of Mildred Fowler

1. I, Mildred Fowler, declare as follows:

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

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

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

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

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

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

quite dependent on him to do just about everything.

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

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

Declaration of Ralph Sanchez

1. I, Ralph Sanchez, declare the following:

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

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

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

III. RESPONSIVE PARTY'S STATEMENT OF DISPUTED FACTS

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

IV. RESPONSE TO MOVING PARTY'S ARGUMENTS

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

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

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

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

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

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

Doctrine of Estoppel

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

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

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

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

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

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

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

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

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

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

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

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

Exceptional Service - Impossible to Measure Value

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

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

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

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

Not Intend to Measure by Pecuniary Standard

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

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

Not be Restored

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

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

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

Unjust Enrichment

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

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

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

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

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

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

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

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

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

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

ANSWER 2 TO PERFORMANCE TEST A

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

DECLARATION OF MASON FINCH

I, Mason Finch, declare as follows:

1. I am the plaintiff in this action.

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

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

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

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

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

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

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

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

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

11. In about 1994, Mabel had a stroke.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECLARATION OF MILDRED FOWLER

I, Mildred Fowler, declare as follows:

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

2) I clean regularly once a week.

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

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

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

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

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

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

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

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

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

DECLARATION OF TORI PHILLIPS

I, Tori Phillips, declare as follows:

1. I am a home healthcare worker.

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

3 I worked about 6 months until her death.

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

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

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

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

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

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

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

DECLARATION OF RALPH SANCHEZ

I, Ralph Sanchez, declare as follows:

1. I am a colleague of Mason Finch.

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

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

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

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

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

7. They are now 78K.

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

III. RESPONSIVE PARTY'S STATEMENT OF DISPUTED FACTS:

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

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

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

IV Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THURSDAY AFTERNOON
FEBRUARY 28, 2002

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

ADAIR v. OLDFIELD

ADAIR v. OLDFIELD

INSTRUCTIONS

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

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

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

Task A — 50%

Task B — 50%

Law Office of Lawrence Craig

MEMORANDUM

TO: **Applicant**

FROM: **Larry Craig**

DATE: **February 28, 2002**

SUBJECT: **Adair v. Oldfield**

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

These are my questions:

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

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

EXCERPTS FROM THE DEPOSITION OF WILLIAM OLDFIELD

EXAMINATION BY MS. SALISBURY, COUNSEL FOR PLAINTIFF:

* * *

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

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

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

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

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

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

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

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

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

A. The people changed over the years.

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

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

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

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

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

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

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

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

Q. What's a carabiner?

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

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

Q. What happens when the climber reaches the top?

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

Q. Is that difficult?

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

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

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

Q. What did you do?

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

Q. Where was Greg?

A. At the base of the Left Overhang route.

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

A. Yes.

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

A. Nothing in particular.

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

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

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

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

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

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

Q. Who unclipped the rope?

A. I don't know.

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

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

BY MR. CRAIG: No questions.

EXCERPTS FROM THE DEPOSITION OF GREG ADAIR

EXAMINATION BY MR. CRAIG, COUNSEL FOR DEFENDANT:

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

RELEASE OF LIABILITY

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

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

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

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

Dated:July 9, 1997 /s/ Greg Adair

EXCERPTS FROM THE DEPOSITION OF JED WILLIAMS

EXAMINATION BY MS. SALISBURY, COUNSEL FOR PLAINTIFF:

* * *

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

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

Q. So, what do you think happened?

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

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

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

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

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

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

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

Q. You think so?

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

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

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

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

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

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

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

Q. Yes, but whom?

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

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

A. No.

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

Q. Including Mt. Everest?

A. Yes, that's become almost obligatory.

Q. Ever had a client or student seriously injured?

A. Of course.

Q. Any get killed?

A. Yes. It comes with the territory.

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

A. No.

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

A. Probably not.

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

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

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

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

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

BY MR. CRAIG: No questions.

THURSDAY AFTERNOON
FEBRUARY 28, 2002

California Bar Examination

Performance Test B

LIBRARY

ADAIR v. OLDFIELD

LIBRARY

BUCHAN v. UNITED STATES CYCLING FEDERATION

Columbia Court of Appeal, 1991

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reversed.

STATEN v. SUPERIOR COURT

Columbia Court of Appeal, 1996

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEON v. FAMILY FITNESS CENTER

Columbia Court of Appeal, 1998

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is reversed.

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

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

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

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

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

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

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

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

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

The superior court overruled the objection. Rightly so.

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

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

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

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

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

Affirmed.

ANSWER 1 TO PERFORMANCE TEST B

PART A

MEMORANDUM

To: Larry Craig

From: Applicant

Re: Express Assumption of Risk - Adair v. Oldfield

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

A. THE RELEASE DID NOT INVOLVE THE PUBLIC INTEREST

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

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

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

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

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

B. THE TECHNICAL REQUIREMENT FOR A WRITTEN RELEASE WERE MET

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

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

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

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

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

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

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

C. THE RELEASE WAS EFFECTIVE

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

D. CONCLUSION

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

PART B

MEMORANDUM

To Larry Craig

From: Applicant

Re: Implied Assumption of Risk - Adair v. Oldfield

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

A. IMPLIED ASSUMPTION OF RISK

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

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

1. The Nature of the Activity in Question

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

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

2. The General Relationship of the Parties

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

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

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

B. EXPERT TESTIMONY OF JED WILLIAMS

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

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

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

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

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

C. CONCLUSION

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

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM A

To: Larry Craig

From: Applicant

Date: February 28, 2002

Subject: Adair v. Oldfield

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

Answer: Yes.

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

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

Legal Analysis:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM B

To: Larry Craig

From: Applicant

Date: February 28, 2002

Subject: Adair v. Oldfield

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

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

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

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

Legal Analysis:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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