California
Bar
Examination

Performance Tests
and
Selected Answers

February 2003

TUESDAY AFTERNOON
FEBRUARY 25, 2003

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

MORALES et al. v. PARSONS

MORALES et al. v. PARSONS

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**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. 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 performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it 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.
6. Your response must be written in the answer book provided. 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.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of

BROWN, MARRERO & MILAN

1101 Rose Parkway

Garden City, Columbia

M E M O R A N D U M

TO: Applicant

FROM: Jane Kimmel

RE: Morales and Vargas v. Parsons

DATE: February 25, 2003

I need your help on a case we are considering filing against a strawberry grower in Washoe County, arising out of a fire in a farm worker encampment on his property. Our potential clients are Juan Morales, a farm worker who was badly burned, and the family of one of his co-workers, Alberto Vargas, who was killed. The clients were interviewed about a week ago, and since then our investigator has been out to the scene of the fire and I have interviewed a prospective witness. It looks like a sympathetic case to take to a jury, but I'm not sure we have a basis for the landowner's liability under Columbia law. As you'll see from the cases I've pulled together, the Court of Appeals ruled against plaintiffs in a pair of cases with quite similar facts a few years ago.

Please draft a memorandum that identifies and presents as strongly as possible the arguments that will most likely allow our clients to prevail on:

1) The theory of premises liability; and

2) The theory of negligence per se.

EXCERPTS FROM INTERVIEW OF JUAN MORALES

* * * * *

MS. KIMMEL (**Q**): Mr. Morales, let's talk about the night of the fire. Tell me how it happened.

MR. MORALES (**A**): No one knows for sure. I was told the fire started in Alberto Vargas' tent. He was doing something in his tent, maybe mending a shirt he had torn that day. I went to bed around nine, and the next thing I knew people were yelling and trying to get out, and the flames were all around me.

Q: Was Mr. Vargas the only one who was killed?

A: Yes.

Q: What do you think might have caused the fire?

A: I think probably his lamp got knocked over, and something like paper caught fire. He had a lot of flammable things in his tent, like cardboard boxes and magazines.

Q: What kind of lamp did he have?

A: It was an oil lamp, like most of us used. It had a glass cover, with oil in the bottom, and a wick that you light with a match. These lamps are not as bright as the kind of lamp that uses kerosene, that you pump up. But they are a lot easier to use, and cheaper. If one of them tips over, though, the oil spills everywhere, and can start a fire.

Q: Did the camp have electricity?

A: No.

Q: Was water available to fight the fire?

A: There was a shower, and a faucet where you could get water. But there was no hose, and the fire was too big to use buckets, or the cooking pots that were around.

Q: You said the flames were all around you when you woke up. How did you get out?

A: I'm not sure. I know I stood up, and saw the whole wall around the tent door was on fire, and I guess I went through it. When I got outside, with my clothes on fire, I fell to the ground and my friends threw a blanket on me to put out the flames. Then they pulled me away, to a safe place.

Q: Were these canvas tents?

A: They weren't really tents like you would buy at the store. They were more like shacks, really. Mine was made of cardboard boxes flattened out and taped together. It had sheets of plastic on the outside, in case it rained.

Q: You said earlier that Mr. Vargas' tent was right next to yours. Was it made of the same kinds of materials?

A: Yes, about the same. Most of us had a piece of plywood or a tarp for a floor, and then we just made walls of whatever we could find around the place. The owner of the

farm, Mr. Parsons, let us use old boards, cardboard, whatever he didn't want. Some people had tarps that they set up like a regular tent, but they had to find a stake or a pole or something to tie them to. There weren't any big trees where the camp was, just scrub oak and bushes.

Q: Were the shacks or tents close together?

A: Yes, very close. Somebody would make a frame with stakes, and then on each side of them people would use their neighbor's frame as part of their own frame, to attach whatever they were going to use for walls -- cardboard or plastic or whatever. The shacks were in rows or groups like that. They were very close together.

Q: Approximately how many of these dwellings were there in the camp?

A: I don't know for sure. There were about fifty of us living there, and some tents housed two or three people in the same space. So there were maybe 30 or 35 tents.

Q: Was there only one water faucet and one shower for the whole camp?

A: Yes. Before, we didn't even have that. Two years ago we had to carry water from the farm, and wash ourselves from a bucket. Last year Mr. Parsons paid for pipe and let us hook up to the irrigation system and run a water line to the camp.

Q: So it seems that Mr. Parsons provided some materials and services for the camp, but not a lot. What else did he provide?

A: I don't know everything he did when the camp was first built. This was only my third year working there. But since I've been there, it was mainly the water line, and letting us use scrap materials to build the houses. For example, the plastic on the outside of my house was from the rolls we use between the rows of strawberries to keep weeds from growing. He knew we were using that and didn't charge us for it or anything. And he provided two portable toilets, and had this truck come around to empty them.

Q: Was there a way to get mail, or use a telephone?

A: Mail, yes. There was a separate mailbox out by the road for employees. To make a telephone call, it was necessary to go into town and use the pay phone. People who had been working there for a long time could give the foreman's telephone number to their families, for emergencies. He would come over to the camp and tell people to call home. But that was just for some people, and for emergencies. There wasn't really a way for the rest of us to receive telephone calls. But since we were only there part of the year, it worked out.

Q: So except for some minimal services, it seems Mr. Parsons left you workers pretty much on your own in setting up and running the camp.

A: Setting up, maybe so. But he didn't really let us run it. He had rules about who could live there, who could even visit.

Q: What rules?

A: For example, only workers could live there. No wives or families or anyone else. Women couldn't even come there.

Q: Would he actually check to see who was there?

A: Not Mr. Parsons himself, but the foreman, Rudy Mendoza, did. He came around a few times a week, checking on things. And the road to the camp went right by his house, so if anybody came in a car, he came right out.

Q: And he would actually turn people away? Say, "You can't go in there," or something like that?

A: For sure, lots of times. He might let some friends from another farm visit for a few hours, but even then he'd check up to see if people were drinking too much, and make them leave if they were.

Q: So they even regulated how much you could drink?

A: They tried to, sure. They didn't actually search people's shacks or anything, but if Rudy thought someone was getting drunk, he would confiscate his liquor. It didn't come up much, except on Saturday nights. Most Sundays, we didn't have to work, so people would stay up late and talk, play cards, have a few beers. The other days, we had to get up early, so we went to bed pretty early.

Q: Was the night of the fire a Saturday?

A: No, a Tuesday. It was quiet that night. Almost everyone had gone to bed early.

Q: You said that families weren't allowed to live in the camp. Wasn't that a real hardship for some people, if they had families in the area?

A: Well, yes and no. If they could, people would like to be with their families, but it's hard to find work. Even if their family was living in Columbia, they might be twenty miles away, or fifty miles away–who can say? Nobody has a car to drive back and forth, so if they let you live where you're working, you take it. And if your family lives far away, or you're single, why spend money on a place to live? You have that much more to send home.

Q: Were there any workers at the farm during the time you were there who didn't live at the camp?

A: Field workers, no. People would come in to work on the irrigation system or operate machines that we didn't have on the farm, things like that. But the day-to-day workers all lived there.

Q: I guess what I'm trying to get at is whether you were required to live there. Would it have been possible to live somewhere else and simply come there to work every day?

A: Possible? Maybe. If you could get to work by six in the morning and go home at the end of the day, I think it would have been okay with Mr. Parsons and Rudy. But there was no cheap place to live anywhere around there, so, really, no one could do it. If you worked there, you lived there.

Q: You said this was only your third year working at the Parsons farm. Can you think of anyone who has worked there longer, who would be able to tell us more about how the camp was set up, how long it's been there and so forth?

A: Yes. Two of my friends said they will help us, and they have worked there many years. One of them can be reached through his brother, who lives near here. The other one we can reach by sending a letter, but it will take more time.

Q: That's fine. We'll start with the one who lives close by. At this point, as I said, we're just gathering information to decide whether we have a good enough case to take to court. If we file a lawsuit, we'll have plenty of time to track down the other witnesses.

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Law Offices of
BROWN, MARRERO & MILAN
1101 Rose Parkway
Garden City, Columbia

M E M O R A N D U M

TO: Jane Kimmel
FROM: T.C. Gutierrez, Investigator
RE: Visit to Parsons Farms
DATE: February 21, 2003

As you suggested, I parked beyond a curve in the road about a quarter mile away from the entrance to the farm, and approached on foot. Just before I reached the entrance, a beat-up panel truck drove through the gate, passed the house next to the entrance, and turned onto the dirt track leading over to the ravine on the left, where I knew the workers' camp was located. It turned out to be the regular lunch wagon--a vendor of some sort who comes in and sells food to the workers at lunchtime every day. I just followed it down to the camp, and if the foreman saw me, he probably thought I was after a sandwich. Anyway, I wasn't challenged, and I was able to hang out for almost an hour, talking to some of the workers and looking the place over. I took some pictures, and will get those to you as soon as they are developed.

The client guessed right. The camp has been completely rebuilt, if you can call it that, since the fire. The ravine is the only place that makes sense for that kind of camp, because it's one of the few places on the farm with any shade. That's why the workers go back there for lunch. At this point there are two rows of flimsy shacks or makeshift tents along the sides of the ravine, with another cluster of shacks off by itself a little farther up. The road is only passable up to the edge of the camp, and that's where the lunch wagon pulled up, and where they put the portable toilets and the dumpster for garbage.

Anyway, you'll see from the pictures that we really are talking about cardboard shacks. Some of them have an old piece of plywood for one wall, and there's some corrugated

metal or plastic here and there, but the basic building materials are plastic tarps and flattened-out cardboard. You can see that a fire would spread through the place in no time. I was able to get a photo that shows where the water faucet and shower are located in relation to the shacks, and another that shows they are just ¾ inch pipe, nothing heavy-duty or adequate for fire protection. The faucet itself is threaded, so someone could have attached a garden hose, if there had been one, but even now there is no hose in sight. Also, there is still no electricity. I was unsure how to try to document that. My shots of the camp will show there are no overhead lines, and I also have a couple of shots of kerosene lanterns hanging over the shower and cooking area.

As I said, I talked with some of the current workers, but I didn't try to get much information about the fire from them. They were pretty wary of me, even though I told some of them that I was working for a law firm that was looking into the possibility of filing a lawsuit for the people who were injured or killed. One guy actually told me he couldn't talk to me then, but could meet me in town sometime if I wanted, and told me how to set that up. If this goes further, I'll be happy to follow up with him.

I also went to the County Recorder's Office and checked the records on Parsons Farm. Parsons is the owner of record, and the property description includes the area where the camp is located. I ordered a copy of these documents.

EXCERPTS FROM INTERVIEW OF WITNESS EMILIO CRUZ

* * * * *

MS. KIMMEL (**Q**): Mr. Cruz, thank you for agreeing to let me tape record our conversation. It really is the best way to make sure I have an accurate record of what you tell me, and it also speeds things up. Could you just restate, for the record, that the taping is fine with you?

MR. CRUZ (**A**): Sure. I have no problem with it. I already told Juan I would do whatever it takes to help him.

Q: I know you did, and I know he appreciates it. Now, as I told you, the main thing I want to discuss with you is how the camp came to be set up, and how it was run. I understand you've worked off and on at the Parsons farm for many years?

A: Yes, I first started working there about twelve years ago. I worked over in Gaston Valley for a couple of years, but the rest of the time I was at Parsons.

Q: Were you there when the camp was first set up?

A: Yes, that was about eight years ago.

Q: And how did that come about? I mean, where were you workers living before that, and why did you move to the Parsons farm?

A: Well, we were living in different places, over near Wiltsville, about 25, 30 miles from the Parsons Farm. At that time we worked for a labor contractor named Sanchez. He had a couple of trucks that he would load up at his place at five in the morning, and they would drive us over to Parsons' place. But the trucks were always breaking down, you know? And then Sanchez was taking his cut. I think Parsons just wanted to eliminate the middleman, keep more of the profits for himself.

Q: So it was Parsons' idea to set up a camp at his farm?

A: I don't know if it was him or Rudy. It was Rudy who talked to us at the lunch break one day, asked us if we wanted to set up a camp at Parsons' farm, just stay there and work for them directly, every year.

Q: And the workers thought that was a good idea?

A: Sure, who wouldn't? We had to get up an hour earlier, because of the truck ride, and most of us were living in the camp at Sanchez' place, and he charged plenty of rent, which he just deducted from our pay. So we could work the same hours for Parsons at the same pay, but save money and have more time for ourselves. And I don't know if you've ever ridden in the back of a truck with 15 or 20 other people, but

that's a hard way to go back and forth to work, too. The shape those trucks were in, it felt like we were risking our lives, every time.

Q: I can see why the move made sense. So you never had to pay rent at the Parsons place?

A: No. What would they charge for?

Q: Believe me, I'm not saying they should have charged you rent, I just need to know whether they did or not. I understand you left Parsons Farm after the fire?

A: Yes. I'm lucky. I have family nearby, and I've always been able to find work.

Q: Can you tell me how the camp was first constructed?

A: Well, as I said, it was in the middle of the season, eight years ago. We moved over there on a Sunday, after we got paid that Saturday night. Mr. Parsons sent his own trucks over to pick us up with our stuff, and I think he paid Sanchez what he owed him under their contract. I'm not sure about that part. Anyway, we got over there and spent the rest of Sunday rigging up a place to sleep. Rudy took some of us into town to buy stuff we needed, like flashlights and plastic tarps, duct tape, things like that.

Q: What did you do for food?

A: Most of us had been doing our own cooking at Sanchez' place, because there was electricity there, and hot plates to cook on. So we brought over whatever food we had, and bought more in town. But we were eating out of cans that Sunday and for a few days after that. By the middle of the week Rudy got Roberto Moya, who was already selling us food at lunchtime, to bring it in at night as well. Later on we got a couple of camp stoves and fixed up a fireplace with a grill over it, but a lot of people just bought from Moya.

Q: So the foreman, Rudy Mendoza, arranged for food to be brought in?

A: I think Moya was his brother-in-law or something. It's not like we had a choice. Toward the end of the week Moya would let us buy on credit, you know? And then Rudy would take what you owed him out of your pay. So they definitely had some kind of arrangement.

Q: Do you think they were cheating you?

A: No, the food was okay, and it was pretty reasonable. I just mean that Rudy made sure that Moya didn't have any competition.

Q: And is Moya the person who still sells food to the workers every day?

A: Yes.

Q: Let's go back to the building of the camp, those first few days. Did Mr. Parsons or Rudy provide any of the materials?

A: Oh, sure. They had piled some things they thought we could use at the campsite, and there were other locations on the farm where there were stacks of old boxes, boards, things like that, that they let us use. Like there was an old henhouse on the property that wasn't being used anymore, and we took the roof from that, and some of the boards that were in good shape.

Q: Did they provide any tools you needed?

A: Yes, they let us use all the different tools. Just hand tools, you know, like hammers and shovels, things like that. There was no way to use power tools.

Q: Did they provide garbage cans and latrines from the beginning?

A: It took awhile before they had that dumpster brought in, and had a regular garbage pick-up. But the latrines, yes. They were set up before we got there.

Q: Is there anything else like that that you can think of that shows they were preparing to have you move in there?

A: Maybe the water. Like I said, we didn't get water piped to the site until last year, but before that they installed a valve on the irrigation line that ran closest to the camp, so we could get water there and carry it to the camp. They gave us the buckets, and a couple of big coolers for drinking water to keep at the camp.

Q: I know there was no telephone. What about the mail? Did they put in the mailbox right away?

A: No, I don't think they expected us to get mail, or something. It was a year or two before we had our own mailbox.

Q: Can you think of anything else they provided? If not that first year, in the years since?

A: The water line to the camp, the shower. They would save old tarps for us, things like that. All the strawberries we could eat, especially if they were too ripe to ship. And we could take anything they were throwing away. We got some dishes and stuff that way.

Q: So they didn't do that much to help. But Juan said they also didn't leave you alone, that they had a lot to say about who could live in the camp, or even who could come there, how late they could stay and so forth. Do you agree on that?

A: Oh, yeah. Lots of rules. Every year they gave everybody a copy. I brought you one.

Q: Thanks, this could come in handy. And I take it that Rudy was the main enforcer? That he actually checked up on who was there, stopped people coming in, things like that?

A: Yeah, anybody coming in had to pass his house, and he was right out there. No women. One time a nurse from the health clinic in town came out to give a guy some tests results, and she couldn't even get in. It was their private property.

* * * * *

PARSONS STRAWBERRY FARM
CAMP RULES AND REGULATIONS

- NO ONE IS PERMITTED TO LIVE ON THESE PREMISES WITHOUT THE EXPRESS PERMISSION OF THE OWNER OR HIS AGENT.

- NO OVERNIGHT VISITORS. OTHER VISITORS PERMITTED AT SOLE DISCRETION OF OWNER OR HIS AGENT.

- NO PETS OF ANY KIND.

- PLACE ALL TRASH IN DESIGNATED RECEPTACLES.

- SMOKING PERMITTED OUTSIDE OF DWELLINGS ONLY.

- NO ALCOHOLIC BEVERAGES.

- NO FIREARMS.

- NO LOUD MUSIC, TALKING, OR OTHER LOUD NOISE AFTER 10 PM, SATURDAYS EXCEPTED (MIDNIGHT SATURDAYS).

- COOKING TO BE DONE IN DESIGNATED AREAS ONLY.

- USE LATRINE AND KEEP IT CLEAN.

MORALES et al. v. PARSONS

LIBRARY

EXCERPTS FROM
COLUMBIA EMPLOYEE HOUSING ACT

Section 1. **Findings and declarations.**
The Legislature finds and declares that protections provided to tenants of farm labor camps help ensure that minimum health standards are maintained in those camps, thus protecting the health of the farm laborers and the community. The Legislature further finds and declares that those protections have been historically found to be necessary and still are necessary today because of the extreme health violations frequently found to exist in farm labor camps.

The Legislature finds and declares that despite added statutory protections, violations of health standards continue to exist in farm labor camps. Protections for tenants who complain about substandard conditions have been weakened by the use of summary unlawful detainer actions by camp owners against complaining tenants. It is the intent of the Legislature to improve conditions in labor camps by closing these loopholes that have developed in the law's enforcement.

Section 2. Employee housing compliance with building standards.
Buildings used for human habitation, and buildings accessory thereto within employee housing, shall comply with state building standards relating to employee housing unless a local ordinance prescribing minimum standards which is equal to such regulations is applicable. If such a local ordinance is applicable to buildings used for human habitation within employee housing, these buildings shall comply with the construction and erection provisions of the ordinance.

* * * * *

Section 8. "Employee housing"
(a) "Employee housing," as used in this part, means any portion of any housing accommodation, or property upon which a housing accommodation is located, if all of the following factors exist:

(1) The accommodations consist of any living quarters, dwelling, boardinghouse, tent, bunkhouse, maintenance-of-way car, mobile home, manufactured

home, recreational vehicle, travel trailer, or other housing accommodations, maintained in one or more buildings or one or more sites, and the premises upon which they are situated or the area set aside and provided for parking of mobile homes or camping of five or more employees by the employer.

(2) The accommodations are maintained in connection with any work or place where work is being performed, whether or not rent is involved.

(b) "Employee housing" means the same as "labor camp" as that term may be used in this or other codes.

* * * * *

Section 37. Duty to comply with requirements and regulations.

Every person, or the agent or officer thereof, constructing, operating, or maintaining employee housing shall comply with the requirements of this part, with building standards published in the State Building Standards Code relating to employee housing, and with the other regulations adopted pursuant to this part.

* * * * *

Section 61. Threats to health and safety; punishment.

(a) Any person convicted under this part, or found in contempt of a court order or injunction relating to the enforcement of this chapter, where there are violations that are determined by the trier of fact to be so extensive and of such a nature that the immediate health and safety of residents or the public is endangered and where the extent and nature of the violations are due to the defendant's habitual neglect of customary maintenance and display a flagrant lack of concern for the health and safety of residents or the public, is punishable by a fine not exceeding six thousand dollars ($6,000) and by imprisonment for not less than six months, but not exceeding one year, for each violation or day of a continuing violation, if the trier of fact finds serious violations of the following categories of violations are involved:

(1) Serious defects or lack of gas, water, or electric utility systems, unless caused by the tenant's failure to pay gas, water, or electric bills.

(2) Serious defects or lack of adequate space and water heating.

(3) Serious rodent, vermin, or insect infestation.

(4) Severe deterioration, rendering significant portions of the structure unsafe or unsanitary.

(5) Inadequate numbers of garbage receptacles or service.

(6) Unsanitary conditions affecting a significant portion of the structure as a result of faulty plumbing or sewage disposal.

* * * * *

GRIGGS v. BARNES CONSTRUCTION COMPANY

Columbia Court of Appeals (1992)

On December 7, 1988, Russell Griggs was electrocuted while working in a construction yard when a cable he was holding touched an overhead high voltage line. At the time of the accident, Griggs was working for Barnes Construction, a sole proprietorship owned by J.D. Barnes. Barnes Construction was engaged in several building projects in and around the town of Goose Creek in Adams County. Materials and equipment for these projects were stored in Barnes' "job yard" in Goose Creek. On the day in question, Griggs and another Barnes Construction employee, Clinton Morrow, were working in the job yard stacking timber. Morrow was operating a boom truck, and Griggs was assisting him by attaching the boom cable to bundles of timber. As Morrow was maneuvering the boom, he looked into the bright sunlight, which caused him to swing the boom into an overhead 12,000-volt power line. Unfortunately, Griggs was holding the boom cable at that very moment. The cable conducted the electricity into Griggs' body, causing his death by electrocution.

Griggs' widow and children filed suit against Barnes for wrongful death, alleging that, as a landowner, Barnes owed a general duty of due care to persons coming on his land, including employees, to protect them from the hazard presented by the high voltage lines. The trial court granted defendant's motion for summary judgment on the ground that defendant did not owe a duty of due care to the decedent, and plaintiffs appealed.

Under the common law, a landowner's duty of due care to a person coming onto his land turned on whether the person was classified as a trespasser, licensee or invitee. In *Rowland v. Christian (1968)* our Supreme Court repudiated this classification system and substituted the basic approach of foreseeability of injury to others. The court held that the proper test to be applied to the liability of the possessor of land is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others. In regard to those working on the land, the landowner who induces or knowingly permits a workman to enter the land for performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work. Whether a "duty" exists in a particular case is a question of law. "Duty" is merely a conclusory

expression used when the sum total of policy considerations lead a court to say that the particular plaintiff is entitled to protection.

Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. However, this is not true in all cases. It is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant owed a duty of due care to the person injured.

Plaintiffs argued in their opposition to the motion for summary judgment that Barnes should have taken steps to prevent the injury because he knew that the high voltage lines ran across his property and also knew that the boom truck was being stored and operated on the property. Consequently, plaintiffs contend that, viewing the evidence in the light most favorable to plaintiffs, Barnes should have reasonably foreseen that the boom might come into contact with the high voltage lines while the truck was being operated on the premises.

The most important policy consideration in determining whether a duty exists is the foreseeability of the harm. Viewing the evidence in the light most favorable to plaintiffs, as we must, we believe the harm--electrocution caused by the boom coming into contact with overhead power lines--was reasonably foreseeable by Barnes. In our view, the practical necessity of encountering the danger (i.e., the necessity of using the boom truck to move materials), when weighed against the apparent risk involved (electrocution by contact with electrical wires), is such that under the circumstances, a person might (and in fact did) choose to encounter the danger. We stress, however, that we find the injury "foreseeable" only as it pertains to a general duty of care. A court's task in determining “duty” is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is

sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent. Thus, the fact finder is still free to find that the particular plaintiff's injury (i.e., Griggs' electrocution) was not foreseeable in light of this particular defendant's conduct.

In addition to foreseeability, a court should consider the following factors in determining whether a duty of due care exists: (1) the degree of certainty that the plaintiff suffered injury; (2) the proximity between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability of insurance for the risk involved.

Here, the considerations numbered (1), (4), (5) and (6) militate in favor of imposing a duty in this case. The plaintiff clearly suffered injury; there is a strong policy of preventing future harm such as that which occurred here; the defendant could have easily discharged his burden by having the power lines insulated, or by specifically prohibiting the use of boom trucks or cranes in the area underneath them; and the risk here is likely covered by a standard liability policy. In short, the sum total of policy considerations lead us to say that Barnes, as a landowner, had a general duty to use due care to protect people coming onto his land from the obvious electrocution hazard on the property. Whether or not Barnes breached that duty with respect to Griggs is an issue of fact which should be left to the fact finder to decide.

Consequently, we reverse the summary judgment.

ESTEBAN RAUL LUCAS v. MURAI FARMS, INC.

Columbia Court of Appeals (1997)

Plaintiffs appeal from summary judgments granted in favor of defendants George T. R. Murai Farms, Inc. and Ramon Navarro, doing business as Chiquito Navarro Ranch. Plaintiffs Esteban Raul Lucas and Jorge Reyes (plaintiffs Guadalupe Reyes and Mario Garcia Reyes's decedent) (collectively plaintiffs) were migrant farm workers employed by Navarro at the time a fire occurred in temporary migrant farm worker housing located on property adjacent to that of Murai and Navarro. Lucas was gravely injured in the fire and Reyes was killed. Plaintiffs sued Murai and Navarro for damages for personal injuries, on theories of premises liability and negligence per se.

On October 22, 1987, when the fire occurred, Lucas and Reyes were undocumented Mexican nationals, working as migrant farm laborers and residing in an encampment known as the cancha, located along a creekbed on undeveloped land that was adjacent to the ranches owned by Murai and Navarro. As was their custom, Lucas, Reyes, and several co-workers built a living structure in the cancha from parts of wooden pallets, tomato stakes, cardboard, irrigation plastic, and twine, all taken from trash dump areas on the Murai and Navarro ranches.

According to his deposition, Lucas believed that the property on which he was living belonged to Murai. However, it was actually undeveloped land owned by defendant Perry Pollock. Lucas never obtained anyone's permission to live on the Pollock property and was never told to stay there by any authorities on the ranches where he worked. He did not rent a more standard dwelling because of his fear of immigration authorities, because he was sending a substantial portion of his wages home to Mexico, and because he wanted to live near his employment and his friends.

At the time of the fire, Lucas and Reyes had been working for Navarro for approximately two weeks. On the night of the fire, Lucas went into the sleeping structure about 10 p.m. to go to sleep, while Reyes remained outside reading by the light of a candle. Both had drank some beer that evening. Lucas does not know how the fire started. He woke up in the hospital with serious burn injuries and learned that Reyes had died in the fire.

At the time of the fire, nonparty George Hruby, owner of Ranch-Industrial Patrol Company (RIPCO), had contracted with Murai and Navarro to provide security services to the farms. Hruby's contract did not include performing services outside the borders of either the Murai ranch or the Navarro ranch. Hruby was not told by any Murai or Navarro employees to patrol any areas outside the ranch property, such as the cancha area. However, Hruby's business provided basic police protection for the farm laborers who lived in the labor camp, since Hruby felt that no other police or border patrol agencies were ensuring the safety of the workers. RIPCO's activities in the cancha included prohibiting drinking and prostitution in the labor camp, restricting access to the camp, and expelling union organizers. RIPCO former employees signed declarations stating that their instructions regarding the cancha property and the methods used to patrol it came from Hruby, rather than anyone at Murai or Navarro.

At several points in the life of the labor camp, trash from the camp blew over onto Murai and Navarro property, and foremen employed by Murai and Navarro made the workers pick up trash in their camp. In building the shelter, Lucas used materials from trash heaps on the Murai farm, and Reyes used plastic from Navarro's farm. Navarro forbade workers to take discarded materials of any kind from the ranch, including plastic. General Manager Mark Murai prohibited anyone from taking materials from the ranch as well. Murai provided some services and amenities to workers living in the cancha, such as allowing them to use water and toilet facilities on the Murai ranch, allowing them to receive mail there, and allowing caterers and vendors access to Murai land to provide services to camp inhabitants.

Approximately a year after the fire, plaintiffs filed this action for damages for personal injuries, alleging there was a duty on the part of Murai and Navarro to provide adequate and safe housing for Lucas and decedent, as well as a duty to make safe the conditions on the cancha property or to warn plaintiffs of the dangerous conditions created by the flammable structures. After extensive discovery, Murai and Navarro each filed motions for summary judgment. At the hearing on these motions, the trial court found as a matter of law that neither Murai nor Navarro had a duty to provide housing to Lucas and plaintiffs' decedent, to ensure that the cancha was safe and habitable, or to warn Lucas and Reyes of risks involved in living in the camp. The court noted that Murai was not an employer of plaintiffs, and neither defendant had any legal authority to eject the

workers from the Pollock property. The court further noted there were no triable issues of fact regarding negligence per se, as none of the statutes or ordinances relied upon applied to Murai or Navarro, who did not own or control the subject property.

Plaintiffs' main contention on appeal is that Murai and Navarro were not entitled to summary judgment because they did not completely establish an absence of control on their part over the area where the fire occurred, the cancha. They contend that triable factual issues remain as to the nature and extent of these defendants' control over the adjacent plot of land where the cancha was located. Plaintiffs also argue that alleged statutory violations occurred leading to liability on these defendants' parts under the Employee Housing Act.

Turning to the main issue of the extent of Murai's and Navarro's control over the cancha property, plaintiffs' theory is that the activities of Hruby's security service, RIPCO, constituted control over the premises such that the duty of a possessor of premises must be imposed upon the ranch owners. Plaintiffs also pursue an alternative theory that Murai and Navarro, as agents for each other, through the activities of their foremen, encouraged the workers to live at the cancha by providing services, amenities, and security at the premises, and controlling access to them, such that the ranch owners undertook a measure of obligation that would justify a court in imposing upon Murai and Navarro as a matter of law a duty to make the premises safe or to warn of dangers.

In support of their assertion that Murai and Navarro had a duty based upon their control of adjacent land, plaintiffs rely upon *Southland Corp. v. Superior Court* (Columbia Court of Appeals, 1988), where the court concluded that there were triable issues of fact concerning whether a store owner, which had an easement over adjacent land and allowed its customers to park on the land in order to gain access to the store, had a sufficient degree of control over that land, on which the plaintiff was criminally assaulted, in order to justify the imposition of a duty on the store owner to keep the premises safe for users of the property. The court noted that although the critical issue for imposition of a duty is control over premises, the concept of control as developed in case law has been somewhat elastic and the exercise of control is not necessarily confined to those premises which are owned or possessed by the defendant. A

number of circumstances led to the Court of Appeal's conclusion that triable issues remained over the extent of the store owner's control over the adjacent lot, so as to legally permit the imposition of a duty to those customers using the lot, such as regular use of the adjacent lot for parking, authorization in the store lease for such parking, knowledge on the part of the store owner of the customers' regular use of the lot, and significant commercial benefit from the use of the lot.

In this case, plaintiffs rely upon several factors to support their assertion that Murai and Navarro had an adequate degree of control over the adjacent property where the cancha was located in order to support the imposition upon them of a duty of care and/or to warn of danger. First, Lucas claims that RIPCO was an agent of Murai and Navarro inasmuch as RIPCO's security activities at the cancha, such as banning alcohol and prostitutes, showed control over the entire premises. Murai, however, made a showing that it did not instruct RIPCO to patrol the camp. Navarro made a showing that he did not know about the existence of the camp until after the fire, and his contract with RIPCO also did not cover off-premises areas. It thus does not appear that any actions of Murai or Navarro, as principals, were relied upon by Lucas and Jorge Reyes to create the impression that RIPCO was the agent for the ranchers for purposes of insuring overall camp safety. Although a principal is liable for the torts of an agent under the doctrine of respondeat superior, for this liability to be imposed on the innocent principal, the agent's tort must have been committed during the course and scope of his employment. We conclude that as a matter of law, the type and extent of activities that RIPCO engaged in at the cancha were not enough to constitute control of the cancha property for purposes of imposing a duty on Murai and Navarro.

Secondly, plaintiffs rely upon the activities of Murai and Navarro employees, such as the foremen at the farms, to make a showing of some degree of control over the cancha property. For instance, Murai and Navarro foremen instructed workers living at the camp to pick up trash, and allegedly permitted scrap materials to be taken from Murai and Navarro dumps for use in building the wood and plastic shelters. By their activities in allowing the workers to use water and toilet facilities on Murai property, and allowing the workers to receive mail at the Murai address, it is alleged that these employers encouraged the labor camp environment to exist, and gained an economic

benefit from it, so as to justify the imposition of a duty to make the premises safe or to warn of dangers.

A number of considerations lead us to reject plaintiffs' argument that a duty existed here as a matter of law. First, a duty to exercise ordinary care not to injure another will arise out of a voluntarily assumed relationship only if public policy dictates that such a duty should be imposed. Whether in a specific case the defendant will be held liable to a third person not in privity as a matter of public policy involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

The facts here showed that both Murai and Navarro ranch owners and managers made an effort to prohibit workers from using building materials from the ranch scrap heaps, Navarro in particular because he believed the plastic used for fumigation of crops was poisonous. Even though Murai and Navarro foremen apparently did not prevent the workers from taking such scrap materials from the ranch, the factors outlining the public policy for whether to impose a duty of care based on such activities indicate that no such duty should be imposed. In particular, foreseeability of this type of harm is questionable, and the necessary closeness of connection between defendants' conduct and the injury is missing, since it was the use of an open-flame candle in the shelter (over which use these defendants had no control) which caused the injury.

The law of premises liability does not extend so far as to hold a landowner liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect the condition of such adjoining property. The activities of Lucas and the plaintiffs' decedent in building the shelters and using lighted candles in them must be distinguished in kind from the activities of the customers who used the dangerous adjacent parking lot in *Southland Corp., supra*. Lucas and Jorge Reyes were not business patrons of their employers, and no third party criminal acts were inflicted upon plaintiffs for which the ranch owners should be held responsible. Instead, plaintiffs knew of the danger of using fire in the temporary structures, but did so anyway.

Although a possessor of land must exercise reasonable care to make the premises safe or to warn regarding dangerous conditions or activities the possessor knows of or could readily discover, there is no obligation to protect the invitee against dangers which are known to him, or which are so apparent that he may reasonably be expected to discover them and be fully able to watch for himself.

An owner of property is not an insurer of safety, but must use reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils. The danger of the structures at the cancha was obvious and was not in any sense latent or concealed, especially to those persons who built the structures and used them. Consequently, we see no basis for the imposition of a duty on the ranch owners to warn of dangers inherent in the use of the structures just off their premises, nor any duty to make those structures safe for the inhabitants.

Because of the conclusions reached above, that no duty of care or duty to warn may be imposed on Murai and Navarro towards plaintiffs, we find it unnecessary to discuss the statutory claims directed toward the employers as alleged owners and controllers of property.

The judgments are affirmed.

ESTEBAN RAUL LUCAS v. PERRY C. POLLOCK

Columbia Court of Appeals (1997)

This is the second of two cases decided today arising out of a fire in temporary migrant farm worker housing constructed on defendant Perry Pollock's land, in which plaintiff Esteban Raul Lucas was gravely injured and plaintiffs Guadalupe Reyes and Mario Garcia Reyes's decedent, Jorge Reyes, was killed. In granting Pollock's motion for summary judgment, the trial court found Pollock had breached no landowner's duties sounding in negligence that were owed to plaintiffs, and was not liable for damages. Plaintiffs appealed.

The farm where Lucas and Reyes were working at the time of the fire was located adjacent to Pollock's property, which was undeveloped and not used for any purpose, including farming. Pollock acquired this land in 1975 after he foreclosed on a trust deed, was holding it solely for investment purposes, and at the time of the accident was trying to sell it, using the services of real estate agent James Daley. Pollock never gave anyone permission to enter onto or live on his property, and he testified in his deposition he was unaware that anyone was present there at the time of the fire. He did admit to having seen that a fence was down on the northern edge of the property, and tire tracks indicating that vehicles might have entered at some time in the past. The area on Pollock's property where the migrant encampments were made was hidden deep within a gully and was obscured by thick underbrush. The shelters were invisible and inaccessible from the single paved road in the area, or from the southern portion of the adjoining ranch, where Lucas and Reyes worked. The owners of that farm denied that they had ever seen shelters near the Pollock property. Pollock never discussed his property with anyone who worked for the adjoining farms.

Approximately a year after the fire, Lucas and Reyes's survivors filed their complaint for personal injury and wrongful death against Pollock and the owners of the farms adjacent to his land, one of whom had employed the plaintiffs. As against Pollock, the cause of action was for premises liability.

After discovery had been conducted, Pollock filed his motion for summary judgment, arguing that he owed no legal duty of care to the plaintiffs and had acted reasonably in the management of his property in view of the probability of injuries to others, even trespassers. Plaintiffs' opposition focused upon allegations of Pollock's actual knowledge of conditions on the property, or imputed knowledge on the basis of his real estate agent's familiarity with the property resulting from his appraisal and attempts to sell it.

Regarding their claims of Pollock's actual knowledge, plaintiffs argue that a defendant's actual knowledge may be shown, not only by direct evidence, but also by circumstantial evidence. Hence, his denial of such knowledge will not, per se, prevent liability. They also argue that landowners may be held liable for failure to correct within a reasonable time such defects in the property as would have been revealed by a reasonable inspection. From all of these rules, plaintiffs argue, a triable issue of fact is created as to the existence of knowledge on the part of Pollock, impliedly creating a duty to make safe his land from the dangerous conditions which caused the fire. They argue that a landowner is responsible not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property. On the issue of Pollock's constructive knowledge, plaintiffs argue that Pollock's real estate agent, Daley, was under a duty to inform Pollock of matters in connection with the agency which would affect the marketability or value of Pollock's real property. The presence of a migrant farm worker encampment is argued to be such a matter affecting the value of real property.

We find several flaws with plaintiffs' reasoning. First, although the evidence showed Pollock had designated Daley as his agent in the proposed sale of the property, the scope of that agency created duties in Daley only to Pollock as the principal and to prospective purchasers of the property. Plaintiffs have made no showing that third party trespassers or bystanders on the property were entitled to any particular duties arising out of that agency, which was created for a limited purpose.

Here, the injured plaintiffs had no dealings with Pollock either directly or through Daley. In opposition to Pollock's motion, plaintiffs were able to raise only speculation and suggestions that Pollock "must have known" about the existence of the encampments.

However, such evidence is not sufficient to justify an inference of actual knowledge, nor is the same equivocal evidence as to Daley sufficient to support an inference of constructive knowledge on Pollock's part. Moreover, the evidence on which the plaintiffs rely to show notice of the presence of the encampment (i.e., Pollock's knowledge that an alternative access route to the property had apparently been developed and his admission after the fire in a letter to the police department that farm workers lived on the property, along with Daley's familiarity with the property) does not as a matter of law establish that Pollock, as landowner, had a duty to these plaintiffs to make the premises reasonably safe for the purposes for which they were used. A landlord should not be held liable for injuries from conditions over which he has no control. Manifestly, Pollock had no control over the existence of hazards in the migrant farm workers' encampment, which he had not authorized to be built, and the dangers of which all the evidence showed he lacked actual or constructive knowledge.

In conclusion, even if we assume that Pollock had actual or constructive knowledge of the presence of migrant encampments upon his property, we are unable to conclude as a matter of law from such evidence (if any) that a duty existed on Pollock's part to take steps to correct or prevent the particular dangers which led to plaintiffs' injuries in this case, specifically the danger of fire in the temporary structures. Pollock's status as landowner did not create in him a duty to insure the well-being of these third parties upon his property, nor any duty to protect them from their own activities, nor any duty to police an area in which he was conducting no activity whatsoever. Nor did the actual condition of Pollock's land in its undeveloped state, or his management of it, contribute to or cause the accident which injured the plaintiffs. The issue presented by this motion for summary judgment is whether any knowledge on Pollock's part, if shown, created a duty on the theory that his conduct was unreasonable in light of any such knowledge. The trial court's grant of summary judgment correctly resolved that issue.

The judgment is affirmed.

MICHAEL R., a Minor v. JEFFREY B., a Minor

Columbia Court of Appeals (1984)

Michael, a minor, appeals through his guardian ad litem from a judgment granting respondents' motion for summary judgment. The issue herein is whether verbal encouragement to commit assault with a deadly weapon is affirmative conduct sufficient, as a matter of law, to impose civil liability for damages ensuing from that assault.

On December 18, 1979, at approximately 8 p.m. Michael, while walking home from a school banquet, was struck in the eye with a marble and, as a result, was blinded in that eye. Earlier that day Lance, Bruno, Edie and Jeffrey took turns shooting marbles with a slingshot. Only Jeffrey shot marbles at automobiles driving by the open field in which they were playing. As Michael left the school after the banquet, Lance pointed him out to Jeffrey and, according to Jeffrey's testimony, Bruno, Edie and Lance prompted and encouraged him to shoot Michael with the slingshot. For purposes of the summary judgment motion, respondent Bruno admits making the statement, “Hey, shoot him; go for it.” Jeffrey testified that he did not know Michael and had no intention of shooting at him until incited by the others. Jeffrey was prosecuted in juvenile court for assault with a deadly weapon and pleaded "guilty."

Appellant's complaint alleged that defendants “negligently, recklessly, wantonly and intentionally shot a marble in the direction of plaintiff by the use of a slingshot or other device, in a reckless and wanton disregard of the possible consequences to plaintiff by reason thereof, and said defendants knew or should have known that said conduct would unreasonably expose the general public and in particular the plaintiff to probable serious harm....” Respondent Bruno moved for summary judgment on the ground that he had no duty under Columbia law to control the conduct of the third person who injured plaintiff. The motion was granted.

On appeal Michael argues that the remark, "Hey, shoot him; go for it" is a violation of Penal Code § 653f and constitutes negligence per se.[1] Solicitation consists in asking another to commit one of the crimes specified in § 653f with intent that the crime be committed, but intent may be inferred from the circumstances of the asking. The alleged cause of action is not a violation of the statute, but rather negligence of the defendant, and the statute is merely evidence offered to show such negligence.

Violation of a statute without justification constitutes presumptive failure to exercise due care if the violation proximately caused the injury and the person injured was one of the class of persons for whose protection the statute was adopted. Respondent contends that § 653f was intended neither to prosecute "verbal bystanders" nor provide for civil liability. We disagree. It is indisputable that an injury resulting from commission of an assault with a deadly weapon is the type of injury a statute prohibiting solicitation to commit assault with a deadly weapon was designed to prevent. Someone who encourages another to shoot a person is not a "verbal bystander." Such solicitation is precisely the conduct proscribed by the statute.

Additionally, the statute need not provide specifically for civil damages or liability. Violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action.

Proof that a defendant was negligent as a matter of law does not automatically establish liability; plaintiff still bears the initial burden of showing that defendant's negligence was a proximate cause of the injury. An actor may be liable, however, if his negligence is a substantial factor in causing an injury; he is not relieved of liability because of an intervening act of a third person whose act is reasonably foreseeable.

In *Rowland v. Christian (1968)* the Columbia Supreme Court identified seven factors to be considered in determining whether a duty is owed to third persons: 1) the foreseeability of

[1] Penal Code § 653f provides: "(a) Every person who solicits another to ... commit or join in the commission of...assault with a deadly weapon or instrument...is punishable by imprisonment in the county jail not more than one year or in the state prison...."

harm to the plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the proximity between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and 7) the availability of insurance for the risk involved.

The harm in the instant case was clearly foreseeable; Jeffrey had been shooting at automobiles previously. The certainty of appellant's injury was undisputed. There was a proximate connection between the verbal encouragement and the shooting. Encouragement or solicitation of an assault with a deadly or dangerous instrument was clearly wrong. Imposing a duty would promote a policy of preventing future harm; it would not impose liability which did not previously exist for mere bystanders. The burden on Bruno to abstain from encouraging or soliciting a crime was minimal.

We, therefore, find that appellant's opposition to respondents' motion for summary judgment raised a triable issue of fact whether Bruno actively encouraged, solicited or conspired to injure Michael and that verbal encouragement is included within the parameters of Penal Code § 653f to constitute negligence per se.

The judgment in favor of respondents is reversed.

ANSWER 1 TO PERFORMANCE TEST - A

MEMORANDUM

TO: Jane Kimmel

FROM: Applicant

RE: Morales & Vargas v. Parsons

DATE: February 25, 2003

Upon a review of the case background, relevant case law, and statutory provisions, our clients are most likely to prevail upon the following grounds:

1. Duty

In Griggs v. Barnes Construction Co. (Griggs), Griggs, an employee of the defendant, was electrocuted while working in a construction yard when a cable he was holding touched an overhead high voltage line. In reversing the trial court's summary judgment in favor of the employer-defendant, the Court reasoned that the total of policy considerations created upon the landowner a general duty to use due care to protect people coming onto his land from the obvious electrocution hazard. In reaching this conclusion, the court relied on Rowland v. Christian (1968).

The law in Columbia regarding a landowner's duty to due care to a person coming onto their land is based upon foreseeability of injury and public policy. Specifically, the Griggs court, relying on Rowland, re-emphasized that the liability of a possessor of land is tested based on whether: (1) in the management of his property; and (2) he has acted as a reasonable man in view of the probability of injury to others. In addition, a landowner who induces or knowingly permits a workman to enter the land for performance of duties mutually be beneficial to both parties is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work.

In addition to foreseeability, the Griggs court considered the following whether determining whether [sic] a duty of care existed: (1) the degree of certainty that the plaintiff suffered injury; (2) the proximity between the defendant's conduct and the injury suffered; (3) the moral blame attached to the defendant's conduct; (4) the policy of preventing future harm; (5) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability of insurance for the risk involved.

Under the Griggs factors, Mr. Parsons should have reasonably foreseen that a fire might be started by the oil lamps that were necessitated by his failure to provide electricity to the farm worker encampment. The practical necessity of encountering the

danger, i.e., the necessity of using oil lamps to replace electricity, when weighed against the apparent risk involved, i.e., fire, was such that under the circumstances, a person might choose to encounter the danger of a fire in order to have basic necessities, i.e., light. Therefore, the injury was foreseeable. Nevertheless, it is still necessary to determine if this type of harm is such that liability should be imposed.

The facts of the instant case clearly pass the muster of the second tier of Griggs factors. First, Morales and Vargas have clearly suffered injuries. Second, Parsons' conduct was an actual and proximate cause of the risk of fire, both in his failure to provide electricity and necessitate the use of other means of light, and his failure to provide adequate fire protection through an adequate water supply and delivery system. Third, Parsons' operation and maintenance of the employees' living conditions was so inadequate as to warrant the attachment of moral blame, including Parsons' flagrant lack of concern for the health and safety of residents on his property. Fourth, there is a strong policy of preventing future harm such as that occurred here, as is outlined in the Employee Housing Act (see below under negligence per se for further discussion). Fifth, the extent of the burden to Parsons and the consequences to the community of imposing the duty with resulting liability for breach are not unreasonable. The harm of forcing workers to live in dangerous and unhealthy conditions that are clearly in violation of the Employee Housing Act outweighs the detriment to the landowner, who also economically benefits from their close proximity to his farm. Parsons also voluntarily undertook this burden when he invited the workers to live on his land. Sixth, it is likely that Parsons has property insurance to cover fire loss considering his livelihood is the farming of his land.

2. Theory of Premises Liability

In Lucas v. Murai, the court found under the Griggs test that liability could not be imposed on landowners for a fire that occurred on adjacent property since the landowners did not exhibit sufficient control over the property in order to make the imposition of a duty justifiable. Even though the plaintiffs had been allowed some services and amenities from the landowner's property — like mail, water, and toilet facilities — the court considered more persuasive the facts that the landowners prohibited the use of certain flammable and dangerous materials, that the plaintiffs never obtained anyone's permission to stay on the land, that the plaintiffs were never told to stay on the land, and that the security patrol that patrolled the camp was not hired by the landowners for this purpose. Essentially, the court determined that the landowners could not be held liable simply because the property was adjacent when the landowner actions did not influence or affect the condition of the adjoining property. Furthermore, the Murai court found persuasive that the use of fire in temporary structures created a danger that plaintiffs knew of or was so apparent that they were reasonably expected to discover it and protect themselves. The Court refused to impose liability on the landowners to warn of, or to make safe, dangers inherent in structures used off their premises.

In Lucas v. Pollock, the court, in reviewing the same facts as Murai but under a premises liability cause of action against the actual owner of the property in Murai, determined that the owner had no duty to the workers because: (1) he had no control over the existence of hazards in the encampment; (2) he had not authorized the encampment; (3) no duty to protect the workers from their own activities; (4) no duty to police an area in which he was conducting no activity; (5) no liability for the actual condition of the land in its undeveloped state or his management of it; and ([6]) that even if Pollock knew of the presence of the workers, that such knowledge alone was insufficient to impose a duty upon him to make the premises reasonably safe for the third parties.

The Murai case is easily distinguishable on its facts for two reasons: (1) unlike Murai, Mr. Parsons clearly owned the property that the workers lived on; and (2) unlike Murai, Mr. Parsons clearly controlled and encouraged the encampment environment. The reasoning in Pollock supports this distinction. Although the Murai and Pollock courts declined to impose duties on certain landowners, both cases can be read to establish the general principle that a duty will only be imposed where injured parties were on the land of the defendant, with defendant's knowledge, and that the defendant exercised enough control over, and received enough benefit from, the arrangement as to justify the imposition of a duty to make safe a foreseeable danger.

The facts in the instant case fit are not offensive to the principles in Murai and Pollock. Moreover, the workers were trespassers, anticipated or discovered -- as was the case in Pollock. The workers on Parsons farm were invited to the property by Parsons, for Parsons' benefit. As such, Parson[s] owned a duty to warn of nonobvious, dangerous artificial and natural conditions, had a duty to conduct active operations on his property with reasonable care, and had a duty to inspect and make safe additional dangerous conditions.

To begin, there is no question that Parsons owned the property on which the workers were encamped. In fact, had he chosen to, he had the legal authority to have the workers ejected. Additionally, Parsons, both personally and through his agent, foreman Rudy Mendoza, clearly controlled the subject property. Parsons is responsible for the acts of his agents under the theory of respondeat superior. Under negligence theories, an employer is vicariously liable for the acts of his employee if the acts are undertaken within the scope of his employment. The facts indicate that Rudy performed his duties as foreman under the direction of Parsons, including enforcement of the Rules and Regulations imposed upon the workers. Furthermore, Rudy held himself out to the workmen as an authority on behalf of Parsons, and the workers followed his instructions as a result.

Parsons was also clearly the employer for which our clients worked. For example, Parsons formulated Rules and Regulations for the property, which were handed out yearly. The Rules specifically gave permission to certain types of persons to live on the land. The Rules regulated visitors "at sole discretion of owner or his agent," banned pets, women, alcohol, firearms, and noise at certain times. Mr. Cruz related an incident where a nurse visited the encampment to deliver test results to a worker but was

refused entry because it was "private property." Furthermore, the Rules regulated smoking, trash dumping, cooking, and cleanliness. As a result, Parsons exhibited a tremendous amount of control over how the encampment operated [and] was maintained.

Parsons also received economic benefits by the workers living on his land. Before the workers lived directly on his land, they lived on the land of Mr. Sanchez. Approximately 8 years ago, Rudy spoke with the workers about setting up a camp at Parsons' farm and staying there rent-free. By having the workers stay directly on the farm, it appears that Mr. Parsons could eliminate the need to pay for their transportation to and from the farm by Mr. Sanchez.

Parsons also encouraged the encampment environment by allowing workers to take whatever trash materials they could use from the farm -- mostly plastic tarps and flattened-out cardboard -- and going to the point of putting certain materials out for the workers -- like old tarps. The workers were also allowed to use hand tools in the construction of their 'homes'. In addition, Rudy took the workers into town to buy additional items that might be used in building shelters. Parsons also provided a separate mailbox out by the road for employees. It appears that Rudy also arranged for a vendor to come onto the camp and sell food at lunchtime. When the workers began living at the encampment, Rudy arranged for the vendor to visit in the evening as well. If the workers were not able to pay for the food, then Rudy would deduct the debt owed from their pay.

The conditions of the camp were also grave, including an absence of an adequate water system for fire protection. There was one water faucet and shower with ¾ inch pipe for the entire camp, which was inadequate for fire protection. Even though the faucet was threaded for a garden hose, no garden hose was present. Moreover, the fire that is the subject of this claim was too big to use buckets for. The encampment was also highly dense, including 30 or 35 tents with 50 persons inhabiting them, built very close together. In addition, there was [sic] scrub oak and bushes in the area - - highly flammable natural conditions. The water situations appears [sic] to have always been bad. Water did not get piped into the site until last year; before that time, a valve was placed on the irrigation line and the workers were given buckets and coolers. Sanitation is also inadequate. Even though there were two latrines before the workers arrived, it took some time before dumpsters for garbage were brought in and regular garbage pick-up was instituted[.]

Rudy would have been aware of these conditions as he lived on the road that went to the encampment, and visited the encampment several times a week; he was, therefore. The scope of Rudy's agency status created a duty to inform Parsons of matters in connection with Rudy's role as foreman, especially given the extensive rules and regulations that Parsons imposed on the workers and the traditional role that Rudy had played in enforcing them, as they were renewed yearly.

Turning to the incident at hand, it appears that Parsons did not have direct control over the oil lamp that is alleged to have caused the fire. Furthermore, Morales indicates that

items in the workers' tents were flammable. Nevertheless, it was Parsons that made possible the environment in which oil lamps were extensively used. It was also Parsons that failed to provide electricity -- necessitating alternate means of lighting -- and adequate water -- a basic necessity. As stated in the Griggs court, even if the danger was obvious, the risk of danger was outweighed by the need to engage in the activity.

Morales and Vargas clearly suffered injury. There was also a close proximity between Parsons' conduct and the injury suffered. Mr. Parson clearly undertook an obligation, and influenced and affected the condition of the property, when he created the encampment environment and will be held to a duty of care to the workers to make reasonably safe or warn of dangers. The duty was breached by the inadequate living conditions and fire protection as outlined above. The result was a foreseeable risk of fire. The injury was serious bodily injury and death, also foreseeable.

3. Theory of Negligence Per Se

Under a theory of negligence per se, a statute can serve to establish a duty. A violation of the statute establishes a presumption of a breach; causation and damages, however, must still be proven. (See Michael v. Jeffrey). Additionally, it must be shown that the person injured was one of the class of persons for whose protection the statute was adopted. Proximate causation exists when a person's negligence is a direct or substantial factor in causing an injury. If the action is an indirect cause, i.e., the person set into motion the events that led to the injury, then an individual can still be held liable. Such person is not relieved from liability because of an intervening act of a third person whose act is reasonably foreseeable. A person committing a negligent act is responsible for all reasonably foreseeable consequences of his action.

Under the Columbia Employee Housing Act, the legislature has put forth minimum health standards. The Act applies to any building used for human habitation. Employee housing is defined as including any accommodations that consist of, inter alia, dwellings, boarding houses, tents and the premises upon which they are situated. The accommodations must be maintained in connection with any work or place where work is being performed, regardless of rent, and specifically includes 'labor camps.' Every person, or agent thereof, that constructs, operates or maintains, employee housing is subject to the Act. Any person convicted under the Act where violations are so extensive and of such a nature as to cause danger to health and safety of residents, and where the extent and nature of the violations are due to the defendant's habitual neglect of customary maintenance and display a flagrant lack of concern for the health and safety of residents, is punishable by a maximum fine of $6,000 and imprisonment of between 6 months and 1 year for each violation if those violations involve, inter alia: (1) serious defects or lack of gas, water, or electric utility systems . . . ; and (2) serious defects or lack of adequate space and water heating.

Mr. Parsons is clearly liable under the Act. Parsons and Rudy operated and maintained the premises upon which there was housing used by persons working on Parsons land and paid by Parsons. As the facts enumerated above show, Parsons regulated and controlled the encampment, provided some services and amenities, and invited the

workers to set up camp, stay there, and work for him directly every year. The violations are also of a nature that caused danger to health and safety, and were a result of Parsons' habitual neglect of customary maintenance and flagrant indifference for health and safety. The lack of electricity alone constitutes an extensive and serious violation under this Act. The poor location and provision of water also accounts for a substantial risk of danger to health and safety, especially in the case of fire. Since Parsons is liable under the Act, and the living conditions that gave rise to the danger and harm are exactly the types of injury that the statute sought to prevent by mandating compliance with building codes, the duty to the workers, and the breach thereof, is established by the statute under a negligence per se theory.

Parsons' actions were also the proximate cause of the injury, as the injury in the instant case was clearly foreseeable. Parsons knew that the encampment did not have electricity and did not have sufficient fire protection. This made the failure to provide these services a substantial factor in causing the injuries suffered. Despite the fact that Vargas may have spilled the oil lamp that was the direct cause of the fire, reasonably foreseeable acts of a third party is not an [sic] superceding force relieving Parsons of liability. Once an individual sets into motion the negligent acts that result in an injury, he is liable for all foreseeable and probable consequences. The risk that an oil lamp would be spilled -- especially given their pervasive use in the camp, their low cost, and the lack of electricity -- was clearly foreseeable. Therefore, Parsons' actions were the proximate cause of the injuries.

Furthermore, imposing a duty on Mr. Parsons would promote the policy of preventing future harm, improving conditions in labor camps, and addressing extreme health violations. While the burden on Mr. Parsons to provide electricity may be more substantial than other burdens that the court has imposed, under these circumstances, it is the only reasonable and viable option available, and is less costly than the impact of 30 to 35 'homes' burning down, leaving 50 persons without shelter, and causing grave injuries. The Court is likely to take into account that there has [sic] already been severe losses because of these conditions.

Conclusion

Under either negligence per se or premises liability, the extension control, influence, and affect [sic] that Parsons had on the conditions of his own property, both personally and vicariously, combined with the flagrant indifference to the health and safety, living conditions, and fire prevention, create substantial grounds upon which a court would find in favor of our clients.

ANSWER 2 TO PERFORMANCE TEST - A

MEMORANDUM

TO: Jane Kimmel

FROM: Applicant

RE: Morales and Vargas v. Parsons

DATE: February 25, 2003

Statement of Facts

Juan Morales was injured and Alberto Vargas was killed when, apparently, an oil lamp used to illuminate their shacks made of cardboard, plastic and other refuse was knocked over and ignited the shanties in which they lived. The camp is situated on a parcel of land owned by their employer, Parsons Strawberry Farm, whose owner, Parsons, encouraged the formation of the camp in order to cut expenses and have a labor pool located nearby.

At the time of the fire, the camp's residents had limited access to water (one faucet and one shower), no electricity and no gas. The entire camp consisted of approximately 30 to 35 "tents" built one next to the other in two distinct sections.

Issues Presented

May Morales and Vargas' family recover damages against Parsons under either a theory of premises liability or the doctrine of negligence per se?

Short Answer

Yes. Both Morales and Vargas' family may proceed against Parsons under a theory of premises liability or, alternatively, the doctrine of negligence per se. The case law holding contrary is not on point and is distinguishable based primarily on the facts that Parsons owned the land where the camp was located, actively facilitated the camp's creation and exerted control over its operation and likely is in flagrant violation of the Columbia statutory law imposed on employers who provide employee housing.

Discussion

Under Columbia law, whether or not Parsons owned a duty to the residents of his labor camp requires the court to weigh and consider seven factors: 1) the foreseeability of harm to the plaintiff; 2) the degree of certainty that the plaintiff suffered injury; 3) the proximity between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the

extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and 7) the availability of insurance for the risk involved. Michael R.; accord Lucas I.

Morales and Vargas Recover Under the Theory of Premises Liability

"A possessor of land must exercise reasonable care to make the premises safe or to warn regarding dangerous conditions or activities the possessor knows of or could readily discover." Lucas I. In Lucas I, the plaintiffs were migrant farm workers residing in a camp just off the premises of two farmers [sic]. As is the case here, one plaintiff was severely injured and another plaintiff died as a result of a candle setting fire to a shanty comprised of highly flammable material. The surviving plaintiff and the deceased plaintiff's family were suing for recovery based on both premises liability and negligence per se. In regards to the premises liability theory, the court concluded that the employers owed no duty to the workers who resided on an adjacent piece of property.

"[T]he critical issue for imposition of a duty is control over the premises." Lucas I (citing Southland Corp). Generally, a party may not recover for injuries when a dangerous condition on the land is so obvious that the victim can reasonably be expected to see it. Columbia courts have held that such an "obvious" danger excuses the landowner from any further duty to remedy or warn of the condition. Griggs (employee killed by electrocution when cable he was holding on to came in contact with a high voltage, uninsulated power line). However, "[i]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger." Griggs. Under such conditions, public policy may require courts to impose a duty on the defendant to exercise due care towards the foreseeable injured person. Griggs.

Here, the danger of the camp should have been obvious to anyone. Highly flammable cardboard and plastics were used to shelter workers who used dangerous and unstable oil lamps as their primary if not sole method of illumination. As noted by Morales himself, though easier and cheaper than kerosene lamps, if one of the oil lamps tips over, the oil spills everywhere, and can start a fire. The question was not if a fire would have occurred at Parsons' labor camp, but when.

As an obvious danger, normally the landowner's duty would have been discharged under the Lucas I and Griggs analysis. However, the court in Griggs noted an applicable exception to this general rule. When the practical necessity of encountering the danger are [sic] weighed against the apparent risks involved and under the circumstances a person would choose to encounter the risk, then public policy requires the imposition of a duty on the landowner to exercise due care towards the foreseeable injured person.

Here, the plaintiffs were farm workers who had little if no choice to reside on the property in order to secure their employment. The risks of living in a tinderbox were

obvious, but these workers weighed their options and had little recourse but to accept the accommodations as they were. Even though residence in the camp was not technically required by either Parsons or Mendoza, there were no affordable accommodations available within a reasonable distance. In practice, all the farm workers resided in the camp because they had no alternative available. Thus, the fact that the danger was obvious should not preclude the imposition of a duty on Parsons.

Lucas I can easily be distinguished on its facts, the main difference being that the plaintiffs in that case resided on a parcel of land that did not belong to either defendant. "The court [in Lucas I] noted that Murai [defendant] was not an employer of the plaintiffs, and neither defendant had any legal authority to eject the workers from the . . . property." Lucas I. Unbeknownst to the Lucas I plaintiffs, the camp in this case was located on the premises of a third party and not their employers. In addition, both the employers of the migrant labor, Murai and Navarro, had policies forbidding the scavenging of materials by the migrant workers from their property in order to erect shanties.

In this case, Parsons actively encouraged the practice of scavenging highly flammable material to construct shanties and the camp was situated on his land where he possessed legal authority to eject the tenants. Thus, Parsons has a greater degree of culpability than either of the defendants in Lucas I.

In addition, the Lucas I plaintiffs were asserting that liability should attach to the defendants because [of] their agent's assertion of authority over the camp in order to insure overall camp security and safety. Though the agent of the defendants in Lucas I did impose security measures over the camp, such as banning alcohol and prostitutes, the agent was acting without the express or implied authority to do so. Neither defendant instructed the security agency to patrol and monitor the camp. The Lucas I court thus concluded that, as a matter of law, that [sic] the type of activities the security agent engaged in were not enough to constitute control of the camp property for purposes of imposing a duty on the defendants.

Again, the land in question in this case belongs to the employer and the agent he employed to monitor camp safety, foreman Rudy Mendoza, engaged in actions sufficient to establish Parsons' control over the labor camp. As the Parsons Strawberry Farm Camp Rules and Regulations, distributed and enforced by Mendoza, indicate, the laborers at Parsons were subject to tighter scrutiny than the plaintiffs in Lucas I. They were denied any female visitors, and other visitors were allowed at the sole discretion of the foreman or Parsons himself. They also restricted pets, smoking, alcohol, firearms, and imposed a curfew. In addition, they connected a water line to run a shower and for cooking, and Parsons provided two portable toilets for the men to use which he had maintained and emptied on a regular basis.

In addition, Mendoza through an agreement with a family member imposed a virtual monopoly on the farm worker's access to food for both lunch and dinner. Thus, it is clear that the legal conclusions in Lucas I are not applicable to a situation where the

owner/employer exerts this degree of authority or control over the workers' lives and property.

In Lucas II, decided the same day, the court of appeals for Columbia affirmed the dismissal of the case solely against the landowner. The court noted that the injured plaintiffs had no dealings with the landowner, Pollack, either directly or indirectly through his real estate agent, Daley. The plaintiffs were unable to show that the owner had any knowledge of the presence of the camp on his property. Due to that camp's relative isolation and hidden features, the court refused to impose a duty on the landowner merely for failing to exercise the ordinary care or skill in the management of his property. The landowner in Pollack did not reside on the land, received the land when he foreclosed on a trust deed, and at the time of the fire in Lucas II was looking for someone to purchase the property. The Lucas II court concluded that Pollack had no control over the existence of hazards in the migrant farm workers' encampment, he had not authorized its construction, and th[at] he lacked either actual or constructive knowledge of the camp's dangers.

Parsons is in exactly the opposite position. He exerted complete control over the camp in which Morales and Vargas resided. He not only authorized but assisted in the camp's constructions and he had actual knowledge of the camp's inherent dangers because he supplied the refuse that the workers used to build their "homes." The holding in Lucas II is inapplicable to Morales and Vargas' case against Parsons because Parsons's [sic] behavior is much more culpable then either the defendants in Lucas I or Lucas II.

Morales and Vargas Recover Under the Theory of Negligence Per Se

"Violation of a statute without justification constitutes presumptive failure to exercise due care if the violation proximately caused the injury and the person and the person injured was one of the class of persons for whose protection the statute was adopted." Michael R.

First, there must be an applicable statute. The statute, however, need not provide specifically for a private cause of action. Michael R. Under the theory of negligence per se, a violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Michael R.

Under the Columbia Employment Housing Act (CEHA), all "[e]mployment housing shall comply with the state building standards relating to employee housing unless a local ordinance offers equal minimum standards and the housing complies with the local standards." (Columbia Employee Housing Act § 2.) Employment housing [is] any accommodation including tents or other housing accommodations maintained on one or more sites and the premises upon which they are situated or the area set aside and provided for camping of five or more employees. (Columbia Employee Housing Act § 8(1).) The payment of rent is not required. (Columbia Employee Housing Act § 8(2).) The statute further imposes criminal penalties. Any person who violates the CEHA by displaying a flagrant lack of concern for the health and safety of the residents is punishable by a fine not to exceed six thousand dollars and by imprisonment not to

exceed six months for every day of a continuing violation. (Columbia Employee Housing Act § 61.)

Though not familiar with the minimum standards encapsulated in the state building standard and incorporated in the CEHA, it is apparent that the camp as Morales and witness Cruz depict is not fit for human habitation. The shacks were made of cardboard and may or may not have offered any protection from the elements. There was a single shower, a single faucet and two portable toilets for approximately 50 men. Whatever standards the relevant code must require, it is likely that Parsons violated them.

Proof that a Parsons has violated a law does not automatically establish liability. The plaintiffs must still show that Parson's [sic] negligence was a proximate cause of the injury. Michael R. The plaintiffs need only show that Parsons' conduct was a substantial factor in causing the injury. Michael R.

It is clear, based on the discussion of Parsons' activities in establishing and maintaining the camp and the supervisions and authority he wielded over its residents (as discussed, supra) that Parsons' negligence was an actual and proximate cause of Morales' injuries and Vargas' death. He failed to adhere to the applicable statute and as a result two of his employees were gravely injured.

Finally, in order to invoke the doctrine of negligence per se, the plaintiffs must show that they were members of the class intended to benefit from the statute and the type of harm they sufferers [sic] is the kind that the statute sought to prevent. The law's purpose states that the Legislature intended to protect tenants from substandard conditions and protect the public at large from the general health risks imposed by the disease that unsanitary and substandard conditions can generate. (Columbia Employee House Act § 1.) Though the thrust of the legislation appears to be towards ensuring minimum health standards (i.e., sanitation), the purpose is stated broadly enough to encompass death caused by fire or other natural disaster where a substandard housing is a substantial factor resulting in the injury to the worker's health or life.

Though the Lucas I court refused to impose liability under a negligence per se theory on the two defendants in that case, it should be noted that of those defendants, only one was an employer and he had not undertaken to provide housing to his population of farm workers. Parsons is in a completely different position, acting as both the employer of Morales and Vargas and providing them with inhumane and ultrahazardous living accommodations. As such, the CEHA is directly applicable to Parsons' behavior where it would not have been to the defendants in Lucas I.

Conclusion

All of the factors noted above for imposing liability on Parsons for the injuries sustained by the plaintiffs in this case are present. The harm to the plaintiffs was eminently foreseeable. There can be no doubt that the plaintiffs suffered a certain injury. The defendant's conduct is the actual and proximate cause of the plaintiffs' injury. Parsons encouraged and facilitated the camp's operation to save expenses and "cut out the middle man" he was paying to import his needed labor supply daily. He provided the flammable and substandard materials the workers scavenged from his farm in order to piece together shanties one on top of the other. He knew or had reason to know [of] or possibly provided the oil lamps the workers were using to light their hovels. Thus his conduct borders on the recklessness [sic] rather than negligence.

Additionally, society attaches moral blame upon the defendant's conduct. He was acting essentially as a slumlord and profiting at the expense of his worker's safety. The state should encourage others to comply with the statutory code and thus prevent future harm. The defendant could have protected himself with very little effort and there are negligible consequences to the community for imposing liability on the landowner/employee in situations such as this. Finally, the landowner/employer is in a far better position than his workers to protect himself from out-of-pocket expenses and being personally liable by acquiring liability insurance for the risk involved.

Thus, the courts should conclude that Parsons owed a duty to his farm workers, the standard of the duty to be determined under either premises liability or negligence per se.

THURSDAY AFTERNOON
FEBRUARY 27, 2003

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

REESE v. KENNEL KARE, INC.

REESE v. KENNEL KARE, INC.

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**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. 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 performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it 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.
6. Your response must be written in the answer book provided. 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.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Rachel Bergman

214 West Elm Street

Martinville, Columbia

M E M O R A N D U M

To: Applicant

From: Rachel Bergman

Re: Reese v. Kennel Kare, Inc.

Date: February 27, 2003

Our client, Kennel Kare, Inc., is a dog boarding facility. Kennel Kare, Inc. has been sued by pet owners Amanda and George Reese for damages for alleged negligence. No other defendants are named in the action. The Reeses' prize pug was injured while being boarded at our client's kennel. The dog, Mrs. Miniver, escaped while being transferred from her cage to a dog run, became tangled in a barbed wire fence, and suffered disfiguring and severe cuts. This incident occurred some three years ago. While the action was filed more than two years ago, plaintiffs' counsel did not prosecute the action vigorously until recently.

Kennel Kare, Inc., was originally formed by Fred and Helen Dolan more than twenty-five years ago. Fred's and Helen's titles are President and Vice-President, respectively. Their daughter, Phyllis Dolan, now participates in operating the business of the corporation, too. Phyllis' title is Operations Manager.

Attached are the following:

1. My file memorandum from my recent interview with Phyllis Dolan;
2. Registration Form for Mrs. Miniver;
3. Excerpt from Procedures Manual for Kennel Kare, Inc.;

4. Incident Report;

5. Transcript of tape-recorded interview by Phyllis Dolan of Molly Taube, the employee handling Mrs. Miniver at the time of the incident; and,

6. Confidential Memorandum prepared by Phyllis Dolan as Kennel Coordinator to Operations Manager.

I am preparing to defend the depositions of Phyllis Dolan and Molly Taube. Given the lapse of time, I am trying to decide whether and which documents I should show them to prepare for their respective depositions. These documents have not yet been sought through discovery by the plaintiffs.

Referring to the attached cases and the other materials please write a memorandum advising me and giving your reasons for the following:

1. Whether, if I show **Phyllis Dolan** each of the above-listed six documents, I will be successful in resisting a motion by opposing counsel to compel production of these documents. Be sure to analyze, as to each document separately, the issues of privilege and waiver.

2. Whether, if I show **Molly Taube** each of the above-listed six documents, I will be successful in resisting a motion by opposing counsel to compel production of these documents. Be sure to analyze, as to each document separately, the issues of privilege and waiver.

Law Offices of Rachel Bergman

214 West Elm Street

Martinville, Columbia

M E M O R A N D U M

To: File

From: Rachel Bergman

Date: December 27, 2002

Re: Reese v. Kennel Kare, Inc.

These are my notes summarizing my initial interview with Phyllis Dolan on December 27, 2002.

Kennel Kare

Kennel Kare was started by Phyllis' parents, Fred and Helen Dolan, 40 years ago as a family business. The corporate entity was formed more than 25 years ago. Fred and Helen have always been President and Vice-President of the corporation, as they are now. They each originally owned 50% of the shares of Kennel Kare, and continue to maintain these shares. Phyllis has worked for the company, and later, the corporation, for more than 20 years. Over the last five years, Fred and Helen have begun to transfer control of the company to Phyllis Dolan. Phyllis became Operations Manager last year. Fred and Helen still are ultimate decision-makers of the corporation, but Phyllis makes all the day-to-day decisions regarding operations of the company. For example, she is in charge of hiring and firing personnel who work at the kennel. The Operations Manager reports directly to the President and Vice-President; likewise, the Kennel Coordinator, Office Manager, and Marketing Manager report directly to the Operations Manager.

As of the date of the incident, Phyllis' title was Kennel Coordinator. At that time, she reported directly to the Operations Manager, who in turn reported to Fred and Helen. As Kennel Coordinator, Phyllis generally made sure that the kennel was running smoothly. Phyllis could not make major decisions without the approval of the Operations Manager or her parents.

The kennel is located on 5 acres of a 25-acre parcel. Fred and Helen have a home on the parcel. Phyllis has a home closer to town. Kennel Kare boards up to 100 dogs at a time, and employs 20 full-time employees.

Incident on July 5, 2000

Amanda and George Reese dropped off their dog, Mrs. Miniver, on July 2, 2000. They filled out a standard registration form. No unusual behavioral issues were noted. Phyllis estimates that Mrs. Miniver was worth $20,000 before her injuries. Apparently, Mrs. Miniver is a pure-bred, and competed successfully in local, state and national dog shows with cash prizes.

Phyllis recalls receiving a phone call in the early evening of July 5, 2000. Molly Taube, one of the employees on duty that evening, called to let Phyllis know that Mrs. Miniver had gotten loose as Molly was removing her from her cage to take her to the dog run for her evening walk. The dog ran through an open gate and about 25 yards further to a barbed wire fence separating the kennel from an adjoining property. The dog became tangled in the barbed wire fence and suffered severe cuts on her back, side and stomach areas. Molly first called Dr. Jack Carter, the veterinarian listed on the Reeses' registration form. Neither Dr. Carter nor his on-call person was available. Molly then called Dr. Mary Donaldson, the vet on Kennel Kare's on-call list. Molly then called the Reeses at their cell phone number and advised them what had happened. Dr. Donaldson was able to come to the kennel right away, and sutured the dog's injuries. The Reeses arrived at around 11:00 p.m. and took the dog home with them.

Incident Report and Memo

Kennel Kare's Procedures Manual requires that an incident report, interview and memorandum be prepared.

Kennel Kare, Inc.

17878 Greenhaven Lane
Harveyville, Columbia

Registration Form

Tell Us About Yourself

Name_____Amanda and George Reese_____

Address_____98 Crawford Lane_____

City_____Logan City_____State__COL__Zip__97655_____

Home Phone_(555) 655-3248_____Fax_____

Work Phone__(555) 697-2323_____Emergency Phone_____

Email_____Cell_____(555) 401-9899_____

Who else is authorized to drop off/pick up the pet?____n/a_____

Instructions in case of emergency:

Call Dr. Jack Carter (Veterinarian) then call us on cell_____

_____

How did you hear about us?____friend_____

Tell Us About Your Pet

Name___Mrs. Miniver_____Breed____Pug_____Date of Birth/Age___3 years_____

Sex: Female Spayed/Neutered: No

Weight:____25_____Color___brown_____

How does your dog get along with other dogs?_____well_____

people?____well_____

Under what conditions does your dog growl, snarl, bark or cry?

___only when provoked_____

_____

Has your dog ever bitten or been bitten?

___no_____

Has your dog used any daycare/boarding facility before?

___yes_____

Does your dog use public dog runs?

___yes_____

Tell Us About Your Pet's Health

Veterinarian: Dr.___Jack Carter_____at _____Benson Valley_____Clinic/Hospital

Address:_____

Phone number____(555) 767-0934_____

Please describe your pet's general health? (include any current medical conditions)

____good_____

_____

_____

Allergies (if any)_____

Current medications:___none_____

Frequency and time administered:_____

Date of last complete physical exam _____

Vaccinations:

Rabies__current_____Date Administered_____Date Due_____

DHLP___current____Date Administered_____Date Due_____

Parvo___current_____Date Administered_____Date Due_____

Bordatella_current_____Date Administered_____Date Due_____

Please Tell Us About Your Pet's Daily Routine

Wake-up time:____6:30 a.m.,_____

Regular Food: Brand____Pet-time_____Variety___hi-pro_____Feed Times___dinnertime_____

Quantity:_____1 can_____Instructions____mix with warm water and kibble_____

Exercise/Walk____2 times_____Times_____a.m. and p.m._____

Typical Elimination Times_____6:45 a.m., 3:30 p.m. and 8 p.m._____

Sleep Time:____10:00 p.m._____

Favorite Activities/Toys

____frisbee toss and squeaky toy_____

Items brought/Luggage_____

I certify that I am the owner or the agent of the owner of the aforementioned pet, and that I am authorized to board the pet and sign this form. I authorize Kennel Kare, Inc. to contact my veterinarian in order to confirm health, temperament and vaccinations. I give consent to Kennel Kare, Inc. to act on my behalf by obtaining veterinary care at my expense, should Kennel Kare, Inc. deem it necessary. I have read the schedule of fees and agree to pay all charges at checkout, unless previously arranged. I authorize Kennel Kare, Inc. to charge my credit card account, if so provided, for any outstanding invoices. I release Kennel Kare, Inc. (and its agents and employees) from any liability or claim due to injury or death of my dog, unless Kennel Kare, Inc. has been negligent in the care of my dog. I understand that under no circumstances will Kennel Kare, Inc. be liable for consequential damages or damages beyond the replacement value of my dog.

Signed:__*Amanda Reese/ George Reese*_____Date____July 2, 2000_____

Kennel Kare, Inc.

Excerpt from Procedures Manual

* * * * * *

Section X.B. In Case of Sickness or Injury to Animals

Kennel Kare employees are required to do the following in all cases involving sick or injured animals:

1. Notify the supervisor on duty of the sick or injured animal.

2. If the supervisor determines that the animal requires veterinary services, refer to the animal's registration form and call the listed veterinarian. If emergency services are unavailable, refer to the list of on-call providers. Call the providers, in the order in which they appear on the list, and obtain the most immediate services available. Follow other steps indicated in the "Instructions in case of emergency" section of the Registration Form.

3. Once the animal is under the care of a veterinarian, fill out an Incident Report.

4. At the first available opportunity, the Kennel Coordinator or Operations Manager will conduct interviews of all employees who were on duty at the time the animal became sick or injured. These interviews shall be tape-recorded.

5. The person who conducts the interviews shall also prepare a memorandum summarizing the circumstances surrounding the sickness or injury, as well as all steps taken in response thereto.

6. The Incident Report, tape recording and memorandum may be used as the basis for disciplinary action, if so warranted. If so used, the documents will not be made a part of the employee(s)' Personnel File, but will be maintained by the central office as provided below.

7. The original Incident Report, tape recording and memorandum shall be filed in the central office file entitled "Incident Reports," which shall be confidential, kept in a locked file cabinet, and will be made available to legal counsel if litigation results from the incident.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

Incident Report

Name of employee:_____Molly Taube_____

Date of report:__July 5, 2000_____ Time of report:____11:30 p.m.____

Name of animal:_____Mrs. Miniver_____

Description of incident (time and date you first observed sickness or injury; where animal located; describe animal's condition or symptoms; describe who was present; describe steps you took in response, noting dates and times, if possible): At approximately 7:45 p.m., I went to the cage area to take Mrs. Miniver from her cage to the dog run area. For some reason, there was a lot of distracting stuff going on. There was lots of barking and commotion among many of the dogs in the cage area. I didn't notice it at the time, but a pick-up truck from a ranch down the road with 2 black labrador retrievers in the back had driven up to the gate. Those dogs were barking, too. I unlocked Mrs. Miniver's cage, and had swung open the door slightly. I was grabbing her collar so that I could attach a leash when she bolted. By then, the pick-up truck driver had rolled open the gate, and Mrs. Miniver ran through it. I lost sight of her, but ran after her. She seemed to be headed toward a tree-lined area that divides our property from the neighboring ranch. Suddenly, I heard yelping. I found Mrs. Miniver caught up in the barbed wire fence. I had trouble getting her untangled. She bit me a couple of times, but I finally got her loose. I ran her back to the office. Nobody else was around. I called Phyllis and told her what was going on. Mrs. Miniver was bleeding all over. I wrapped her in some blankets we had in the office. I called Dr. Carter, but he wasn't available, nor was his on-call person. I called Dr. Donaldson and she came out right away, I'd say in about 20 minutes. While I was waiting for Dr. Donaldson, I called the Reeses. I told them what had happened. They were really upset.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

Transcript of Interview between Phyllis Dolan (PD) and Molly Taube (MT)
Date of interview: July 8, 2000

PD: Hi, Molly. I have the tape recorder going. You know that I have to do this according to our Procedures Manual, okay?

MT: Yeah, I understand.

PD: Try not to get too stressed out about this. All you have to do is tell the truth, okay? Although, you should know that the Reeses might sue us. You just need to be careful about what you say, okay?

MT: I am really sorry about what happened, Phyllis. I have been with you guys for 7 years, and this is the first time something like this happened.

PD: We're all sorry when something like this happens, Molly. I know you didn't mean for it to end up this way, but why don't you tell me what you remember?

MT: It's pretty much what I said in the Incident Report, Phyllis.

PD: Well, take a look at it again and see if there's anything else you remember.

MT: I guess it was a lot crazier than I thought. I still can't figure out what exactly was going on, but all of a sudden all the dogs went crazy. They were barking and running around in their cages. Then the pick-up drove up. It was really noisy, the truck I mean, and the two dogs in back were also going nuts. Maybe I should have waited to get Mrs. Miniver out. There wasn't a particular hurry or anything, now that I think about it.

PD: Well, but that's in hindsight. Don't second guess yourself. You did what you thought was right at the time, didn't you?

MT: Yeah, of course, but I just feel so bad for Mrs. Miniver and the Reeses . . .and for Kennel Kare.

PD: I know you do. Well, is there anything else?

MT: I really can't think of anything.

PD: Okay, Molly. I'll be writing this up. As you know, part of my job is to make a recommendation about whether we'll be taking any disciplinary action against you. I can tell you now that I won't be recommending any disciplinary action, but I can't say I'm happy about this.

MT: I am still very sorry that this happened, you know. I promise I'll be more careful next time.

Kennel Kare, Inc.
17878 Greenhaven Lane
Harveyville, Columbia

CONFIDENTIAL MEMORANDUM

To: Operations Manager

From: Phyllis Dolan, Kennel Coordinator

Date: July 9, 2000

Re: Incident involving Mrs. Miniver on July 5, 2000

I have reviewed the applicable Registration Form and Incident Report. I also audiotaped an interview with Molly Taube yesterday. I summarize my findings as follows:

1. Molly has been an excellent employee for the past 7 years. She has had excellent performance reviews.

2. Molly does not have an explanation for why the incident occurred. It appears that she may have been distracted by a sudden widespread outburst of barking and excitement by the dogs being boarded at the time. Our facility was pretty full given that it was during the Fourth of July holiday period.

3. Another source of distraction was the unfortunate arrival at the time of the incident of our neighbor's pick-up truck. The truck was quite noisy and was carrying two large, barking dogs who seemed to further contribute to the general barking and excitement of the dogs at the kennel.

4. Under the circumstances, but in hindsight, Molly realizes that she should not have tried to take Mrs. Miniver to the dog run at that time. She could have waited until things calmed down before doing so. Perhaps because of the extra pressures created by being full over the holiday and being short-staffed, her judgment was not at its best.

Based on the above, I recommend that no disciplinary action be taken. I will have a talk with Molly and remind her that during a holiday period, and particularly when

we’re understaffed, she needs to think calmly, coolly and carefully to avoid making rash decisions. Molly agrees that she will be more careful next time.

REESE v. KENNEL KARE, INC.

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SELECTED PROVISIONS OF THE COLUMBIA EVIDENCE CODE AND COLUMBIA CODE OF CIVIL PROCEDURE

* * * * * *

Evidence Code § 771

(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent to the testimony of the witness.

* * * * * *

Evidence Code § 912

The right of any person to claim lawyer-client privilege [and the other privileges] is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

* * * * * *

Evidence Code § 952

"Confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a

legal opinion formed and the advice given by the lawyer in the course of that relationship.

* * * * * *

Evidence Code § 954

Subject to Evidence Code § 912, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication.

Evidence Code § 955

The attorney who received the communication or made a communication subject to the attorney-client privilege shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under Evidence Code § 954.

* * * * * *

Code of Civil Procedure § 2017

Any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, if the matter either is itself admissible in evidence or appears to be reasonably calculated to lead to the discovery of admissible evidence.

* * * * * *

SULLIVAN v. SUPERIOR COURT

Columbia Court of Appeal (1972)

There is apparently no conflict as to the facts alleged in the petition. Petitioner William Sullivan alleges that he interviewed his client, Mary Spingola, concerning the events surrounding an automobile accident. The interview was conducted in the course of an attorney-client conference, during which petitioner asked questions and plaintiff in the underlying action, Spingola, gave her answers. This interview was tape-recorded.

During the taking of the deposition of Spingola, defense counsel asked her if she had used anything to refresh her memory. Her counsel as well as she stated that to refresh her recollection she used the transcription made by petitioner's secretary of the electronically recorded conference between her and the attorney.

The defendants in the underlying action then demanded the production of the transcription. Petitioner refused to produce it on the ground that it was protected by the attorney-client privilege. The trial court ordered production of the transcription.

Petitioner then filed this petition to prohibit enforcement of this order, contending that requiring the production of the transcription violated the attorney-client privilege and that Spingola's refreshing her memory from the transcription was not a waiver of the privilege.

To successfully invoke the lawyer-client privilege, three requirements must be met. There must be (1) a communication, (2) intended to be confidential, and (3) made in the course of the lawyer-client relationship. The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full

disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Furthermore, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he considers to be unfavorable facts.

Code of Civil Procedure § 2017 expressly exempts privileged matter from discovery. There can be no doubt that the document in question is privileged. Defendants do not argue otherwise. Defendants, however, contend that the provisions of Evidence Code § 771 control in a situation of this kind and require disclosure because they claim Spingola waived the privilege. Evidence Code § 771 provides in pertinent part:

(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken. (b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce into evidence such portion of it as may be pertinent to the testimony of the witness.

There is an apparent conflict between Evidence Code § 771 and other statutes dealing with the attorney-client privilege. In interpreting the various statutes on the subject, certain rules of statutory interpretation must be borne in mind. One rule provides that when two provisions of a statute are inconsistent, then a specific provision will control over a general one. Thus, under this rule, the specific provisions of the Evidence Code governing the protection of specific privileges will control over the more general provisions of Evidence Code § 771 which refers to the production of *any* document used by a witness to refresh his memory. Another rule provides that when an irreconcilable conflict exists

between two sections of a statute, the later occurring provision controls over an earlier provision, even though both were enacted at the same time. Under this rule, the Evidence Code sections governing privilege control over the earlier occurring in § 771.

Evidence Code § 952 defines a confidential attorney-client communication to include disclosures of information to those to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer is consulted. Spingola was not asked whether, despite the fact that she refreshed her memory by reading the transcription, she had an independent recollection of the facts of the accident. However, it may be assumed that any careful lawyer would grant her the opportunity before trial to refresh her memory with her first statements to her attorney.

In view of the importance of the attorney-client privilege and the nature of the writing involved here, it cannot be held that Spingola waived the privilege by refreshing her recollection from it. Moreover, to hold otherwise and thereby undermine the sanctity of the attorney-client privilege may have very far-reaching effects upon attorney-client communications which are not justified by the facts of the present case.

Petition granted.

DIXON v. SUPERIOR COURT

Columbia Court of Appeal (1968)

Petitioner Corey Dixon (Dixon) seeks a writ of mandamus directed to the Superior Court, Orange County, ordering it to grant his motion to produce certain reports.

In an action by Dixon for personal injuries resulting from an explosion on August 3, 1965, Southern Counties Gas Company (Gas Co.) was named as the defendant. Mr. Reynolds, an employee of Gas Co. at the time of the accident, was a lead man in charge of a crew of at least two other men including Alfred Jones. They did construction and maintenance work for Gas Co. Mr. Reynolds was not present at the scene of the explosion, but was required by Gas Co. to prepare certain investigation and accident reports in connection with the accident. Mr. Jones was present at the scene of the explosion. Mr. Reynolds and Alfred Jones were not named as defendants. Reynolds' reports were prepared and submitted at various dates, commencing in August 1965 and continuing to and including May 1966. Plaintiff was to take the deposition of Alfred Jones. Prior to the time when the deposition was taken, and in order to refresh his memory, Jones reviewed Reynolds' reports, which had been given to him by the attorney for Gas Co.

At the deposition, Dixon elicited the fact that Jones had refreshed his recollection in this manner. Gas Co., however, refused Dixon's request to produce the reports.

Subsequent to the taking of the deposition, Dixon moved the court for an order pursuant to Evidence Code § 771 (all further references are to provisions of the Evidence Code unless otherwise indicated), requiring Gas Co. to produce and permit him to inspect and copy the reports which had been identified. Section 771 provides in pertinent part: "(a) If a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of

an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken."

The motion specifically described and identified the papers and documents it desired to inspect and copy. This motion was denied on the basis that the papers and documents were privileged under the attorney-client privilege, and that the privilege had not been waived.

The questions presented are: (1) Were the reports privileged as attorney-client communication, and (2) if there was a privilege, was there a waiver?

Attorney-client privilege

The problem involved obviously relates to the extent of the attorney-client privilege when the client is a corporation. The problem becomes complex because a corporation can speak only through an officer, employee, or some other natural person. Certainly, this fact should not result in an absolute denial of the privilege, nor should it lead to the conclusion that the privilege attaches to every report or statement made by a corporate agent and furnished to the corporation's attorney. The existence of such a privilege in favor of a corporate client has been assumed in many Columbia cases, but the precise extent of the privilege seems never to have been discussed by the Columbia appellate courts.

Certainly the public policy behind the attorney-client privilege requires that an artificial person be given equal opportunity with a natural person to communicate with its attorney, within the professional relationship, without fear that its communication will be made public. As one writer has said, "The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with their legal advisers, the more willing one should be to accord them a flexible and generous protection."

But reason dictates that the corporation not be given greater privileges than are enjoyed by a natural person merely because it must utilize a person in order to speak. If

we apply to corporations the same reasoning as has been applied in regard to natural persons in reference to privilege, and if we adapt those rules to fit the corporate concept, certain principles clearly emerge. These basic principles may be stated as follows:

1. When the employee of a defendant corporation is also a defendant in his own right, his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist;

2. When such an employee is not a co-defendant, his statement regarding the facts with which his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents the employer should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation at the time of the communication; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the non-litigant employee), and the communicating employee is a "member of the control group";[2]

3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness. The fact that the employer requires him to make a statement does not alter his status or make his statement subject to the attorney-client privilege;

4. Where the employee is not a witness and his only connection with the matter grows out of his employment to the extent that his report or statement is required to be made by the employer, his statement or report is that of the employer;

[2] The most useful definition of "member of control group" is as follows: The control group comprises all those employees, of whatever rank they may be, who are authorized to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney. All persons so authorized, in effect, personify the corporation when they make their disclosures to the lawyer and the privilege would apply.

5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged;

6. When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived;

7. Finally, no greater liberality should be applied to the facts which determine privilege in the case of a corporation than would be applied in the case of a natural person (or association of persons), except as may be necessary to allow the corporation to speak.

Under the facts of this case, Reynolds was not named as a co-defendant. His position in the corporation, while in management, was not one of ultimate control. He could not be said to be speaking for the corporation when he made his report. He could be said to be speaking for the corporation only if he had the authority to make critical and key decisions on behalf of the corporation.

Reynolds' connection to the case grew out of his employment with Gas Co. His reports were required in connection with the investigation of the incident by Gas Co. Because Gas Co. directed the making of the reports for transmittal to its attorney, the reports are privileged.

Nevertheless, our inquiry does not end there. The facts require further analysis in that finding the existence of privilege is not dispositive of the conflict between a liberal interpretation required under our rules of discovery and the liberal construction in favor of the exercise of the attorney-client privilege. Nor does it decide whether the privilege was waived.

Evidence Code § 912 provides in pertinent part as follows:

(a) The right of any person to claim the lawyer-client privilege ... is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

In this case the privilege rested with Gas Co. Defendant Gas Co. had knowledge that the deposition of its employee, Mr. Jones, was to be taken and had the knowledge that Mr. Jones had read the Reynolds' reports.

Gas Co.'s legal position is that where a witness gives testimony which involves the contents of privileged reports furnished to him to refresh his memory, the holder of the privilege may assert the attorney-client privilege when the request is made to produce the document.

We disagree. When, with knowledge of their intended use, privileged records are furnished to an independent witness (as defined in number 3, above), the privilege is waived.

Let a writ of mandamus issue.

ANSWER 1 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Rachel Bergman
FROM: Applicant
DATE: February 27, 2003
RE: Reese v. Kennel Kare, Inc.

You have asked for me to draft a memorandum advising you whether we can be successful in a motion to compel production [of] six specific documents if they are disclosed to parties other than those who may be considered our clients. I will analyze the documents separately and separately discuss each other party.

First, you would like to show the six documents to Phyllis Dolan. Phyllis is currently the Operations Manager of Kennel Kare, Inc. ("Kennel"). Kennel is our client. As the Operations Manager, Phyllis reports directly to the President and Vice-President of Kennel, who happen to be her parents. Phyllis makes all of the day-to-day decisions for Kennel, but the ultimate decision makers are the President and Vice-President. Kennel, the corporation, is our client, not its officers, directors, or employees. As such, Phyllis is not our client, but depending on her status within the corporation, her statements could be construed as those of Kennel and therefore privileged. At the time of the incident, Phyllis was the Kennel Coordinator and could not make major decisions.

1. Memorandum to File regarding Interview with Phyllis

On December 27, 2002, you interviewed Phyllis and drafted a memorandum to the file summarizing the interview. Under our facts, Phyllis [is] not a co-defendant in the case. This memorandum would be privileged under the lawyer-client privilege if three requirements are met as set forth in Sullivan: There must be (1) a

communication; (2) intended to be confidential; and (3) made in course of lawyer-client relationship. In the context of a corporate client the matter is complex because the corporation can only speak through its officer or employees or another natural person. The court in Dixon set forth certain basic principles in connection with privilege and waiver in the corporate context. In Dixon, the court stated that if the employee is not a co-defendant, his statement regarding facts with which his employer may be charged made by such employee to employer's lawyer should not be privileged unless he is the natural person to be speaking for the corporation at the time of the communication. Therefore, the privilege will attach if the statement is made by an employee in the "control group". Employees in the control group are those who are authorized to control or take a substantial part in the decision about any action that the corporation may take upon advice of an attorney.

In our facts, we have a communication, the interview between you and Phyllis; intended to be confidential, presumably because she was being interviewed by Kennel's lawyer in the context of litigation, Phyllis intended the conversation to be confidential; and it was made in the course of the lawyer-client relationship. At the time of the interview, Phyllis was Operations Manager and made all day-to-day decisions for Kennel, therefore she was in Kennel's control group. Accordingly, she was speaking for the corporation at the time of the communication. The fact that she was not in this position at the time of the incident is irrelevant. She was in the position at the time of the communication, which is required by Dixon. Therefore, her interview and your memorandum are privileged.

The next issue is whether by showing the memorandum to Phyllis [it] waives the privilege. Under the Evidence Code § 771, if a witness, either while testifying or prior to such testimony, uses a writing to refresh his memory with respect to the matter in which he will testify, the writing must be produced at the hearing at the request of the adverse party. Presumably then, if we show Phyllis the

memorandum regarding her prior interview to refresh her memory of the events, we would be compelled to produce the memorandum if the opposing counsel requests it. However, according to Sullivan, this section is in conflict with other statutes dealing with the attorney-client privilege. The facts in Sullivan would be comparable to ours. A client used the transcript of privileged attorney-client communication to refresh his memory prior to a deposition. Opposing counsel sought production of the transcript and the trial court ordered production. The client's lawyer petitioned the court to prohibit production. Under two theories, the court found that other attorney-client privilege statutes controlled over § 771 and stated that in view of the importance of the attorney-client privilege and the nature of the writing, the client did not waive the privilege by refreshing her recollection from the writing. Therefore, d[ue] to the similarity in issues, allowing Phyllis to look at the memorandum would not waive the privilege. We should first ask Phyllis if she has any independent recollection before resorting to the memorandum. Accordingly, we would be successful in resisting a motion to compel production of the memorandum.

2. Registration of Mrs. Miniver

The registration form would not be privileged. This was not a communication between client and lawyer in the course of their relationship. Additionally, it was a form filled out by plaintiffs, so it obviously was disclosed to third parties. Therefore, there is no confidential communication under Evidence Code § 952. Because there is no privilege, no privilege can be waived by showing it to Phyllis. Whether we show it to Phyllis for her deposition or not, opposing counsel could compel production of the registration form. We would not [be] successful in resisting this motion.

3. Excerpt from Kennel's Procedure Manual

Again, this is not a confidential communication between a lawyer and client pursuant to § 952. Even if the manual was intended to be confidential among Kennel and its employees, it does not meet the other requirements to invoke the lawyer-client privilege. It is not a communication made in the course of the lawyer-client relationship. Even if we argue that the excerpt was given to us in the course of our representation of Kennel, this was not the intent of the manual. Accordingly, because this is not a confidential communication, there is no privilege, it can't be waived and we can be compelled to produce the manual. Showing it to Phyllis will not affect this result.

4. Incident Report

The issue with the report is whether a report by an employee of a corporate defendant is privileged communication as to the corporate client. Dixon is the authority on this issue. Another of the basic principles stated by the court in Dixon is "when an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness; the fact that the employer requires him to make the statement does not alter his status or make his statement subject to the attorney-client privilege." This is directly on point with the incident report written by Kennel's employee Molly Taube. Molly was the only person to witness the incident. Pursuant to the procedures manual, she was required to draft a report of the incident. Pursuant to Dixon, Molly is an independent witness and the fact that Kennel's procedures required her to make the report doesn't change this. The incident report is not privileged. Furthermore, even if Molly was an employee in the control group, the report was not a communication made in the course of the lawyer-client relationship or even a communication to a lawyer, in accordance with Evidence Code § 952 and Sullivan. Accordingly, because the incident report is not privileged, there will be no waiver by showing it to Phyllis. We would lose in resisting a motion to compel the production of the incident report. The fact that the incident report, in accordance with the procedures manual, shall be kept in [a] confidential locked

file cabinet and used in case of litigation may help show that the report was confidential information. However, because Molly was the witness to the incident, the principles set forth in paragraphs 5 and 6 in Dixon, which I will discuss below, do not apply. So, as stated above, we will be compelled to produce the incident report, no matter whether it is shown to Phyllis or not.

5. Transcript of Molly's Interview

Pursuant to Kennel's procedures manual, the Kennel Coordinator or Operations Manager must interview the witness employee. The interview must be tape-recorded and as with the incident report, kept confidential and made available to counsel if litigation results. On July 8, 2000, Phyllis, as Kennel Coordinator, conducted an interview with Molly. Under the basic principles in Dixon, paragraph 4 states that where the employee making the statement or report is not a witness, and his only connection with the matter grows out of his employment to the extent the statement is required to be made by the employer, the statement or report is that of the employer. This document brings up the issue of whether it falls under this paragraph, whether it's a statement or report made by an employee who is not the witness. Here there are statements by Molly (witness) and Phyllis (non-witness). The relevant statements made are presumably by Molly. Phyllis merely asked questions. If the transcript can be considered a report or statement made by Phyllis, the analysis below regarding Phyllis' memorandum will apply if it is a statement by Molly, the same analysis regarding the incident report applies. I believe that because the relevant statements in the interview were made by Molly. Therefore, this transcript is not privileged and showing it to Phyllis will have no effect of waiver. We will not be successful in resisting the motion to produce the transcript. The fact that Phyllis states there might be a lawsuit is irrelevant.

6. Phyllis' Confidential Report

Pursuant to the procedures manual Phyllis, as the person conducting the interview, must prepare a memorandum of the incident. The memorandum, along with incident report and tape-recorded interview, may be used towards disciplinary action, but will not be placed in the employee's personnel file. The memorandum is also placed in the confidential locked file in case of litigation.

As stated above, pursuant to Paragraph 4 of Dixon, this report should be considered a report of the employer, Kennel. Phyllis was not a witness to the incident and her only connection to the matter grows out of her employment because it was required by Kennel to be made. Paragraph 5 states that in the case of Paragraph 4, the privilege of the report is to be determined by employer's purpose in requiring the report. If the report is required for confidential transmittal to Kennel's attorney it would be privileged. In our facts, Kennel requires the report. There is no express statement of its purpose, but it is to be kept in a locked cabinet in the central office to be "made available to legal counsel if litigation results from the incident." This shows that the purpose of this report was for confidential transmitt[al] to Kennel's attorney. Opposing counsel may argue that the purpose of the report was to discipline the employee. Under Paragraph 6 of Dixon, if the employer has more than one purpose in directing the employee to make the report, the dominant purpose controls, unless the secondary use causes confidentiality to be waived. In our facts, the manual states the memorandum, with the incident report and interview, "may be used as a basis for disciplinary action." Discipline is not the dominant purpose. This leaves confidential attorney communication as the dominant purpose. The secondary purpose for discipline does not waive confidentiality because it is not placed in employee's file. Therefore the communication is privileged.

So, under our facts, Phyllis was not named a co-defendant. Her position at the time of the memorandum was not one of ultimate control, so she could not be said to be speaking for Kennel when she made this report. Phyllis' connection grew out of her employment with Kennel. Her report was required in connection with the

investigation of the incident by Kennel. Because Kennel directed the making of these reports for transmittal to their attorney, the memorandum is privileged.

The same analysis regarding waiver that was discussed in Section 1 above relating to Phyllis' interview apply here. Phyllis will not waive the privilege if the memorandum is shown to her prior to her deposition. We will be successful in opposing the motion to produce.

Molly Taube - You would also like a discussion of privilege and waiver issues in relation to showing the same six documents to Molly in preparation of her deposition.

1) File Memorandum of Interview with Phyllis

The same analysis regarding privilege applies here as it did under Phyllis' discussion. The memorandum is privileged. The issue is whether that privilege is waived if we show it to Molly to refresh her recollection. Again, we look at Dixon, which is directly on point. A witness employee reviewed reports made by his supervisor as required by the corporation in order to refresh his recollection of the incident. Relying on § 912 of the Evidence Code, which addresses waiver of attorney-client privilege if holder of such privilege has disclosed a significant part of such communication or has consented to such disclosure, the court held that privilege was waived.

The corporation in Dixon argued that holder of the privilege does not waive the privilege where a witness gives testimony that involves contents of privileged reports furnished to refresh his memory. The court found that defendant had knowledge that his employee's deposition was to be taken and had knowledge that such employee read the privileged reports. The court held that, when, with knowledge of the[ir] intended use, privileged records are furnished to an independent witness, the privilege is waived.

This would be our case if we allow Molly to use our memorandum of Phyllis' interview. Therefore, we should not show Molly this memorandum or else the privilege will be waived.

Documents 2 - 5 (Registration Form, Procedures Manual, Incident Report, Transcription of Molly's Interview).

As analyzed above, none of these documents are privileged. So, showing them to Molly will not effect [sic] the result. We will be compelled to produce these documents.

6. Phyllis' Report

This would be the same analysis as under #1 for Molly. The report by Phyllis is privileged. Pursuant to Dixon, showing it to Molly would waive the privilege. The privilege rested with Kennel. Kennel would have knowledge that the deposition of Molly would take place and would have the knowledge, through us as Kennel's lawyers, that Molly had read the memorandum. Because Kennel has knowledge of its intended use, for confidential transmittal to its attorney, and knows the privileged report is being furnished to Molly, an independent witness, the privilege would be waived. Therefore, we should not furnish the memorandum to Molly or we will be compelled to produce it to opposing counsel.

ANSWER 2 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Rachel Bergman

FROM: Applicant

DATE: February 27, 2003

RE: Reese v. Kennel Kare, Inc.

You have asked me to prepare a memorandum analyzing, if you show certain file documents to Phyllis Dolan and Molly Taube in preparation for their depositions, whether a motion to compel disclosure of those documents can be resisted successfully. Below, I analyze in turn each of the documents you refer to, being sure to analyze issues of privilege and waiver.

1. Your File Memorandum From Your Recent Interview With Phyllis Dolan.

Privilege

In Sullivan v. Superior Court, the Court of Appeal refused to uphold a trial court's order to compel production of a transcription of an interview between the lawyer and the client, which the lawyer gave to the client to refresh her recollection before deposition. In the case at hand, you would have Phyllis Dolan review the notes from your interview with her.

In Sullivan, the defendant herself had given the interview, and was giving the deposition. In the case of our clients, Ms. Dolan is not a named defendant. However, privilege attaches to communications between the attorney representing the defendant corporation and employees who are not co-defendants, who are in the "control group." Dixon.

Ms. Dolan is a member of the company's "control group." "The control group comprises all those employees ... who are authorized to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney." Ms. Dolan is the Operations Manager, and was Operations Manager at the time of your interview with her in December 2002. As Operations Manger, Ms. Dolan makes all the day-to-day decisions regarding operations of the company, and approves "major decisions." The Kennel Coordinator, Office Manager, and Marketing [M]anager report to Ms. Dolan. She reports directly to the [P]resident and [V]ice [P]resident of the company.

Your Interview of Ms. Dolan is Privileged.

Waiver

As in Sullivan, there is no waiver of confidentially if Ms. Dolan refreshes her recollection with your interview with her. However, the privilege can be waived if the notes are shared with Ms. Taube. S 952 allows disclosure of communications with third persons which are reasonably necessary, without waiving the privilege. However, it is not reasonably necessary to share the notes with Ms. Taube. Substantively, all of the events of the day in question are available in other documents, notably, her incident report (see below).

2. Registration From for Ms. Miniver

Privilege

This registration form is not a confidential communication between client and attorney. First, it is not confidential, it is signed by Amanda and George Reese, and read by whoever was working at the kennel, or whoever the Reeses chose to share it with. Second, it is not between clients and attorney.

No privilege attaches to this document. There is no problem with waiver, if you choose to allow the witnesses to read it before their depositions.

Discoverability

CCP 2017 allows discovery of any matter relevant to the action, and admissible in evidence or reasonably calculated to lead to admissible evidence. The registration form is relevant to show that the plaintiff's dog was boarded at the kennel, and is admissible as a business record.

3. Except From Procedures Manual For Kennel Kare, Inc.

Privilege

The procedures manual is not a confidential communication. It is available to all employees of the kennel. It is not between attorney and client. It is issued and published by the company, to all employees. Privilege does not attach to the manual.

Waiver is not a problem, if you wish to show it to the witnesses before their depositions.

Discoverability

The manual is discoverable under CCP 2017. It is relevant to show negligence, and admissible as a business record.

4. Incident Report

Privilege

"When an employee has been a witness to matters which require communication to the corporate employer's attorney, he is an independent witness. The fact that the employer requires him to make a statement does not alter his status or make his statement subject to the attorney client privilege." Dixon.

The reporter here is Ms. Taube. She is an independent witness, because she witnessed the incident with the dog. Even if the Kennel had required that she make a statement about the incident that she witnessed which requires communication to a lawyer, her statement is not subject to the privilege.

Waiver

Waiver is not an issue, because no privilege attaches. The incident report is discoverable whether or not you show it to the witnesses.

Discoverability

Under CCP 2017, the report is discoverable. It is relevant to show the plaintiff's prima facie claim, and it is admissible as a business report.

5. Transcript of Tape-recorded Interview by Phyllis Dolan of Molly Taube; and

6. Confidential Memorandum Prepared by Phyllis Dolan as Kennel Coordinator to Operations Manager

The same analysis applies to both of these documents.

Privilege

The rule in Dixon states, "Where the employee is not a witness, and his only connection with the matter grows out of his employment to the extent that his report or statement is required to be made by the employer, his statement is that of the

employer; ... (and I)f ... the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same."

Here, the interview was conducted by Phyllis Dolan, and the report was written by Phyllis Dolan. She was not a witness, her only connection with the incident grows out of her employment, and the interview and the report were required by the employer, as recited in the manual. So. Ms. Dolan's statements and report are clearly "of the employer."

Whether the report and statements that are "of the employer" are privileged is determined by the employer's purpose in requiring them. Dixon. If the employer "directs the making of the report for confidential transmittal to its attorney, the communication may be privileged." In our clients' case, there are two purposes, outlined in the procedures manual, for the tape and report. (The [p]rocedures Manual also discusses the Incident Report, but its character is distinct because it is composed by a witness employee, see #4 above).

"When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control unless the secondary use is such that confidentiality has been waived." The two purposes outlined in the manual are for employee discipline and to be available to counsel in case of litigation.

The dominant purpose of our client is to make the documents available to counsel for litigation. The secondary purpose is to make decisions about employee discipline, and nothing happens in the course of that decision making to waive confidentiality.

First, the documents are kept confidential, in a locked cabinet, apart from other documents. Second, the documents are used by the person charged to make

the report (whose statements are "of the employer") and the Operations Manager, who is in the Control Group (see above), to decide employee disciplinary action, maintaining their confidentiality within the circle of representatives of the corporation whose communications to counsel are privileged. Third, the documents are not kept with personnel files, but are filed separately for access to attorneys in case of litigation. Fourth, as mentioned, the files are kept segregated and "available to legal counsel if litigation results from the incident."

Applying the rules in Dixon, privilege attaches to the confidential memorandum and the transcript of the interview between Ms. Dolan and Ms. Taube.

Waiver

The issue of waiver arises, because Ms. Taube is both a witness to the incident, and is a person outside the "control group". As discussed in #4 above, even if Ms. Taube's statements are made at obligation of her employer and for the attorney, they are not privileged.

The confidentiality of the interview is not waived because Ms. Taube participated, even though she is a witness employee (see #4 above) and she is not in the "control group." Section 952 says that the confidentiality of a communication is not waived when disclosure is reasonably necessary for the transmission of the information. Of course, for Ms. Dolan to interview Ms. Taube, it is necessary that Ms. Taube participate.

To offer the memorandum or the transcript to Ms. Dolan should not constitute a waiver of confidentiality. However, if the memorandum is disclosed to Ms. Taube, the privilege will have been waived and the memorandum will be subject to a motion to compel. It is not necessary to the representation that Ms. Taube see the transcript or the memorandum. If her recollection needs to be refreshed, she

can see the incident report, which is not privileged, and is subject to disclosure anyway.