California Bar Examination

Performance Tests And Selected Answers

July 2009

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
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PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2009 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the July 2009 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

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California Bar Examination

Performance Test A

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FARLEY v. DUNN

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. 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 preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Sundquist & Davis
Attorneys at Law
12 Manning Blvd.
Columbia City, Columbia

MEMORANDUM

To: Applicant

From: Wendy Davis

Date: July 28, 2009

Re: **Farley v. Dunn**

Our firm represents Dunn Insurance Company ("Dunn"), which is headquartered in Columbia. Dunn insures a wide variety of activities, including commercial trucking. Dunn has been sued by Farley Trucking, Inc. ("Farley"). Farley is a large, interstate trucking company also located here in Columbia. Farley, an apparently sophisticated company, aided by its insurance broker, seeks to elevate the status of a one-page letter into a three-year contract for millions of dollars of commercial general liability insurance coverage, and, in the process, unilaterally rewrite important terms of the insurance contract that was subsequently signed by the parties.

We are now prepared to file a motion for summary judgment, seeking dismissal of the entire lawsuit. Following the guidelines set forth in the attached memorandum regarding persuasive briefs in support of motions for summary judgment, please draft a Statement of Uncontested Facts and a persuasive brief in support of our motion in which we argue that the one-page letter is not enforceable as a contract, varies the one-year term of the policy, and is not a sufficient basis for Farley's fraud allegation.

Sundquist & Davis
Attorneys at Law
12 Manning Blvd.
Columbia City, Columbia

MEMORANDUM

To: Attorneys

From: Executive Committee

Re: **Persuasive Briefs in Support of Motions for Summary Judgment**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs in support of motions for summary judgment to be filed in state court shall conform to the following guidelines.

All of these documents shall start with a Statement of Uncontested Facts that itemizes the facts that are material to support our motion and explains why each of the material facts is undisputed. The attorney must sift through the facts in the file and draft a statement that persuasively shows that there is indeed no genuine issue of material fact. This requires a careful comparison of the opposing side's characterization of the facts in the file. The format and style shall be as follows:

Fact #1: The May 1, 2005 memorandum was signed by the President of the company.

Undisputed Because: The President of the company admitted this fact in paragraph 2 of her affidavit.

Fact #2: The meeting between James and Spellman occurred on March 1, 2006.

Undisputed Because: This fact is alleged in paragraph 10 of the plaintiff's complaint and is admitted in paragraph 14 of the defendant's answer.

Following the Statement of Uncontested Facts, the attorney must then argue, applying the law to the facts, and move on to show that, in light of the uncontested facts, our client

is entitled to judgment as a matter of law.

This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position the attorney is advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER:** DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER:** A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Victoria Cooper, Esq.
State Bar No. 7579
Michaels & Farnsworth, LLP
515 Francesca Way
Marion, Columbia
(555)337-2021
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

Farley Trucking, Inc.,	Civil Action
Plaintiff,	No. 89765
v.	
	COMPLAINT
Dunn Insurance Company,	
Defendant	
_____/	

THE PARTIES

1. Plaintiff, Farley Trucking, Inc. ("Farley"), is a corporation organized and existing under the laws of Columbia, with its principal place of business in Columbia City, Columbia.

2. Upon information and belief, Defendant, Dunn Insurance Company ("Dunn"), is an insurance corporation incorporated under the laws of Columbia, with its principal place of business located in Columbia City, Columbia.

3. Upon information and belief, Dunn insures certain types of liabilities, including liabilities associated with the commercial trucking industry.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action.

5. Venue is proper in this Court.

BACKGROUND

6. Farley is a truckload motor carrier of general commodities in both interstate and intrastate commerce. Farley is among the five largest truckload carriers in the United States. It operates throughout the 48 contiguous states and also portions of Canada and provides through-trailer service in and out of Mexico. At 2006 year-end, Farley's fleet consisted of 7,475 tractors, over 19,770 trailers, and over 10,000 employees and independent contractors. The principal types of freight Farley transports include consumer products, retail store merchandise, food and paper products, beverages, industrial products, and building materials.

7. In the summer of 2006, Farley, through insurance brokers Bradford Insurance Brokers, Inc. (“Bradford”), negotiated with Dunn to purchase commercial general liability coverage.

8. In a letter dated July 11, 2006 (the “Agreement”), Dunn entered into a contract with Farley to provide coverage for a fixed premium rate of .0940 per 100 payroll miles for a period of three consecutive years beginning August 1, 2006 and ending August 1, 2009. (A true and correct copy of the Agreement is attached to this Complaint as “Exhibit A.”)

9. In accordance with the Agreement, effective August 1, 2006, Farley purchased from Dunn a commercial general liability policy (the “Policy”) that provided for $5,000,000 in policy limits per occurrence. (A true and correct copy of the relevant excerpts of the Policy is attached to this Complaint as “Exhibit B.”)

10. All premiums due and owing under the Policy have been paid.

11. In breach of the Agreement, on May 23, 2007, Dunn sent Farley a notice of non-renewal (the “Notice”) of the Policy effective August 1, 2007. (A true and correct copy of the Notice is attached to this Complaint as “Exhibit C.”)

12. As of May 23, 2007, there was no material change in Farley's operations.

13. As of May 23, 2007, no claim in excess of $500,000 has been filed.

14. As of May 23, 2007, Dunn has neither requested an increase in coverage nor

a decrease in the policy deductible.

15. After Farley received the Notice, representatives from Bradford met with representatives from Dunn. The Bradford representatives learned from this meeting that Dunn claimed that their notice of non-renewal was because the terms of Dunn's reinsurance agreements would not allow them to lay off the risk they assumed in the Policy.

16. Dunn knowingly misrepresented its intention to renew and willfully placed its own pecuniary interest before that of its policyholder in failing to renew the Policy at the fixed premium rate through August 1, 2009, as it contracted to do in the Agreement.

17. Due to Dunn's breach of the Agreement, Farley was forced to purchase insurance similar to that previously provided under the Policy for the period August 1, 2007 through August 1, 2009, at a cost to Farley significantly in excess of the fixed premium rate provided for in the Agreement.

BREACH OF CONTRACT

18. Farley repeats and realleges the allegations contained in paragraphs 1 through 17 as if fully set forth herein.

19. Dunn was obligated under the Agreement to renew the Policy at the fixed premium rate of .0940 per 100 payroll miles for a period of three consecutive years beginning August 1, 2006 and ending August 1, 2009.

20. Dunn sent Farley a notice of non-renewal of the Policy effective August 1, 2007 — two years before their obligation expired.

21. Thus, Dunn has breached the terms of the Agreement.

22. As a result of such breach, Farley has suffered, and will continue to suffer damages.

23. Farley, therefore, is entitled to an award of compensatory and consequential damages in an amount to be proven at trial.

FRAUDULENT INDUCEMENT

24. Farley repeats and realleges the allegations contained in paragraphs 1 through 23 as if fully set forth herein.

25. Farley has justifiably relied upon the Agreement entered into on July 11, 2006.

26. Dunn's actions as enumerated in paragraphs 1 through 25 constitute

fraudulent inducement.

27. As a result of Dunn's fraudulent inducement, Farley has suffered, and will continue to suffer damages.

WHEREFORE, Plaintiff prays for judgment as follows:

(a) For compensatory and consequential damages in an amount to be proven at trial;

(b) For attorneys' fees and expenses of litigation incurred in bringing this action, and

(c) For such other and further relief as this Court may deem just and proper.

Michaels & Farnsworth, LLP

Dated: January 9, 2009

Victoria Cooper

by: Victoria Cooper, Esq.

Attorneys for Plaintiff Foley Trucking, Inc.

Bradford Insurance Brokers, Inc.
456 Peal Street
Columbia City, Columbia

July 11, 2006

Scott Gordon, President
Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance

Dear Mr. Gordon:

I enjoyed meeting with you yesterday and wanted to follow up our conversation concerning the proposed Farley Trucking, Inc. insurance policy with a brief summary of our discussion. We are in agreement that you will provide a rate of .0940 per 100 miles for the period of August 1, 2006 through August 1, 2009 with a minimum deposit of $987,800 for the referenced account for the 12 month period August 1, 2006 through August 1, 2007.

This rate will not change unless:

1) There is a material change in operation;
2) There has been a claim in excess of $500,000;
3) Farley requests an increase in coverage or a decrease in deductible.

If there are any questions, please contact me. I look forward to working with you.

Sincerely,

Bradford Insurance Brokers, Inc.

Jennifer Barba

Jennifer Barba
Vice President

EXHIBIT A

Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

POLICY OF INSURANCE

Policy No. GYC 3427

NAMED INSURED: Farley Trucking, Inc.

TERM: The policy term shall be one year, from August 1, 2006 to August 1, 2007.

PREMIUM: $987,800 per year, adjustable at a rate of .0940 per 100 payroll miles.

* * *

COVERAGE: Dunn will provide $5 million commercial general liability coverage per occurrence.

* * *

23. This policy constitutes the entire agreement between the insured and the insurer concerning this insurance.

24. Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums.

25. We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy.

Mark Jones

For Farley Trucking, Inc.
Date: July 20, 2006

Scott Gordon

For Dunn Insurance Company
Date: July 20, 2006

EXHIBIT B

Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

May 23, 2007

Mark Jones
Farley Trucking, Inc.
987 Broadway
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance No. GYC 3427

Dear Mr. Jones:

This letter is to advise you that Dunn Insurance Company is not renewing the 2006-2007 Policy No. GYC 3427.

We are willing to consider renewal options for this account. However, any renewal option we may offer may contain changes in limits, premiums, terms and conditions. If you wish to proceed on this basis, please forward completed signed, dated renewal submission including all pertinent information.

I look forward to hearing from you or your insurance broker.

Sincerely,
Dunn Insurance Company

Scott Gordon

Scott Gordon
President

cc: Jennifer Barba, Bradford Insurance Brokers, Inc.

EXHIBIT C

Wendy Davis, Esq.
State Bar No. 5862
Sundquist & Davis
12 Manning Blvd.
Columbia City, Columbia
(555)337-1091
Attorneys for Defendant

SUPERIOR COURT OF COLUMBIA

COUNTY OF CHESTER

Farley Trucking, Inc.,
Plaintiff,

v.

Dunn Insurance Company,
Defendant
_____/

Civil Action
No. 89765

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

THE PARTIES

1. Defendant admits the allegations of paragraph 1.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3.

JURISDICTION AND VENUE

4. Defendant denies that this Court has jurisdiction over this action as Plaintiff has failed to state a claim upon which any relief may be granted.

5. Defendant denies that this Court has venue over this action as Plaintiff has failed to state a claim upon which any relief may be granted.

BACKGROUND

6. Defendant admits the allegations of paragraph 6.

7. Defendant admits the allegations of paragraph 7.

8. Defendant admits that Exhibit A is a true and correct copy of the July 11, 2006 letter but denies the remaining allegations of paragraph 8.

9. Defendant admits that Exhibit B is a true and correct copy of portions of the policy purchased by Plaintiff from Defendant but denies the remaining allegations of paragraph 9.

10. Defendant admits the allegations of paragraph 10.

11. Defendant admits that Exhibit C is a true and correct copy of the non-renewal notice but denies the remaining allegations of paragraph 11.

12. Defendant admits the allegations of paragraph 12.

13. Defendant admits the allegations of paragraph 13.

14. Defendant admits the allegations of paragraph 14.

15. Defendant denies the allegations set forth in paragraph 15.

16. Defendant denies the allegations set forth in paragraph 16.

17. Defendant denies the allegations set forth in paragraph 17.

BREACH OF CONTRACT

18. Defendant repleads its response to the allegations contained in paragraphs 1-17 as though they were set forth herein verbatim.

19. Defendant denies the allegations of paragraphs 19 through 23.

FRAUDULENT INDUCEMENT

20. Defendant repleads its response to the allegations contained in paragraphs 1-17 as though they were set forth herein verbatim.

21. Defendant denies the allegations in paragraphs 25-27.

PRAYER FOR RELIEF

Defendant denies that Plaintiff is entitled to any of the relief it has sought, including but not limited to, the alleged compensatory and consequential damages, or any award of attorneys' fees.

DEFENDANT'S DEFENSES

The Complaint fails to state a claim upon which relief may be granted.

Plaintiff's rights and claims, if any, are barred by the statute of frauds.

WHEREFORE, Defendant requests that Plaintiff's request for relief be denied in its entirety.

Sundquist & Davis

February 8, 2009

Wendy Davis

by: Wendy Davis, Esq.
Counsel for Defendant
Dunn Insurance Company

Victoria Cooper, Esq.
State Bar No. 7579
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515 Francesca Way
Marion, Columbia
(555)337-2021
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

Farley Trucking, Inc.,

Plaintiff,

Civil Action

No. 89765

v.

Dunn Insurance Company,

Defendant

_____/

AFFIDAVIT OF MARK JONES

Mark Jones, being first duly sworn, states the following upon personal knowledge:

1. I am the Risk Manager of Plaintiff Farley Trucking, Inc. ("Farley"), a commercial trucking company.

2. Farley is a publicly-traded Columbia-based company involved in various lines of business, including the commercial trucking of goods throughout the United States.

3. I have been employed by Farley in this capacity during all relevant times and during those times purchased complex insurance programs from a multitude of insurance companies to cover different lines of business and risks with different layers of coverage.

4. As of January 1, 2006, Farley had annual operating revenues of over $1 billion.

5. In 2006, Farley employed a full-time Risk Manager who helped purchase a number of Farley's insurance policies. Farley also contracted with professional insurance brokers, Bradford Insurance Brokers, Inc. (“Bradford”), for assistance in obtaining such insurance.

6. Beginning in or about June 2006, Bradford entered into negotiations with Dunn to obtain a commercial general liability policy for Farley. These negotiations culminated in Dunn's agreement to provide such coverage for the period of August 1, 2006 to August 1, 2009 (Exhibit A to the Complaint).

7. Pursuant to the agreement to provide such coverage for three years, Dunn issued the Policy of Insurance covering the period August 1, 2006 to August 1, 2007 (Exhibit B to the Complaint).

8. In May, 2007, Farley specifically requested Dunn provide a new policy for the second year (August 1, 2007 to August 1, 2008) at the same rate, going so far as to have its broker fax a copy of the July 11, 2006 Agreement to Dunn.

9. On May 23, 2007, Dunn advised Farley that, pursuant to the non-renewal provision of the policy, it was not renewing the 2006-2007 policy.

10. Farley, through Bradford, engaged in negotiations with another insurer for a new policy for the August 2007-August 2008 period and ultimately bought a policy for that period with different terms of coverage and different exclusions from the 2006-2007 policy.

11. The 2007-2008 policy's premium rate was also higher than the premium rate for the 2006-2007 policy.

Mark Jones

Mark Jones

Subscribed and sworn to

before me this 9th day of January, 2009

R Grunberg

by: Notary Public

Wendy Davis, Esq.
State Bar No. 5862
Sundquist & Davis
12 Manning Blvd.
Columbia City, Columbia
(555)337-1091
Attorneys for Defendant

SUPERIOR COURT OF COLUMBIA
COUNTY OF CHESTER

Farley Trucking, Inc.,
Plaintiff,

Civil Action
No. 89765

v.

Dunn Insurance Company,
Defendant
_____/

AFFIDAVIT OF SCOTT GORDON

Scott Gordon, being first duly sworn, states the following upon personal knowledge:

1. I am President of Defendant Dunn Insurance Company ("Dunn").

2. Plaintiff Farley Trucking, Inc. ("Farley") purchased from Dunn a commercial general liability policy (the "Policy") that provided for $5,000,000 in policy limits per occurrence.

3. The term of the policy was from August 1, 2006 through August 1, 2007.

4. In the spring of 2007, Farley sought renewal of the Policy, or the issuance of a new one-year policy, at the 2006-2007 rate.

5. On May 23, 2007, Dunn sent Farley a notice of non-renewal of the Policy, effective August 1, 2007.

6. Dunn did not agree in word or substance to provide insurance coverage to Farley for 3 years pursuant to the July 11, 2006 letter, or otherwise.

7. Farley failed to object entirely to the non-renewal of the Policy until one and one-half years later when it first asserted its claim under the July 11, 2006 letter through this legal action.

*Scott Gordon*_____

Scott Gordon

Subscribed and sworn to
before me this 8th day of February, 2009

*Don Ramos*_____

Notary Public

JULY 2009

California Bar Examination

Performance Test A

LIBRARY

FARLEY v. DUNN

LIBRARY

Columbia Civil Code § 1350..... 24

First Data POS, Inc. v. Willis Group (Columbia Supreme Court, 2001)..... 25

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Callaway v. DeMaio Swine Breeders, Inc. (Columbia Court of Appeals, 1998)..... 31

Dana v. Piedmont Motors (Columbia Supreme Court, 1974)..... 35

COLUMBIA CIVIL CODE § 1350

§ 1350. Obligations which must be in writing.

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:

* * * *

(4) Any contract for sale of lands, or any interest in, or concerning lands;

(5) Any agreement that is not to be performed within one year from the making thereof;

(6) Any promise to revive a debt barred by a statute of limitation; and

(7) Any commitment to lend money.

First Data POS, Inc. v. Willis Group

Columbia Supreme Court (2001)

In 1992, appellant First Data POS, Inc. (“First Data”) purchased COIN Banking Systems (“COIN”), a software development company, from appellees the Willis Group (“Willis”). The parties executed a Stock Purchase Agreement (the “Agreement”) in which First Data agreed to pay Willis $2.5 million in exchange for all of COIN's stock. The Agreement provided that Willis might receive additional payments, so long as COIN's post-acquisition business generated certain levels of revenue over the three-year period following the Agreement's execution (the earnout provision). The Agreement expressly stated that First Data was under no obligation to carry on the current business of COIN, or even to maintain COIN as a business entity, but rather that First Data was authorized “at any time without limitation and without notice to Willis to reorganize or merge COIN out of existence or cease the sale of any of the products or services of COIN.” Finally, the Agreement contained a standard merger clause, which stated that:

> [The] Agreement ... constitutes the entire agreement between the parties with respect to the subject matter contained herein and supercedes all prior agreements and understandings, both oral and written by and between the parties hereto with respect to the subject matter hereof.

Approximately three years after the Agreement's execution, Willis filed suit alleging that during the precontractual negotiations, First Data had misrepresented its intention to increase COIN's business after it acquired the company, and that those misrepresentations had induced Willis to enter into the Agreement and to sell COIN's stock for less than its then-current market value. Willis' complaint against First Data alleged fraudulent misrepresentation and breach of contract. The Court of Appeals reversed the trial court’s granting of summary judgment as to Willis' civil fraud and breach of contract counts.

Summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law. Col. R. Civ. P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial.

The proper construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A Court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. If the language remains ambiguous after applying the rules of construction, only then may extrinsic evidence be considered to resolve the ambiguity.

The Agreement's terms state with absolute clarity that First Data was under no obligation to continue carrying on COIN's business and could, at any time and without notice to Willis, “reorganize or merge COIN out of existence or cease the sale of any of COIN's products or services.” Despite this express contractual provision, Willis' claim is based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution. It has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract. Therefore, the Court of Appeals erred by basing its ruling upon such contradictory parol evidence.

The Court of Appeals also erred by concluding that the Agreement's merger clause did not preclude Willis' claim that First Data's precontractual representations amounted to fraud or fraudulent misrepresentation. As explained above, the Agreement's

unambiguous merger clause states that it was the parties' intention that the Agreement supercede all precontractual agreements and representations, both oral and written, concerning First Data's acquisition of COIN's stock.

It is axiomatic that contracts must be construed to give effect to the parties' intentions, which must whenever possible be determined from a construction of the contract as a whole. Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud.

The rational basis for merger clauses is that where parties enter into a final contract all prior negotiations, understandings, and agreements on the same subject are merged into the final contract, and are accordingly extinguished.

It follows from these well established precepts of contract law and the precedent based thereon that any impressions held by Willis that were based upon First Data's purported precontractual representations that it would increase COIN's business after the acquisition were superceded by the merger clause contained in the parties' Agreement, which expressly put Willis on notice that the Agreement's terms superceded any and all prior representations not contained therein.

Thus, Willis' claim that they were deceived by First Data's precontractual misrepresentations has no basis. Under the express terms of the Agreement, Willis could not have reasonably placed their reliance upon any precontractual representation that was not also included in the Agreement's language, and thus Willis could not have been deceived by such precontractual representations. Without deception, of course,

there can be no fraud claim.

Accordingly, the Court of Appeals erred in ruling that the contractual merger clause did not preclude Willis' claim that First Data had committed fraud in making precontractual representations regarding the future business operations of COIN Banking Systems. As a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based upon precontractual representations.

Judgment reversed.

Hieke v. George D. Warthen Bank

Columbia Court of Appeals (1999)

Alleging that appellee-defendants George D. Warthen Bank (the "Bank") had breached an agreement to loan them $80,000, appellant-plaintiffs Jane and Ray Hieke ("Hieke") brought suit to recover in fraud and contract. The Bank answered and counterclaimed, seeking to recover on notes which were allegedly in default. After discovery, the Bank moved for summary judgment on their own counterclaim as well as on Hieke's main claim. The trial court granted summary judgment in favor of the Bank and Hieke appeals.

Construing the evidence most favorably for Hieke, they borrowed $40,000 from the Bank pursuant to an *oral* extension of a $120,000 line of credit, but were subsequently denied the additional $80,000 when they sought to borrow it. However, such a commitment to lend Hieke money would have to be evidenced by a *writing* signed by the Bank. Columbia Civil Code §1350. The fact that the Bank did loan Hieke $40,000, as evidenced by a note, would not serve to take the alleged oral agreement outside the Statute of Frauds.

A contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to supply contractual elements that are missing. Further, for such a contract, oral evidence is not permitted to prove provisions that are inconsistent with the writing.

In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract. The act of lending Hieke $40,000 may be entirely consistent with an agreement to lend them an additional $80,000, but neither is it inconsistent with the lack of an agreement to lend them any additional sum whatsoever. The lending of $40,000 in no way tends to prove that the Bank agreed to the oral contract that Hieke

seeks to enforce. To hold that the mere act of lending *any* sum to a borrower will serve to render enforceable an alleged oral agreement to lend some *additional* sum would negate §1350 and have the anomalous effect of subjecting the lenders of this state to potentially fraudulent claims despite the protection ostensibly afforded them under the Statute of Frauds. It follows that the trial court correctly granted summary judgment in favor of the Bank as to Hieke's contract claim.

The trial court likewise correctly granted summary judgment in favor of the Bank as to Hieke's fraud claim. Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by §1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

With regard to the Bank's counterclaim, there is no dispute either as to the execution of the notes or as to Hieke's default thereon. In the original and supplementary evidence offered in support of the motion for summary judgment, the Bank showed the amounts of unpaid principal and interest that were owing on the notes. In opposition, Hieke offered nothing to demonstrate the existence of any *genuine* issue of *material* fact. It follows that summary judgment was properly granted in favor of the Bank.

Judgments affirmed.

Callaway v. DeMaio Swine Breeders, Inc.

Columbia Court of Appeals (1998)

Callaway Farms (“Callaway”) brought suit against DeMaio Swine Breeders, Inc. (“DeMaio”) for fraud and bad faith in selling diseased swine. The trial court granted summary judgment, dismissing Callaway's claims. For the following reasons, we affirm.

In 1992 and 1993, Callaway operated a large swine breeding herd with approximately 5000 sows in Wilkes County, Columbia. Callaway regularly introduced new breeding stock into its herd supplied by DeMaio. DeMaio is in the business of raising and selling swine breeding stock.

From 1989 through 1994, Callaway and DeMaio executed numerous written contracts documenting Callaway's purchase of breeding stock from DeMaio. Each contract contains a limitation of liability in the case of disease, stating:

> DEMAIO CANNOT AND DOES NOT GUARANTEE THE ABSENCE OF ANY PATHOGENS OR DISEASES IN THE BREEDING STOCK SOLD BY DEMAIO. PATHOGENS OR DISEASES MAY BE PRESENT AT TIME OF SALE OR MAY APPEAR LATER.

The contracts recommend that the buyer have the swine tested at the buyer's expense prior to delivery. In the case of diseased swine, the contracts provide that replacement of the swine is the buyer's sole remedy. On the front page, in bold red letters, the contracts provide:

> DEMAIO GIVES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SWINE OR THEIR PROGENY. DEMAIO GIVES NO WARRANTIES OF MERCHANTABILITY, HEALTH OR FITNESS FOR A PARTICULAR PURPOSE.

Each contract contains a merger clause, stating that “[t]his contract supersedes all prior written or oral agreements related to the swine sold hereunder, and this contract cannot be amended except in a writing which refers to this contract and which is signed by both parties.” Moreover, the contracts provide a blank for the purchaser to state any promises or representations made by the seller not otherwise specified in the contract. In each of the contracts, Eugene Callaway, Jr., an officer of Callaway, wrote “none” in the blank.

In early 1993, Callaway considered replacing DeMaio with Pig Improvement Company (PIC) as their supplier of breeding stock. Callaway decided against this move, however, when it learned from a PIC veterinarian that PIC's herds had tested positive for Porcine Reproductive and Respiratory Syndrome (PRRS), a swine disease caused by a virus. In sows, PRRS may cause abortions and birth of stillborn, underweight, or defective pigs. PRRS is highly contagious and widespread. Callaway explained to DeMaio's sales personnel that it wanted to avoid PRRS and that was the reason they had decided to stay with DeMaio over PIC. Clinton Day, a DeMaio salesman, replied: “Well, that is a pretty good reason to stay with us.”

Callaway's herds tested negative for PRRS on March 1, 1993. On March 11, 1993, Callaway received nineteen boars from DeMaio. The animals had no clinical signs of PRRS at the time of shipment or delivery. As was the conventional practice, a Callaway farm manager signed the invoices upon delivery.

On April 9, 1993, Callaway's herds developed the PRRS virus. No swine were introduced to the Callaway herds from any source other than DeMaio.

Callaway filed suit alleging fraud and seeking damages in excess of $2,000,000. DeMaio filed a motion for summary judgment that the trial court granted.

This court exercises a complete and independent review of the trial court's grant of

summary judgment, and applies the same legal standards used by the trial court. As such, we must view all evidence and make all reasonable inferences in favor of the nonmovant. This court should affirm the trial court's grant of summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Col. R. Civ. P. 56(c).

The Columbia common law tort of fraud has five elements: (1) a false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to the plaintiff. In granting summary judgment, the trial court found that Callaway's reliance upon Mr. Day's statement was not justifiable in light of the contractual provisions disclaiming liability for diseases.

Callaway asserts that the trial court improperly granted summary judgment on the fraud claim, stressing that the question of justifiable reliance was one for the jury. In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish that his reliance is justifiable.

DeMaio's contract with Callaway devotes over fifty lines of text to disclaimers as to pathogens and diseases and buyer's responsibilities as to testing and quarantine. The contract expressly states that "[o]rganisms which cause swine diseases (called pathogens) are present in every swine herd, including DeMaio's swine herds." The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds.

In red letters, in a paragraph labeled "BUYER'S UNDERSTANDING," the buyer must attest that he "ha[s] discussed the purchase of DeMaio breeding stock with DeMaio, and ha[s] read this Contract, and, in particular, ... the 'Pathogen and Disease — Statement and Limited Replacement Policy', and 'Testing and Quarantine — Buyer's

Responsibility' on the back of this page." The contract also has a space for the buyer to fill in any additional representations made by DeMaio representatives.

The situation is complicated somewhat by the fact that the alleged misrepresentation by Mr. Day was made after the contracts were signed. On delivery, one of Callaway's farm managers signed a delivery invoice stating that:

> The Warranties and Remedies, if any, applicable to the swine delivered with this invoice are determined in the contract between you, the Buyer, and DeMaio Swine Breeders, Inc. Please refer to that contract for the warranties, exclusive remedies, and statements regarding the swine, including their fertility, diseases and soundness. Acceptance of the swine here delivered is a reconfirmation of that contract and its terms.

We agree with the trial court that, by signing this invoice, Callaway reaffirmed the sales contract and all of its provisions, including the merger clause. As such, Callaway could not justifiably rely on the intervening representation of Mr. Day as a matter of law.

AFFIRMED.

Dana v. Piedmont Motors

Columbia Supreme Court (1974)

A suit in tort by a buyer against a seller for an alleged fraudulent misrepresentation by the seller's agent resulted in a jury verdict and judgment for the buyer, and on appeal by the seller the Court of Appeals affirmed. We determine the judgment of the Court of Appeals should be affirmed.

In this case, the buyer, Ryan Dana (“Dana”), contended that he purchased a used automobile with the understanding that the vehicle had never been wrecked. The seller, Piedmont Motors, denied that this representation was made by its agent (salesman) to the buyer. The buyer, Dana, signed a sales agreement which contained the words, “No other agreement, promise or understanding of any kind pertaining to this purchase will be recognized.” In addition, the purchase agreement stated that the car is sold “as is.” Subsequent to the purchase, the buyer discovered that the automobile had been wrecked, tendered the car to the seller, gave notice of rescission of the contract and brought the present action in tort for fraud and deceit.

In our review of the case, we accept the jury's factual determination that the seller's agent knowingly misrepresented the car as never having been wrecked. The decisive issue we address is whether the language of the merger clause that “no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized,” was legally effective to prevent the buyer from claiming that he relied on the seller's misrepresentation. It has been recognized that §2-202 of the Uniform Commercial Code was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions. Thus, in contract actions, the effect of merger and disclaimer clauses must be determined under the provisions of the Uniform Commercial Code.

However, under Columbia law, traditionally two actions have been available to a buyer in which to sue a seller for alleged misrepresentation in the sale. The buyer could affirm

the contract and sue in contract for breach or he could seek to rescind the contract and sue in tort for alleged fraud and deceit. Our threshold question in this tort case is to determine whether the adoption of the Uniform Commercial Code left available in Columbia a buyer's historic remedy in tort. The passage of the Uniform Commercial Code by the legislature evinced an intent to have that body of law control all commercial transactions. While the Code, however, is an attempt to make uniform the law among the various jurisdictions regarding commercial transactions, the draftsmen realized that it could not possibly anticipate all situations. Thus, §2-721 of the Code states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

In addition, it provides that:

> Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission nor a claim for a rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

The commentary by the drafters of the Uniform Commercial Code on this section states: “Thus the remedies for fraud are extended by this section to coincide in scope with those for nonfraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.” See Official Comment, Uniform Commercial Code, §2-721.

We conclude from this language that neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code in Columbia.

Having decided that a remedy in tort still exists in Columbia for actual fraud, we turn next to the seller's contention that the disclaimer language used here prevented any reliance by the buyer on the alleged fraudulent misrepresentation, and consequently the buyer's action must necessarily fail. The seller contends that there is no fraud on which the buyer relied that prevented him from knowing the contents of the contract, and, therefore, the buyer is bound by the terms of the contract.

We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract.

Judgment affirmed.

Answer 1 to Performance Test A

To: Wendy Davis

From: Applicant

RE: Statement of Uncontested Facts and brief in support of motion for summary judgment in Farley v. Dunn.

Pursuant to your instructions, here is the Statement of Uncontested Facts and the argument section of the brief in support of our motion for summary judgment against Farley. Please let me know if there are any problems. Thank you.

MOTION FOR SUMMARY JUDGMENT

Statement of Uncontested Facts

Fact #1: On July 11, 2006, Jennifer Barba of Bradford Insurance Brokers, Inc. ("Bradford") sent a letter ("the Letter") to Dunn Insurance Company ("Dunn") President Scott Gordon purporting to clarify an agreement made on behalf of Farley Trucking, Inc. ("Farley"), whereby Farley would receive insurance coverage from Dunn for a period of 3 years, from August 1, 2006 through August 1, 2009.

Undisputed Because: This fact is alleged in Exhibit A of Farley's complaint and admitted in paragraph 8 of Dunn's answer.

Fact #2: On July 20, 2006, Farley entered into a contract for commercial general liability insurance ("the Policy") with Dunn whereby Dunn would provide coverage for a fixed premium rate of .0940 per 100 payroll miles for the term of August 1, 2006 to August 1, 2007.

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint, Farley's Risk Manager Mark Jones admitted this fact in paragraph 7 of his affidavit, and Dunn admitted this fact in paragraph 9 of its answer.

Fact #3: The Policy contained a merger clause which stated "This policy constitutes the entire agreement between the insured and the insurer concerting this insurance."

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint and admitted as true in paragraph 9 of Dunn's answer.

Fact #4: The Policy allowed Dunn the option to non-renew the Policy by mailing to Farley written notice of non-renewal at least 60 days before the expiration date of the Policy.

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint and admitted as true in paragraph 9 of Dunn's answer.

Fact #5: In May, 2007, Farley sent a request to Dunn for Dunn to provide a new policy for August 1, 2007 through August 1, 2008, at the same rate as the existing policy.

Undisputed Because: The fact is alleged in Mark Jones' affidavit in paragraph 8 and admitted in Dunn's President Scott Gordon's affidavit in paragraph 4.

Fact #6: On May 23, 2007, more than 60 days before the expiration of the Policy, Dunn sent Farley a notice of non-renewal of the policy ("the Notice") effective August 1, 2007.

Undisputed Because: This fact is alleged in Exhibit C of Farley's complaint, and also in paragraph 9 of Mark Jones' affidavit, and admitted as true in paragraph 11 of Dunn's answer.

Fact #7: Dunn did not renew the Policy.

Undisputed Because: This fact is alleged in Exhibit C of Farley's complaint and admitted as true in paragraph 11 of Dunn's answer.

Argument

Summary judgment is warranted when there is no genuine issue of material fact. Col. R. Civ. P. 56(c). Dunn is entitled to summary judgment on the fraud and breach of contract actions brought by Farley for the following reasons.

I. The Letter Violates The Statute Of Frauds, And Thus Is Not A Binding Contract Between Dunn And Farley, Because It Was Not Signed By Dunn, The Party To Be Charged, And Partial Performance Is Not Inconsistent With A Lack Of A Contract.

In order for a contract to exist between two parties, there must be an offer, acceptance, and consideration. An offer requires an objective willingness to enter into a contract. Acceptance requires that the other party agree to accept the terms of that contract. Consideration requires that there be some bargained-for exchange between the parties for their offer and acceptance. In the event that only one party claims that a contract exists, the opposing party may invalidate the contract if it does not satisfy the Statute of Frauds. In Columbia, the Statute of Frauds is defined in Columbia Civil Code Section 1350: "To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:…(5) Any agreement that is not to be performed within one year from the making thereof."

The Letter clearly falls under this provision in the Columbia Civil Code. Farley claims the Letter is a binding services contract on Dunn with duration of three years. Because the services contract under the Letter could not possibly be performed within one year of its making, the contract would fall under Columbia's Statute of Frauds. Thus, in order for the services contract within the Letter to be valid, it must be in writing and assigned by the party to be charged, namely Dunn.

Although the Letter constitutes writing, it was not signed by a party to be charged. The Letter was addressed to Dunn, but was only signed by Jennifer Barba of Bradford. Under section 1350, if the writing was signed by a person authorized to act for the charged party, the writing will satisfy the Statute of Frauds. Here, Jennifer Barba is not authorized by Scott Gordon, or any member of Dunn, to enter into contracts on Dunn's behalf. Thus, Jennifer Barba's signature is not one which may bind Dunn to a valid contract. Therefore, the Letter does not satisfy Columbia's Statute of Frauds, and the Letter is not a valid contract between Dunn and Farley.

Additionally, under the court's ruling in Hieke, the issuance of part performance is

not enough to satisfy the Statute of Frauds for a modification to a contract if the original contract is complete on its terms. Furthermore, under Hieke, part performance will only satisfy the Statute of Frauds if it is consistent with the presence of a contract and inconsistent with a lack of a contract. Here, the Policy is both complete on its face and terms, and it is not inconsistent with a lack of a contract. Although Dunn providing insurance for one year is consistent with the presence of a contract for three years, Dunn providing insurance for one year is consistent with the presence of a contract for three years, Dunn providing insurance for one year is not inconsistent with the lack of a contract for three years. As such, Farley cannot use the doctrine of partial performance to satisfy Columbia's Statute of Frauds.

For the reasons stated above, the Letter did not constitute a contract between Dunn and Farley. As such, Dunn could not have breached the contract within the Letter. Therefore, Dunn is entitled to summary judgment on the issue of a breach of contract arising out of the durational term stated in the Letter.

II. Dunn Did Not Breach Its Policy With Farley By Issuing A Non-Renewal Notice And Subsequently Allowing The Policy To Self-Terminate Because The Letter Does Not Alter The One-Year Duration Of The Policy.

Farley claims that the Letter constitutes a variation in the Policy's terms intended by both Farley and Dunn. Under this variation, Dunn would be bound under a contract for three years, even though the Policy explicitly states that Dunn is only bound under the Policy from August 1, 2006 to August 1, 2007. Farley's argument will fail as a matter of law because the parol evidence rule prohibits use of the Letter to contradict the express terms of the Policy. As such, the original clear terms of the Policy control, and Dunn was only contractually bound to provide insurance to Farley for one year. Thus, Dunn is entitled to summary judgment because it did not commit breach when it allowed the Policy to self-terminate at the end of the year term.

A. The Policy's terms are clear and unambiguous on their face; thus, parol evidence may not be used to contradict its terms.

The Columbia Supreme Court held in First Data that when a court is enforcing the terms of a contract, the court will first look to the four corners of the contract. If the terms are ambiguous, the court will use the rules of contract construction. Under the Court's ruling in First Data, a court is only allowed to use extrinsic evidence if ambiguities in the language persist. Furthermore, the Court in First Data held that the parol evidence rule prohibits evidence of prior or contemporaneous agreements to alter, vary, or change unambiguous terms in a written contract. Thus, if the contract's terms are clear, parol evidence may not be used to contradict them.

Here, the terms of the Policy are clear and unambiguous from the face of the written contract. The Policy clearly states that the policy term shall be one year, from August 1, 2006 to August 1, 2007. See Exhibit B of Farley's complaint. There is no indication anywhere in the Policy itself that any other term duration was intended by the parties. Thus, under the Court's ruling in First Data, a court must interpret the Policy according to the four corners of the contract. Therefore, a court must read the Policy as one requiring a term of one year.

Furthermore, because the Policy is clear and unambiguous on its face, parol evidence may not be used to contradict its terms. See First Data. The letter constitutes parol evidence because it is evidence of a prior agreement that materially contradicts the terms of the Policy. As the Policy is clear on its face, the Court's interpretation of the parol evidence rule in First Data prohibits a court from admitting the Letter to alter the duration of the Policy's term.

B. The merger clause within the Policy shows the Policy to be a complete and accurate reflection of the parties' intent: thus, parol evidence may not be used to contradict its terms.

The Court in First Data also held that a merger clause in a contract that states that the contract is a complete and final reflection of the parties' intent prohibits a court from admitting parol evidence that would vary the terms of the written agreement. The Policy at issue here contained just such a merger clause, showing that Dunn and Farley

intended the Policy to be a complete and final reflection of the terms of their contract. This merger clause is in plain, unambiguous language leaving no alternative constructions. See Exhibit B of Farley's Complaint. Furthermore, the terms of the contract are similarly clear and unambiguous. See Id. Thus, under First Data, a court cannot admit parol evidence to contradict or vary the clear terms of the contract. For this reason, as well as those stated above, the Letter is not admissible to change the duration of the Policy from one year to three years. Because the term in only one year, Dunn did not breach its duty to Farley, and Dunn is entitled to summary judgment as a matter of law on the issue of breach.

III. Dunn Did Not Commit Fraud On Farley Because Farley's Reliance On The Terms Of The Letter Was Not, As A Matter Of Law, A Reasonable Reliance Necessary For A Fraud Action.

As the Court stated in First Data, "if there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim" the claim fails. Dunn is entitled to summary judgment as a matter of law on Farley's fraud claim because Farley failed to present a genuine issue with regards to an essential element of the cause of action.

A. Farley could not have justifiably relied on the Letter's terms when it is expressly contradicted by the Policy's terms; thus Farley cannot prove every element of Fraud and Dunn is entitled to summary judgment.

Under the court's ruling in Callaway, the five common law elements of fraud are 1) false representation, 2) scienter, 3) an intent to induce the plaintiff to some action or inaction, 4) a justifiable reliance on that intent, and 5) damage to the plaintiff. Callaway states that where a representation is controverted by the express terms of the contract, the plaintiff will be unable as a matter of law to show that the reliance is justifiable. Thus, if the representation that the plaintiff claims it relied upon is expressly contradicted by the terms of the contract entered into by the plaintiff, the plaintiff cannot

recover for fraud.

Here, the express terms of the Policy state that the duration of the policy was only for one year. The representation that Farley claims to have detrimentally relied upon is the Letter, which states that the duration of the policy was three years. Thus, under the clear holding of Callaway, Farley cannot have justifiably relied upon the contradictory terms in the Letter after agreeing to the terms of the Policy. Thus, under Callaway, Farley cannot, as a matter of law, possibly satisfy the fourth element of a fraud cause of action. As the Court stated in First Data, "if there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim" the claim fails. Therefore, under Callaway and First Data, Farley's cause of action for fraud fails as a matter of law, and Dunn is entitled to summary judgment.

B. Farley could not have justifiably relied on the Letter's promise of a three-year term when that promise is unenforceable under the Statute of Frauds; thus Farley cannot prove every element of fraud and Dunn is entitled to summary judgment.

In Hieke, the court stated that a plaintiff cannot claim fraud, as a matter of law, on a promise that is unenforceable when it is made. One such reason that a promise may not be unenforceable is if it does not satisfy the Statute of Frauds. As stated above, the Letter does not satisfy the Statute of Frauds, both because it is not signed by Dunn (or Dunn's authorized representative), the party to be charged, and because Farley cannot show existence of the contract through the doctrine of partial performance. Thus, under the rule of Hieke, Farley cannot claim fraud based on any representations made in the Letter. As such, Farley cannot prove justifiable reliance, and Dunn is entitled to summary judgment on the fraud action.

C. Farley could not have justifiably relied on the Letter's terms after Farley agreed to the merger clause in the Policy; thus Farley cannot prove every element of fraud and Dunn is entitled to summary judgment.

However, under the Court's ruling in Piedmont Motors, reliance on a fraudulent misrepresentation is determined by a jury and not by the provisions of a contract. That case is distinguishable from the present case, however, on numerous grounds. First

Piedmont Motors interpreted a contract for the sale of a good over $500, thereby interpreting the contract through the lens of the UCC. Here, the Policy is a services contract and is not subject to any UCC provisions. Second, Piedmont Motors concerned a disclaimer clause in a contract as opposed to the merger clause seen here. For this reason, First Data, a later case from the Columbia Supreme Court, is controlling.

In First Data, the Court held that a merger clause, like the one found in the Policy, trumps any claims by the plaintiff that he suffered a justifiable reliance on a fraudulent misrepresentation. The Court in First Data held that where there is a merger clause, there can be no reasonable reliance on any agreements that came before the contract with the merger clause. Without this reasonable reliance, there can be no deception. With no deception, there can be no fraud. See First Data. As the final line in First Data states, "as a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based on precontractual representations."

The Policy contained a valid merger clause stating that the Policy was the entire agreement between Dunn and Farley concerning the insurance. Thus, the merger clause extinguishes any reliance that Farley may have had in any previous agreement that did not amount to a contract. Because Farley could not have justifiably relied upon any prior agreement, Farley cannot, as a matter of law, claim fraud based on that agreement. Thus, Dunn is entitled to summary judgment as a matter of law on the fraud cause of action.

Conclusion

The terms of the contract between Dunn and Farley are only those which are found in the Policy. The Letter, both as an unenforceable contract under the Statute of Frauds and as inadmissible parol evidence, cannot be used to contradict or vary the clear, unambiguous language of Policy. As such, the terms of the Policy control. The Policy states that the duration of the Policy was only one year, and that Dunn may give notice to Farley of an intent to non-renew 60 days before the expiration of the Policy. It is uncontested that Dunn issued that notice within the 60-day period. Furthermore, there is no genuine issue of material fact that Dunn breached any other duty under the Policy.

Thus, Dunn is entitled to summary judgment.

Finally, there is no genuine issue of material fact as to fraud.

Answer 2 to Performance Test A

Persuasive Brief in Support of a Motion for Summary Judgment

Statement of Uncontested Facts

Fact #1: Farley, through insurance brokers Bradford, negotiated with Dunn to purchase commercial general liability coverage.
Undisputed Because: This is stated in Farley's complaint in Paragraph 7 and Dunn admits to it in its answer in Paragraph 7.

Fact #2: Bradford sent a letter to Scott Gordon, President of Dunn, regarding their conversation concerning the proposed insurance policy, and Jennifer Barba, of Bradford, is the only one who signed it.
Undisputed Because: Exhibit A shows a true and correct copy of the letter according to Farley's complaint in Paragraph 8 and Dunn's answer in Paragraph 8.

Fact #3: The policy has a clause in Paragraph 23 that states that "this policy constitutes the entire agreement between the insured and the insurer concerning this insurance."
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #4: The policy has a statement that says "Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums."
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #5: The policy has a statement that says "We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy."

Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #6: The policy is signed by Mark Jones, the Risk Manager of Farley, and Scott Gordon, the president of Dunn.
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #7: The term of the policy reads that it shall be for one year, August 1, 2006 to August 1, 2007.
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #8: Dunn issued a policy covering the period for August 1, 2006 to August 1, 2007.
Undisputed Because: Mark Jones' affidavit states this in Paragraph 7.

Fact #9: Dunn sent Farley a notice of non-renewal of the policy, effective August 1, 2007, on May 23, 2007, more than 60 days prior the expiration of the policy.
Undisputed Because: Exhibit C shows a true and correct copy of the letter according to Farley's complaint in Paragraph 11 and Dunn's answer in Paragraph 11.

Fact #10: Farley requested Dunn to continue its policy beyond August 1, 2007.
Undisputed Because: Mark Jones' affidavit states this in Paragraph 8 that Farley requested Dunn to provide a new policy beyond August 1, 2007, and Scott Gordon's affidavit in Paragraph 7 indicates that Farley has asserted that the policy was supposed to extend beyond August 1, 2007.

Argument for Summary Judgment

Dunn has been sued by Farley for both breach of contract and fraudulent inducement. In light of the uncontested facts set forth above, our client, Dunn, is entitled to judgment as a matter of law because (1) the one-page letter from Bradford Insurance to Dunn is not enforceable as a contract because it is not signed by Dunn, the party charged, and thereby, fails to satisfy Columbia Civil Code Section 1350, which requires any agreement that is not performed within a year to be in writing and signed by the party charged in order to be enforceable; (2) elevating the one-page letter to a contract would vary the one-year term of the policy in violation of the plain meaning of the contract because the letter indicates that the agreement persists for three years whereas the policy clearly states that the policy is only for one year and that Dunn may cancel and choose not to renew the policy after a year; and (3) there is not a sufficient basis for Farley's fraud allegation because (a) there is no enforceable agreement for three years; (b) based on the non-renewal provision in the policy, Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud and (c) there is no action in tort because there was no fraud in the inducement.

Standard for summary judgment

As the Columbia Supreme Court has noted in *First Data*, pursuant to Col. R. Civ. P. 56(c), "summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law." Moreover, as the court in Callaway points out, the court "must view all evidence and make all reasonable inferences in favor of the nonmovant." Summary judgment, thus, requires two steps. The first step is to show there is no genuine issue of material facts. The second step is to show that the moving party is entitled to judgment as a matter of law even if all the evidence is viewed in favor of the nonmoving party.

No genuine issue of material facts

"The threshold inquiry [in Step 1] is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards." *First Data.*

In this case, a number of uncontested facts are stated above. These facts have been admitted by both parties in their complaints, answers and/or affidavits. They both admit that the letter from Bradford to Dunn on July 11, 2006 was "a true and correct copy" and that the policy between Farley and Dunn is accurate, including the provisions of this policy, is a "true and correct copy." Because both parties have admitted to this, there is no genuine issue of fact with regards to whether these documents are accurate.

Judgment as a matter of law

The court can find that Dunn is entitled to judgment as a matter of law on both breach of contract and fraud in the inducement based on all three issues analyzed below based on the uncontested facts stated above and the law in Columbia. Because of this and the fulfillment of the first step in summary judgment, Dunn is entitled to summary judgment for dismissal of this suit.

1. The one-page letter from Bradford Insurance to Dunn is not enforceable as a contract because it is not signed by Dunn, the party charged, and thereby, fails to satisfy Columbia Civil Code Section 1350, which requires any agreement that is not performed within a year to be in writing and signed by the party charged in order to be enforceable.

Columbia Civil Code Section 1350 states that "to make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith." One of the obligations stated is an agreement that is not to be performed

within one year from the making thereof.

Here, Farley has alleged that the one-page letter is enforceable as a three-year contract from August 1, 2006 and August 1, 2009. Clearly, such an agreement cannot be performed within a year and thus, it must satisfy Columbia Civil Code Section 1350(5). This means the letter must be in writing and be signed by the party charged. While the letter is a writing, it is undisputedly signed only by Bradford, not Dunn, who is the party charged on the agreement. Thus, the letter does not satisfy Section 1350(5) and cannot be enforceable as a contract.

Because the letter cannot be enforceable as a contract, Dunn cannot be held to a three-year contract. Since there is no three-year contract, Dunn could not have possibly breached its contract by ending the policy in a year.

2. Elevating the one-page letter to a contract would vary the one-year term of the policy in violation of the plain meaning of the contract because the letter indicates that the agreement persists for three years whereas the policy clearly states that the policy is only for one year and that Dunn may cancel and choose not to renew the policy after a year.

Farley is also arguing that the letter should be admitted to show that the policy was meant to be a three-year contract, not a one-year contract.

The Columbia Supreme Court has stated in *First Data* that the construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. "Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible and the contractual language used by the

parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud." *First Data.*

In *First Data,* the court found that the agreement between First Data and Willis stated with "absolute clarity" what the obligations or lack thereof were between them. "Because Willis' claim was based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution," the court found that this contradictory parol evidence was inadmissible. The Columbia Supreme Court clearly holds that "it has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract."

In this case, the policy clearly states that the term of the policy will be for one year. Looking at the four corners of this policy, it is evident that "the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation." Thus, pursuant to *First Data, "*no construction is required or even permissible and the contractual language used by the parties must be afforded its literal meaning." The literal meaning of the contract is that it persists only for one year.

Moreover, similar to the case in *First Data*, here the policy agreement had an undisputed merger clause that stated in Paragraph 23 that "this policy constitutes the entire agreement between the insured and the insurer concerning this insurance." Because there is a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement. The July 11th Letter is a prior representation that contradicts the written clause. It claims that the agreement was for three years instead of one. Farley is attempting to use this in direct contradiction to a valid written agreement but, according

to the law in *First Data*, this is inadmissible.

Because such contradictory evidence is inadmissible under Columbia law, the one-page letter cannot be admitted to vary the plain terms of the one-year term policy. The policy is thus construed by its plain meaning, which states that it is a one-year contract. Because the policy only persists for one year, Dunn did not breach the contract by notifying Farley that the policy would end at the end of its term of one year and not be renewed.

3. There is not a sufficient basis for Farley's fraud allegation because (a) there is no enforceable agreement for three years; (b) based on the non-renewal provision in the policy, Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud and (c) there is no action in tort because there was no fraud in the inducement.

Farley has argued that Dunn has committed fraud by knowingly misrepresenting its intentions to renew the contract and has even fraudulently induced Farley to enter the contract. In *Dana*, the Columbia Supreme Court notes that an action for fraud can be based both in contract and in tort. Thus, it must be determined if there was fraud based in contract and in tort.

(a) Because there is no enforceable agreement for three years, there is no fraud based in contract.

According to *Callaway,* fraud has five elements: (1) false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damages to the plaintiff. Here, Farley is suggesting there was a false misrepresentation by the defendant that the policy was supposed to persist for three years.

However, under *Hieke,* "a contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to

supply contractual elements that are missing. In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract." The court found in *Hieke* that while lending $40,000 was consistent with part of the contract, this "in no way tends to prove that the Bank agreed to the oral contract that Hieke seeks to enforce. To hold that the mere act of lending any sum to a borrower will serve to render enforceable an alleged oral agreement to lend some additional sum would negate Section 1350. "Fraud cannot be predicated on a promise which is unenforceable at the time it [was] made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by Section 1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds." *Hieke.*

Similarly, in this case, Dunn performed part of the contract - it provided insurance for one year. However, Farley is insisting that it should have performed for three years. Dunn's alleged partial performance of a contract was consistent with the contract but, like in *Hieke,* it "in no way proves" that Dunn agreed to a three-year contract. Farley cannot allege that based on the conversation between Bradford and Dunn, there was a three-year contract because an oral agreement of this length would violate Section 1350 as noted above in section (1). Because there was no enforceable contract for three years, fraud cannot be predicated on this promise. Thus, as in *Hieke,* one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

<u>(b) Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud in contract</u>.

As noted above, fraud can be found if there is justifiable reliance. In most cases, the question of justifiable reliance is a jury question but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish his reliance is justifiable. The Court in *Callaway* found that there could be no justifiable reliance in light of the contractual provisions disclaiming liability for

diseases. "The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds."

Likewise, in light of Dunn's non-renewal provision and the clear language on the face on the policy that says the term of the policy is for one year, Farley cannot justifiably rely on any alleged suggestion that their agreement with Dunn would persist for three years.

There is no action in tort because there was no fraud in the inducement.

According to Dana, a purchaser may rescind the contract he has entered into and sue in tort for alleged fraud and deceit. In such a tort action, a disclaimer in a contract cannot be used against the party where fraud had induced a party to enter into a contract. In *Dana*, the purchaser sought to rescind the agreement because he alleges that he had been fraudulently induced to enter the agreement by a misrepresentation prior to the agreement.

Here, Farley was not induced to enter into a contract with Dunn based on fraud. Rather, Farley sought this policy through Bradford and, indeed, it originally intended to continue the policy for another three years. Farley wanted to continue the agreement, not rescind the agreement, as in *Dana*. However, because it was unable to continue the agreement, it sought a different policy and is now seeking damages. However, Farley's undisputed attempt to continue the agreement clearly indicates that there was no fraud in the inducement and, thus, there is no fraud based in tort.

Based on the above analysis, it is clear that there was no fraud in tort as a matter of Columbia law and that Dunn should be entitled to summary judgment as a matter of law on this matter.

Conclusion

Because of the analysis above based on governing Columbia law as applied to the undisputed facts of this case, Dunn is entitled to summary judgment as a matter of law on the claim that it has not breached its contract and on the claim that it has not fraudulently induced Farley to enter the contract or committed other misrepresentations.

JULY 2009

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

WILLIAMS v. GOLUB

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WILLIAMS v. GOLUB

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.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. 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. 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 preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: Applicant

From: Lauren Evans

Date: July 30, 2009

Re: **Williams v. Golub**

We represent Adam Golub, a successful personal injury lawyer, who has been sued for defamation by Adrienne Williams. Ms. Williams was an associate in Mr. Golub's firm until she resigned to set up a solo law practice, taking one of the firm's clients with her. Mr. Golub was recently served with the complaint that alleges that a letter he sent to the client was defamatory.

As you will see when you read my notes from my interview with Mr. Golub, at least one of the assertions he made in the letter was untrue and is defamatory unless privileged. I need your help therefore in analyzing whether there are privileges that might apply.

An answer to the complaint is due next week. Please prepare an objective memorandum for me that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File

From: Lauren Evans

Date: July 29, 2009

Re: **Interview with Client Adam Golub**

Adam Golub is the principal of a five attorney personal injury law firm. He has been sued for defamation by a former associate, Adrienne Williams, who left the firm "under unpleasant circumstances." He said that her work was substandard and that he spoke to her about it "numerous times" and that ultimately she resigned on January 13, 2008 rather than be fired. Williams followed up with a resignation letter in which she announced that a client on whose case she had worked, Harvey Campbell, had decided to retain her as his lawyer and that she had taken portions of the client's files. Golub called her and accused her of "poaching" his client and demanded that she return the files. She declined, and said that he would be getting a letter from Campbell (and maybe others) instructing him to transfer the case to her and to turn over the remainder of the file to her.

Golub says the case she took involved a client with paralysis resulting from the collapse of a roof. He said that liability among multiple defendants wasn't clear and that the cause of the collapse was contested as well as the permanency of the injury. He said he "couldn't imagine how a lawyer as inept as Williams could win the case, and at stake was a potential multimillion dollar verdict and the client's capacity to pay for medical treatment over the long term." Golub's firm took the case on a contingency fee of 33% of the recovery plus costs, and he has already invested hundreds of hours on

the investigation and more than $30,000 for expert witness fees. He composed and sent a letter to the client to “warn him about Williams” and to persuade him not to change lawyers.

After reading the letter I said to Golub, “You certainly used some strong language.” He responded, “Although it’s complicated, Campbell has a strong case. There was a lot of money involved for both Campbell and me. The more he gets, the more I get. Also, I just didn’t want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case.”

I asked if the letter worked. He said that no, it hadn’t. About a week after he sent the letter, he received a fax from Campbell, telling him that he had retained Williams as his lawyer and that Golub should transfer all files and evidence to Williams. I asked Golub if he’d assumed he was still Campbell’s attorney up until the time he got the fax. He said, “Yes. I sure wasn’t about to take Adrienne’s word for it.” Golub said over the course of the next month he had complied in transferring files, etc., and that he had formally withdrawn from the case. Even so, he continued to have disputes over the transfer of the firm's claim for its share of legal fees and costs. He said that the atmosphere between them “was quite poisonous and that was, no doubt, the reason she filed the defamation lawsuit.”

I asked him to tell me about Adrienne Williams. He said that she went to law school after working for a decade as an emergency medical technician and that he had hired her after she had worked at the Robin, Thomas, David and Sweet law firm for two years. She started at the previous firm right after passing the bar exam. Even though “she barely kept her grades high enough to graduate” he was impressed with her experience in the medical field and thought her knowledge of and comfort with medical terminology and procedures would be useful in the practice. He said that, although clients liked her, “she seemed to resist learning what I tried to teach her, and her level of disorganization created some real problems for the firm.”

I asked him if everything he wrote in the letter was true. He said, “I thought so at the time I wrote it. I have since found out that even though I said that she had never handled a case like Campbell’s and that she had never won a case, in fact, when she was with the Robin, Thomas, David and Sweet firm, she did work on another paralysis case in which she had gotten a million dollar verdict.”

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File

From: Lauren Evans

Date: July 29, 2009

Re: **Telephone Conversation with Emily Sweet**

After talking to Mr. Golub I called Emily Sweet. Emily is a partner in the law firm of Robin, Thomas, David and Sweet. She was Adrienne Williams' boss for 3 years. She said that Williams worked as a law clerk for the firm during her last year of law school and then they hired her as an associate after Williams passed the bar.

I asked whether Williams' work was satisfactory and she said, "Adrienne was quite good for her level of experience. During her time at the firm she tried two personal injury cases to completion and won one and lost one." She said that her research and writing "were adequate, not excellent."

I asked about the case she had won. Emily said, "It was her second trial and she had clearly learned some hard lessons from losing the first. In this one, she got a large verdict, $1.2 million, for a client who had nerve damage with resulting paralysis. I was very proud of her, and the client was very pleased with her work."

I next asked why she had left the Robin, Thomas firm. The reply was "She went to work with Adam Golub because he lured her away with more money. He paid her more than I could afford. I was sad to see her go, but I didn't match his offer."

Conrad J. Gaskill
Panama, Whittier, Francisco & Alameda, LLP
5211 Bay Street
Santa Barbara, Columbia
(555)714-1937
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA
COUNTY OF HERKIMER

Adrienne Williams,
Plaintiff — Civ. # 27706

v. — **COMPLAINT**

Adam Golub,
Defendant
_____/

This is an action for defamation, in which plaintiff Adrienne Williams seeks general, special, and exemplary damages proximately resulting from false and malicious statements defendant Adam Golub made in a letter to a client of the plaintiff impugning her competence and integrity as a lawyer.

1. Plaintiff is a lawyer, admitted to practice in the State of Columbia, and engaged in the private practice of law.
2. Defendant is a lawyer, admitted to practice in the State of Columbia, and is the principal in the law firm of Adam Golub and Associates ("law firm").
3. From July 7, 2004 to January 13, 2008 plaintiff was employed as an associate attorney in defendant's law firm.

4. As part of her duties while employed at the law firm, plaintiff represented Harvey Campbell ("the client") in a suit based upon tort.
5. On January 13, 2008, plaintiff resigned from the law firm.
6. On January 18, 2008, defendant was terminated as counsel for Campbell and was instructed to transfer Campbell's case from the law firm to plaintiff for continuing representation.
7. On January 20, 2008, defendant sent a letter to the client containing false and unprivileged communications tending directly to injure plaintiff and damage her business and professional relationships by mischaracterizing her competence as a lawyer and specifically stating the falsehood that plaintiff had lost every case she had taken to trial.
8. Plaintiff is informed and believes, and based thereon alleges, that the conduct of defendant described above was done with malice.
9. Defendant's conduct was defamatory under the law of the State of Columbia. As a result of defendant's defamation, plaintiff has suffered loss of earnings, injury to her personal, business and professional reputation, harm to her business and professional relationships and severe emotional distress, in an amount to be established at trial.
10. Defendant's conduct was such as to entitle plaintiff to punitive damages in an amount to be established at trial.

Wherefore, plaintiff seeks damages as a result of defendant's defamatory actions in an amount to be established at trial.

Panama, Whittier, Francisco & Alameda

Dated: May 20, 2009

C J Gaskill

Conrad J. Gaskill, Esq.
Attorneys for Plaintiff Adrienne Williams

Adam Golub and Associates
Attorneys at Law
11 Brocklebank Building
Bodie, Columbia
(555)538-2320

January 20, 2008

Mr. Harvey Campbell
1873 West Shawna Lane
Shipley, Columbia

Dear Mr. Campbell:

Adrienne Williams has resigned from our law firm effective January 13, 2008 and set up a solo law practice run from her home. She informed me that you are considering withdrawing your case from our firm and hiring her to represent you in your ongoing lawsuit against those responsible for the roof collapse that injured you so severely. Because I do not think it is in your best interest to be represented by a lawyer with so little experience and such a weak record of success, I ask that you think long and hard before you make this change. If you do decide to transfer representation to her, I will, of course, honor your decision and turn over your file to Ms. Williams.

Ms. Williams has been an attorney for barely five years. In the three and a half years she was with my firm, she won only two cases. In each of those cases there was no defendant actively litigating against her allegations. In one, the doctor was in a mental institution and, in the other, she was suing a hospital for its emergency room practices, which they knew were deficient and were in the process of changing. They were anxious to settle once they had decided how to handle the changes. Both of those cases had been prepared for years by my office before Ms. Williams became involved. She has never before handled a case with an injury such as yours.

While with me, Ms. Williams lost four cases she took to trial. At her prior law firm, the first case she tried was a major case in which she represented a teacher who was dying of cancer that his urologist had failed to diagnose. The defendant's attorney told me that he had been present at a conference when the judge laughed at Ms. Williams for misrepresenting that her client was too sick to appear at a deposition when the defendant had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. The defendant's attorney also told me that Ms. Williams had not prepared her major witness. Her expert witness was unfamiliar with the medical records when questioned on cross-examination. Ms. Williams lost that case and every other one she took to trial.

It takes a lot of money to run a law office. I have heard that Ms. Williams hasn't enough money to hire a secretary. All of our attempts to reach her by telephone in the past two weeks have been unsuccessful because the answering machine says it is full. She will owe me tens of thousands of dollars in disbursements on the cases she hopes to take

from my office.

If the defendant's attorneys know that the plaintiff's attorney has a record of losing cases, has limited experience in trying cases, and is not able to finance the great expenses of a complicated trial such as yours, which involves expert witnesses and depositions, they are likely to resist any legitimate settlement and force the case to trial. Also, Ms. Williams, in her need for money to pay her overhead and finance other cases, may attempt to settle your case for far less than its full value. Your case is worth millions of dollars. It would be criminal to settle the case for anything less. If she does so, she will have put her interests ahead of yours.

I tell you these things because, as your lawyer, I have an ethical obligation to give you candid advice. In addition, as I will receive a portion of the fee in your case, it is in both our interests that you receive the best possible result. As I have told you, I represented another client who has essentially the same injury as yours. I tried her case and obtained a verdict of $3,500,000. The case was sent back for a new trial by the appellate court. The second time I obtained a verdict of $3,400,000. I tried the case in Ness County, a jurisdiction that is much more hostile to plaintiffs than Herkimer. You, therefore, have a very valuable case. I am more than willing to continue to represent you in it. However, if you decide to entrust it to her, please, for both your sake and mine, take the following precautions:

1. Direct Ms. Williams in writing not to enter into settlement negotiations on your case without speaking first to you, discussing her settlement strategy, and obtaining your approval of the amounts she will demand and will be willing to settle for.
2. Before you accept any offer of settlement, you discuss the case with some other experienced personal injury attorney for the sake of having a second opinion and hearing other options. Your case is the first paralysis case that Ms. Williams will be handling. She does not have experience in evaluating or trying cases such as this and has very little rapport with the defense bar and the builders' insurance companies.

Judge Regina Mack, the judge handling your case, is very intelligent and experienced. After Ms. Williams was assigned to her for trial on a recent case, Ms. Williams called the court and stated that her father had been taken to the hospital. Ms. Williams had told me and an associate in my firm that she was afraid of going before this judge. The trial was continued. She then spent the day in the office rather than going to the hospital to see her father in the hospital, if he actually was in the hospital.

Please call me if you have any questions or wish to discuss these matters before making your decision.

Very truly yours,
Adam Golub and Associates
Adam Golub
Adam Golub

The Law Office of Adrienne Williams
560 Winston Street
Reginald, Columbia
555-331-0500

BY PERSONAL DELIVERY **Email: awlawyer@alo.com**

January 18, 2008

Adam Golub, Esq.
Adam Golub & Associates
11 Brocklebank Building
Bodie, Columbia

Dear Adam:

This letter confirms our conversation in which I resigned as an associate with your firm, effective January 13, 2008. You know all of the ways that I was dissatisfied with the way I was treated by you and others at the firm, and I will not rehash them in this letter. My resignation gives me the opportunity to start my own firm, something I have always wanted to do.

Fortunately, I am working to ensure that the clients for whom I had primary responsibility are not harmed by my departure from your firm. They all have been quite happy with my work. That is particularly the case with Mr. Harvey Campbell, who has decided to come with me rather than stay with the Golub firm.

Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new law firm. I will obtain a substitution of attorney from Mr. Campbell and send it to you for signature. In addition, please arrange to have Mr. Campbell's files available for pickup by me on or before January 25, 2008. My hope is that we will be able to amicably resolve any lingering financial issues regarding this case along with the money you still owe me for past services.

Sincerely,

A. Williams

Adrienne Williams

COPIES OF ADAM GOLUB AND ASSOCIATES E-MAIL CORRESPONDENCE

From: duarte@golublaw.com

To: golub@golublaw.com

Sent 12/19/2007 4:15 PM

Subject: RE: RE: Why are you excluding me?

Dear Adam,

I can no longer work productively with Adrienne. I realize that you have been counting on me as the senior associate to train her and bring her along but she has screwed up so many things that I don't feel I am being successful. She is disorganized and doesn't seem to be prepared. I sent her to court for a status conference a few weeks ago and she ended up going to the wrong courtroom and didn't straighten it out in time to be there when the case was called. This kind of thing happens too often, in my view.

I would appreciate it if you would assign me one of the other associates. Sorry to bother you with this. Here is the e-mail I got from her yesterday and my response to it.

Tony

From: duarte@golublaw.com

To: williams@golublaw.com

Sent 12/19/2007 3:45 PM

Subject: RE: Why are you excluding me?

Dear Adrienne:

I am not sure that carrying on this conversation by e-mail is the best idea. You asked why I exclude you, but the truth is that you have excluded yourself. How many client meetings have had to start without you because you came late or not at all? I can answer the question but perhaps you should reflect on it. It makes a very poor impression when we tell a client to expect you but you aren't there. Regarding expert witnesses, given your medical expertise I think you could potentially be a big help in talking with them but in the ones I have been part of with you it has seemed as if you were either unprepared or extremely disorganized. For these reasons I have stopped

scheduling you to be part of many meetings. If I can get a commitment from you to change your behavior, I will rethink my position.

Regarding the written work, I very often find your writing unpersuasive, your research incomplete, your analysis fuzzy, and your grasp of the facts marginal at best. I have offered repeatedly to work with you to help you improve but instead of accepting my constructive criticism you always walk away in a huff so I have just given up.

You aspire to be a trial lawyer but in the time you have been in this firm you haven't shown any of us that you have the drive or the ambition to develop the skills you need in order to be successful.

Tony

From: williams@golublaw.com
To: duarte@golublaw.com
Sent 12/18/2007 2:20 PM
Subject: Why are you excluding me?
Anthony:

I am getting increasingly angry by your repeated exclusion of me from meetings with clients and witnesses. I don't see how I can continue to be an effective member of our litigation team unless I have the kind of first-hand knowledge that comes from these meetings. You rewrite briefs and pleadings that I have drafted without consultation or discussion with me. I thought we were supposed to collaborate but instead you insult my work and act with condescension in ways that undermine me. In the Thornton case summary judgment brief, you ignored what I wrote about the medical diagnosis and substituted your language for mine. As you well know, my knowledge of medicine is far superior to yours and I think the way you botched the descriptions of the client's injuries will harm her case. I know there is much I can learn from you, but you have to treat me with respect.

Adrienne

From the Desk of Harvey Campbell

By Fax Transmission to 555-538-2321

TO: Adam Golub, Esq.
Adam Golub and Associates
11 Brocklebank Building
Bodie, Columbia

FROM: Harvey Campbell
1873 Shawna Lane
Shipley, Columbia

DATE: January 27, 2008

NUMBER OF PAGES, INCLUDING COVER SHEET: One (1)

Dear Mr. Golub,

I have decided to switch attorneys, and I want to be represented by Adrienne Williams.

I appreciate the excellent work that has been done on my behalf by your law firm, and my decision to change law firms is based solely on my desire to stay with Ms. Williams. It does not reflect an adverse opinion toward you or your work.

Ms. Williams has informed me that she will shortly present you a Substitution of Attorney. Please transfer all my records and all of your files, documents, and work product to Ms. Williams.

Finally, now that Ms. Williams is my attorney, in the future please direct all communications to her.

Thank you for your past work and your cooperation in this matter.

Sincerely,

Harvey Campbell

Harvey Campbell

JULY 2009

California Bar Examination

Performance Test B

LIBRARY

WILLIAMS v. GOLUB

LIBRARY

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Scott Rogers v. Associated Aviation Underwriters (Columbia Supreme Court, ----- 88
1953)

SELECTED PROVISIONS OF THE COLUMBIA CIVIL CODE

§ 44 Defamation. Defamation is effected by (a) libel, or (b) slander.

§ 45 Libel. Libel is a false and unprivileged publication by writing that exposes a person to hatred, contempt, ridicule, or obloquy, or causes the person to be shunned or avoided, or has a tendency to cause injury to reputation or occupation.

§ 46 Slander. Slander is a false and unprivileged publication, orally uttered, that charges a person with crime or tends directly to cause injury to a person's profession, trade or business.

§ 47 Privilege. A privileged publication is made:

(a) In the proper discharge of an official duty;

(b) In any

(1) legislative proceeding,

(2) judicial proceeding, or

(3) other official proceeding authorized by law;

(c) In a communication, made without malice, to a person interested therein, by one

(1) who is also interested, or

(2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or

(3) is requested by the interested person to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment.

§ 48 Malice. Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with a good faith belief in its truth at the time it is published shall not constitute malice.

SELECTED PROVISIONS OF
THE COLUMBIA MODEL RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP
RULE 1.4 COMMUNICATION

(A) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(B) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

* * * *

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of

representation.

* * * *

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation.

Comment

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Auden v. Fox and Peters

Columbia Supreme Court (2002)

This appeal is a minor skirmish in a major litigation battle. The parent litigation is a case, *Pinkerton v. Duke Industries*, which after several years is still pending. While awaiting trial, Pinkerton's attorney Phillip Peters ("Peters") took the deposition of James Fox ("Fox"). At the deposition, Fox, in response to questions from Peters, said several unflattering things about Allan Auden ("Auden").[1] Two days after the deposition, Auden filed a defamation action against Peters and Fox. The Trial Court ruled in the defamation action that the statements were absolutely privileged and granted a motion to dismiss the complaint. Auden appeals.

The complaint alleges that Fox and Peters orally published defamatory matter about Auden at the deposition. The trial court held correctly that the plaintiff failed to state a cause of action for defamation because of the privilege recognized in connection with judicial proceedings.

Both sides recognize that the privilege of an attorney in judicial proceedings is absolute in that it cannot be defeated by a showing that the publication was made with malice. For the privilege to apply, however, the defamation published in a judicial proceeding must have "some relation" to the proceeding. (Restatement Torts, §585.)

Columbia Civil Code §47(b) provides that a privileged publication or broadcast is made in any (1) legislative proceeding, (2) judicial proceeding, or (3) other official proceeding authorized by law.

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[1] We will discuss the statements made about Auden only to the extent that such discussion is absolutely necessary to our opinion. The entire record before us is replete with threats by everybody against everybody else to sue them on any theory which imaginative counsel can think of. There is no desire on the part of this court to act as an agent -- albeit immune -- who further publicizes a libel or slander and thereby adds grist to the parties' mills.

The purpose of §47(b) is to afford litigants freedom of access to the courts to secure and defend their rights without fear of being harassed by actions for defamation and to promote the unfettered administration of justice even though as an incidental result it may provide immunity to the evil-disposed and malignant slanderer. Thus, courts should not extend application of the absolute privilege unless the public policy upon which the privilege rests exists.

This statute protects attorneys as well as judges, jurors, witnesses and other court personnel from liability arising from publications made in the course of a judicial proceeding. The policy underlying the privilege is to afford our citizens utmost freedom of access to the courts. As a consequence, attorneys are given broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients. The privilege is absolute; it protects publications made with actual malice or with intent to do harm.

Although defamatory publications made in the course of a judicial proceeding are absolutely privileged, even if made with actual malice, the absolute privilege attaches only to a publication that has a reasonable relation to the action, is permitted by law, and if it is made to achieve the objects of the litigation. The absolute privilege in judicial proceedings is afforded only when the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

First, if the defamatory publication is made in furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term “judicial proceeding” and the persons who should be regarded as litigants or other participants. If this requirement is met, the publication is absolutely privileged even though made outside the courtroom and no function of the court or its officers is invoked.

Second, although the defamatory matter need not be relevant, pertinent or material to any issue before the court, the publication must have some connection or logical relation to the judicial proceeding. Fox and Peters do not even have to claim that the allegedly defamatory deposition questions and answers were admissible, either directly or for the purpose of impeaching any witness or that they were calculated to lead to the discovery of admissible evidence. Doubts should be resolved in favor of relevancy and pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety.

Third, since the deposition questions and answers concerned Auden's credibility, which would affect the outcome of the litigation, they were not pretextually calculated merely to defame and therefore they are made to achieve the objects of the litigation.

Fourth, the privilege stated in §47(b) is confined to statements made by an attorney while performing his function as such. This approach does not protect attorneys, witnesses and litigants who use the mere fact that they are talking in the course of judicial proceedings as a pretext to defame persons with respect to matters that have nothing to do with the question under consideration, yet it does shield counsel, clients and witnesses from having their motives questioned and being subjected to litigation if some connection between the utterance and the judicial inquiry can be established. Likewise, this approach does not shield attorneys, witnesses, or litigants who are no longer involved in the litigation, such as by way of dismissal as an attorney, witness, or litigant.

As long as Peters was actually retained as a lawyer in this litigation, he is protected by this privilege, and, so long as Fox was answering his questions, he, too, is protected.

AFFIRMED.

Kashian v. Harriman

Columbia Supreme Court (1966)

Edward Kashian ("Kashian"), a prominent businessman and civic leader in Paradise Valley, Columbia, brought this action for defamation against Richard Harriman ("Harriman"). The dispute arises from remarks published by Harriman regarding Kashian, who was at the time serving as Chair of the Board of Trustees of Paradise Valley Hospital (PVH), a nonprofit, tax-exempt corporation.

In 1964, PVH announced plans to build and operate a for-profit heart hospital. Local non-profit medical providers, St. Anne Elizabeth Medical Center ("St. Anne") and MediPrime, became concerned that PVH's hospital would compete unfavorably with them. St. Anne wrote a letter to the Columbia Attorney General expressing its concern that PVH's involvement in a for-profit hospital would conflict with its non-profit status and called for an investigation. Harriman, who was counsel for MediPrime, wrote a letter to the Attorney General joining in this request for an investigation.

In 1962, Harriman had been retained as special counsel in the bankruptcy of another provider whose assets PVH had purchased from the bankrupt estate. In his current letter to the Attorney General, Harriman wrote that, in the course of his duties as special counsel, "I conducted an investigation that led me to believe that PVH has engaged in unfair business practices since at least 1959 by pursuing a course on intentional conduct that interfered with the practices of private practitioners. Moreover, my investigation led me to believe that Mr. Kashian has unlawfully used his position as Chair of the PVH Board of Trustees to accrue substantial economic advantages for himself to the disadvantage of PVH." Harriman's letter indicated that he had sent copies to "Clients, and St. Anne."

On June 1, 1964, *The Paradise Valley Bee* published a news article reporting on

Harriman's letter, under the headline "Hospital Official Assailed." The article focused primarily on the accusations about Kashian, and quoted parts of the letter, including the excerpt cited above. Kashian was quoted in the article as saying the accusations were "completely false."

On June 19, 1964, Kashian filed a lawsuit against Harriman asserting that Harriman's letter was false and defamatory. He also alleged Harriman acted with malice.

Harriman filed a motion for summary judgment on all Kashian's claims. Harriman acknowledged sending his letter to the Attorney General with copies to his client and St. Anne, with which he was joining to request an investigation of PVH. He argued that his letter to the Attorney General was absolutely privileged under Columbia Civil Code §47(b), qualifiedly privileged under section 47(c), and not defamatory.

The trial court granted Harriman's motion. The court concluded Harriman's statements were privileged under section 47(b) of the Civil Code. The court declined to decide whether the privilege was a qualified one, in which case it could be defeated by a showing the statements were made with actual malice, because the evidence failed to show Harriman had acted with malice. It also ruled Harriman's delivery of the letter to third persons (his client and St. Anne) was privileged under Civil Code section 47(c). The trial court also declined to reach the question of whether the publication in *The Paradise Valley Bee* was defamatory because Kashian failed to make a sufficient prima facie showing that Harriman was the person responsible for sending the letter to the newspaper. Kashian appealed.

Columbia law recognizes two types of privileged communications: (1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found

privileged.

Section 47(b) defines what is commonly known as the litigation privilege. The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) that have some connection or logical relation to the action; (3) made to achieve the objects of the litigation; and (4) by litigants or other participants authorized by law. The privilege is absolute. If it applies, it does not matter whether the communication was made with malice or the intent to harm. Put another way, application of the privilege does not depend on motives, morals, ethics or intent. The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings and includes statements made to initiate official action. The absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. The privilege is based on the importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity. *Wise v. Thrifty Payless, Inc.*, *supra* (husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive).

Section 47(c) codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege applies to a narrow range of private interests and does not create a broad public interest privilege. The interest protected must be private or pecuniary. It must be a common interest in an outcome, which can exist in the absence of a formal relationship (for example, shareholders who bought corporate shares independently of one another). It can also be in a contractual, business, or similar relationship, such as between partners, corporate officers or members of incorporated associations, or between union members and union officers. The communication must have been in the course of the relationship.

This definition is not exclusive, however, and the cases have taken an eclectic approach toward interpreting the statute. The scope of the privilege is not capable of precise definition and its application depends upon an evaluation of the competing interests that defamation law and the privilege are designed to serve.

The common interest privilege as defined in §47(c) only arises in the absence of malice. Malice for purposes of the statute means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. Malice is not inferred from the communication itself, but from surrounding circumstances.

We now consider whether the privileges apply to Kashian's complaint. Kashian's claim for defamation is based on the letter Harriman wrote to the Attorney General and delivered to his client and involved in the complaint to the Attorney General. We assume the letter was defamatory and consider whether delivery of the letter was privileged.

Kashian argues Harriman's delivery of the letter to the Attorney General's office was subject only to the qualified common interest privilege because there was no official proceeding. We disagree. Section 47(b) provides for an absolute privilege with regard to statements made in "any . . . official proceeding authorized by law." A communication concerning possible wrongdoing made to an official government agency such as a local police department and designed to prompt action by that entity is as much a part of an official proceeding as a communication made after an official investigation has commenced. The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. A qualified privilege is inadequate under the circumstances. Since the privilege is absolute, it cannot be defeated by a showing of malice.

In *Dove Audio, Inc. v. Stark, Vernon & Ruxton*, Dove Audio produced a recording featuring the voices of several celebrities whose royalties were to be paid to their designated charities. When few royalty payments were actually made, one of the celebrities contacted the law firm of Stark, Vernon & Ruxton (SV&R) to request that it look into the matter and contact the appropriate government agency to conduct an investigation. SV&R wrote to the celebrities explaining the situation and soliciting their support for a complaint to the Attorney General's office. Dove Audio sued SV&R alleging the letter was defamatory and interfered with their economic relationships with other celebrities. The court granted SV&R's motion to dismiss the claims on the ground that the communication was absolutely privileged under Civil Code section 47(b). This court held that a petition to the Attorney General constitutes an official proceeding within the meaning of section 47(b) since the Attorney General has the statutory responsibility to protect the assets of charitable trusts and public benefits corporations. In addition, the court held that the privilege extends to communications with private parties who share with the defendant an interest in the investigation preliminary to the institution of the official proceeding.

We conclude, then, that Harriman's delivery of his letter to the Attorney General and the other entities requesting an investigation into PVH's business practices was absolutely privileged under section 47(b). Consequently, we need not reach the questions of the applicability of the qualified privilege as it applies to the delivery of the letter to the Attorney General.

On appeal, Kashian also argues that neither the litigation privilege nor the common interest privilege attaches to publication of the letter to *The Paradise Valley Bee* or to St. Anne. We address these contentions in turn.

As for the publication of the letter to *The Paradise Valley Bee*, we do not reach the question of privilege because we agree with the trial court that there is insufficient

evidence to suggest that Harriman was responsible for sending the letter to the newspaper.

We turn finally to Harriman's publication of the letter to St. Anne. In this case, St. Anne was a party to the request to the Attorney General for an investigation into PVH's tax-exempt status. It follows that their communications with one another in that connection were protected by the litigation privilege.

Kashian maintains, however, that the same privilege does not extend to their communications in regard to Harriman's request for an investigation into Kashian's alleged conflict of interest, a request in which St. Anne had not joined until after Harriman's letter. We need not decide whether the litigation privilege under section 47(b) reaches these communications because we conclude that St. Anne shared a common business or professional interest under §47(c) in investigation of both PVH's business practices and Kashian's potential conflict of interest.

Kashian argues that he presented evidence that, if believed, was sufficient to support a finding of actual malice, which would prevent the defense of a qualified privilege under section 47(c) from arising. On the premise that Harriman's statements about him in the letter are defamatory, Kashian contends a jury might reasonably infer Harriman acted with malice because he failed to conduct an adequate investigation before making the statements.

Malice, which is statutorily defined as state of mind arising from hatred or ill will, may be proved by showing the publisher of a defamatory statement lacked reasonable grounds to believe the statement was true, and therefore acted with a reckless disregard for the rights of the person defamed. However, negligence is not malice. It is not sufficient to show that the statements were inaccurate or even unreasonable; only willful falsity or recklessness suffice. Only reckless or wanton disregard for the truth will imply a willful disregard for or avoidance of accuracy sufficient to establish malice.

Kashian's bare assertion that many of the statements in Harriman's letter are false does not make it so, much less establish that Harriman made the statements maliciously. For example, Harriman urged the Attorney General to investigate certain of Kashian's business dealings using the following language: "Your investigators will need to obtain property profiles on certain properties, such as the proposed Heart Hospital and Women's Center, in order to trace the ownership and development of the properties by entities in which Mr. Kashian has been involved, either directly or indirectly."

In his declaration Kashian asserts that "even a cursory review of the facts would have put anyone on notice that many of these factual allegations are false. For example, it is a matter of public record that the property purchased by the Heart Hospital--which Harriman accused me of profiting from--was sold by River Park Properties approximately 10 years prior to the Heart Hospital's purchase." This evidence tends to show at most that Harriman's letter was inaccurate insofar as it suggested Kashian may have had a direct financial interest at a certain moment in PVH's purchase of land for a heart hospital. The evidence is insufficient to support an inference Harriman acted with a reckless or wanton disregard for the truth when he wrote the letter. Consequently, the trial court was correct in rejecting Kashian's claim under section 47(c) because there was no prima facie showing of malice.

AFFIRMED.

Scott Rogers v. Associated Aviation Underwriters

Supreme Court of Columbia (1953)

This defamation action was brought by Scott Rogers ("Rogers") against Associated Aviation Underwriters (AAU) and various insurance companies that were members of that association. His action was based upon a report made by AAU that he claimed injured his reputation and deprived him of his profession as a pilot. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendants on the ground that the communication from AAU to Rogers' employer, Olympic Oil Company ("Olympic"), was privileged.

AAU is the name of an organization of the aviation insurance departments of the defendant insurance companies. It inspects risks and makes periodic inspections of the aviation facilities insured by the insurance companies.

Olympic employed Rogers as an aircraft pilot from February 1948 until he was discharged about November 22, 1948. He alleged that his discharge resulted from a report of an investigation of all of the aviation facilities and pilot personnel of Olympic by AAU. Two sections of the report are at issue here. First, the report states that, "None of the crew members currently employed by Olympic Oil Company has qualified for Airline Transport Rating (ATR). We advise that all Olympic Oil pilots obtain an ATR rating from one of the recognized competent schools. This training should be given to weed out the weaker pilots." Second, the report stated that, "In checking with a previous employer we were unable to substantiate that Rogers was anything other than an average pilot with questionable flying ability, and this employer lacked confidence in him as a pilot. In addition, we were informed he had a poor personality and there was much better pilot material available. In checking with another source, who has flown with Rogers and has known him personally for seven or eight years, we could not develop any information concerning Rogers' qualifications to operate aircraft in accordance with the high standards desired by the Olympic Oil Company."

Rogers claims that the report does not fall within the qualified common interest privilege. Under the common interest privilege, communication made in good faith in which the person reporting has an interest and in reference to which he has a duty is conditionally or qualifiedly privileged if made to a person having a corresponding interest or duty. By definition the privilege arises only in the absence of malice. Malice is not inferred from the communication itself, but from surrounding circumstances.

Rogers does not contend that AAU did not believe the communications to be true or that they were actuated by hatred or ill will. He does contend that the communications were made with such gross indifference to his rights as to amount to a willful or wanton act. The evidence showed that Rogers actually had an ATR at the time of the report. The evidence further showed that the derogatory statements concerning Rogers were based upon only two telephone calls to persons who had known or been associated with him. A jury might very well have found that there was no sufficient investigation to support the statements against the appellant. We do not think, however, that the evidence was sufficient to submit to the jury the issue of such gross indifference to the rights of Rogers as would amount to willful or wanton conduct from which malice might be inferred.

In *Courtney v. Gault,* the alleged defamatory statement made was without any investigation in reliance upon a report made by a detective agency. The court held that negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged publication.

The judge correctly directed a verdict on the ground that the alleged defamatory statements were privileged and that there was insufficient evidence to authorize the jury to find that they were malicious.

AFFIRMED.

Answer 1 to Performance Test B

MEMORANDUM

To: Lauren Evans

From: Applicant

Date: July 30, 2009

Re: Williams v. Golub

Our client Adam Golub has been sued for defamation by Adrienne Williams. In her complaint the plaintiff states that Mr. Golub's defamatory statement was related to her competence as a lawyer and "specifically stating the falsehood that plaintiff had lost every case she had taken to trial." You asked me to prepare an objective memorandum that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available. Columbia law recognizes two types of privileged communications: "1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and 2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found privileged." Kashian. Below I have analyzed Mr. Golub can assert an absolute privilege or a qualified privilege.

Absolute Privilege

Section 47 of the Columbia Civil Code sets out the elements for establishing absolute or qualified privileges. A privileged publication is made in any 1) legislative proceeding, 2) judicial proceeding, or 3) other official proceeding authorized by law. Columbia Civil Code Section 47(b). Publications made in any one of the mentioned proceedings are given absolute privilege. Auden; Kashian. Thus, it protects publications made with actual malice or with intent to do harm. Auden. However, this absolute privilege is only afforded to a publication that has a reasonable reaction to the

action, is permitted by law, and if it is made to achieve the objects of the litigation. Auden. Thus the privilege is afforded only when the publication "1) was made in a judicial proceeding; 2) had some connection, or logical relation to the action; 3) was made to achieve the objects of the litigation; and 4) involved litigants or other participants authorized by law."

1) Was made in a judicial proceeding

The court in Auden held that as long as the defamatory publication is made in the furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term judicial proceeding. Thus if the statement is made in the furtherance of the litigation the publication is absolutely privileged even though it was made out of the courtroom and no function of the court is involved. Auden.

The letter from Golub to Campbell was arguably made in the furtherance of the litigation. Golub was sending the letter to Campbell in order for Campbell to know the risks involved in selecting Williams over Golub. Pursuant to your interview**,** Golub stated that he did not want a client of his to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case. Moreover, the letter was necessary to determine whether Campbell was going to continue with Golub's representation or Williams'. Although Williams had suggested that Campbell wanted Williams to continue to represent her and not Golub, Golub had yet to hear anything directly from Campbell. As he stated, he was not going to take Williams' word for it. He also needed to know if there was going to be a switch in order to transfer the files to Williams. Thus, the communication can be in the furtherance of litigation because Golub was letting Campbell know his rights and the risks he faced in changing attorneys and because Golub needed to know if Campbell still wanted Golub to represent him.

On the other hand, Williams may argue that the letter was not in furtherance of litigation because Golub's real intention was not to help Campbell but rather help

himself. As Golub mentioned to you the more Campbell got the more he got. Moreover, ever since the split there has been a constant struggle between Golub and Campbell regarding the amount that Golub should get paid, further suggesting that Golub's interest was only personal. Golub in his letter to Campbell even mentioned that he is writing the letter because he will receive a portion of the fee.

Although Golub might [have] had a monetary interest in sending the letter the court will still probably consider the letter to be in the furtherance of the litigation. Just because Golub has a financial interest does not suggest that he did not sincerely care about Campbell's position. The fact that Golub would make more money if Campbell made more money is in the best interest of both parties, not only Golub's. Moreover, on more than one occasion Golub mentioned that if Campbell wanted to change attorneys he would "honor" the decision and turn over the files. Finally, in the end of the letter, Golub asked Campbell to take precautions before settling the case. Although this can also serve Golub's interest, because he will get a piece of the final settlement, in the end it best serves Campbell's and is in the furtherance of the litigation.

Thus, because the letter is in furtherance of the litigation, the court would liberally construe the judicial proceeding term and most probably find that the letter was within the requirements of a judicial proceeding.

2) Had some connection, or logical relation to the action

The court in Auden stated that the defamatory matter need not be relevant, pertinent, or material to any issue before the court; however, the publication must have some connection or logical relation to the judicial proceedings. For the privilege not to apply, "the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety." Auden.

The letter does have some relevance to the proceedings. As mentioned above, it outlines and tells Campbell about the risk in switching lawyers and the effects it might

have on the action. Golub mentioned Williams' lack of experience in relation to the risks that Campbell was taking by switching lawyers. Moreover, Golub mentioned the costs that the attorney representing Campbell would have to incur in order to bring Campbell's case to a successful resolution. For example, he mentioned that in a complicated trial like Williams', there are a lot of expenses related to expert witnesses and depositions and if his attorney could not afford those expenses it might result in a disfavorable settlement. Thus, the letter had some connection or logical relation to the judicial proceedings because it mentioned the consequences of switching attorneys and the risks involved.

Williams might make the same arguments as above regarding Golub's intention in sending the letter. However, Williams will have difficulty showing that the matter is so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety. Williams might argue that although the need for Campbell's attorney to have sufficient funds is related to the case, the statements regarding Williams' competence are not related to the subject matter of the controversy because they do not relate to the substantive aspects of Campbell's case. Moreover, Williams can point to the statements made regarding lying to the judge as wholly inappropriate. However, because the attorney's experience in relation [to] cases tried and won even can affect the client's substantive rights, the statements regarding her experience are related to the subject matter. Moreover, the statement regarding her lying to the judge goes to Williams' ability to prepare and organize for a case. Thus, the statements are related to the matter.

Thus, because the statements have some connection or logical relation to the judicial proceedings this element should be met.

3) Was made to achieve the object of the litigation.

In Auden the court found that defamatory statements made in depositions were made to achieve the object of the litigation because they would affect the outcome of the litigation and were not pretextually calculated merely to defame.

Likewise, here [in] Golub's letter defamatory statements were made to achieve the object of the litigation because they would affect the outcome of the litigation. As Golub mentioned numerous times in the letter having an experienced attorney, with a good reputation, and funds necessary for the cost, would affect the outcome of the litigation because it would directly impact whether the case settled or whether it went to trial. As Golub mentioned, if the defense attorney knows that the plaintiff's attorney is inexperienced and lacks the funds to finance the expenses they are likely to resist any legitimate settlement and force the case to trial.

However, Williams would argue that the letter was pretextually calculated to merely defame Williams because at the time Golub wrote the letter Campbell had already decided to switch to Williams and Williams had informed Golub of this decision. However, not having heard from Campbell personally, Golub could not rely only on Williams' statements. Moreover, the letter was not pretextually calculated merely to defame because on numerous occasions Golub mentioned that he would honor Campbell's decision if Campbell decided to fire Golub and hire Williams.

Thus, a court would most likely find that the statements were made to achieve the object of the litigation because it dealt with the outcome of the litigation and were not pretextually calculated merely to defame.

4) Involved litigants or other participants authorized by law.

The privilege is confined to statements made by an attorney while performing his function as such. Auden. Thus, the privilege does not shield attorneys "who are no

longer involved in the litigation, such as by way of dismissal as an attorney." Auden. As a result, Golub would have to show that he was still retained as a lawyer in the litigation when he made the statements.

Arguably, Golub was still retained as a lawyer in the litigation at the time he made the statements because Campbell had not notified him yet of the switch. Golub's letter to Campbell is dated January 20, 2008, whereas Campbell's fax to Golub notifying him of the switch is dated January 27, 2008. Thus, Golub was still Campbell's attorney at the time of the letter because Campbell had not notified him of the switch. Williams may argue that Golub was not the attorney at the date because Williams had notified Golub of Campbell's intent to switch attorneys. However, just because Williams mentioned Campbell's intent to switch does not really prove that Campbell himself wanted to switch. Moreover, Campbell could have changed his mind and not told Williams at that date. Additionally, on the date the letter was sent, Golub still had Campbell's files and [in] her resignation letter Williams mentions that she will pick up the files on or before January 25, 2008. Finally, even Williams knew that he had to obtain a substitution of attorney from Campbell.

Thus, because Campbell had not yet submitted a substitution of attorney form, Golub was still retained as a lawyer in the litigation.

Golub would most likely be able to meet all four requirements for absolute privilege set out in Auden. Thus, under Columbia Civil Code Section 47(b) the statements would be absolutely privileged.

Qualified Privilege

Section 47(c) of the Columbia Civil Code states that a privileged publication is made "in a communication, made without malice, to a person interested therein, by one 1) who is interested, or 2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or 3)

is requested by the interested person to give the information." If a court were to find that the statement was made with actual malice it would prevent the defense under Section 47(c). Thus, the first issue to be decided is whether the statement was made with malice. The second issue is whether Golub and Campbell had a relationship that is recognized by Section 47(c).

Malice

"Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with good faith belief in its truth at the time it is published shall not constitute malice." Columbia Civil Code Section 48. Moreover, malice is analyzed by not only looking at the statement itself but also the surrounding circumstances. Kashian. The court in Kashian further defined malice as publication of the statement when the "defendant lacked reasonable grounds to believe the statement was true, and therefore acted with reckless disregard for the rights of the person defamed." In turn, courts have refused to hold that [a] defamatory statement made because of the lack of investigation is enough to constitute malice. Scott, citing Courtney. Instead, courts have deemed the lack of investigation as negligence. Thus, "only reckless or wanton disregard for the truth will imply a willful disregard for an avoidance of accuracy sufficient to establish malice." Kashian.

First, Golub's statement was arguably not with malice because at the time he made the statement he had a good faith belief in its truth at the time it was published. As Golub mentioned to you at the time he made the statement he thought that Williams had never handled a case like Campbell's and she had never won a case. Arguably Golub had a good faith belief in this assertion because in the three and a half years that Williams worked for Golub she never won a complicated case. Moreover, the type of cases that Williams had worked on while at Golub were not similar to Campbell's case. Moreover, although Williams worked at another law firm before coming to work for Golub, she had only worked there for two years and it was right after law school. A reasonable person could believe that an attorney out of law school would not have

worked on a case as complicated as Campbell's case was. Thus, Golub could have had a good faith belief that Williams never worked on a similar case while at the other law firm. Additionally, he could have a good faith belief that she never had a trial at the other law firm because [of] the low likelihood that firm would give a new attorney a trial.

However, Williams can argue that Golub, in fact, knew of her prior experience at the other law firm because in the letter to Campbell he mentions Williams' experience prior to joining Golub. In the letter Golub mentions the facts of Williams' first case at the prior law firm and that Golub had spoken to defense counsel that was involved in Williams' first case. Moreover, the facts of the first case concerned a teacher who was dying of cancer that his urologist had failed to diagnose. Although not very similar to Campbell's case, Williams can argue that Golub should have been on notice that she had handled trials at her previous firm and even complex cases. Because there are facts to suggest that Golub knew of Williams' previous experience it might be difficult to prove that the statement was made with a good faith belief in its truth when published.

Although, Golub might not be able to show a good faith belief in the truth he can still argue that his statement was not made with malice because he had reasonable grounds to believe that his statements regarding Williams' lack of experience and victories. Golub again pointed to the fact that Williams never won a complicated case while working for him. In fact the only cases Williams won were the ones where the defendants did not really fight back. Moreover, Golub can point to the e-mail from the senior attorney regarding Williams' performance. The e-mails show that Williams was often late and often not adequately prepared. Additionally, Golub can point to the statements made by the defense counsel in Williams' first case regarding Williams' lack of being prepared. Finally, Golub can also point to the fact that Emily Sweet, an attorney at the previous firm, stated that Williams' research and writing were adequate, not excellent. Thus, taking into consideration all of the surrounding issues, Golub can argue that he had reasonable grounds to believe everything that was stated in the letter. Moreover, because he had reasonable grounds to believe everything he did not willfully disregard an avoidance of the truth.

Williams might argue that Golub lacked reasonable grounds to believe the statements were true because Golub did not investigate the statements and that the facts suggest that he willfully disregarded avoidance of the truth. As mentioned above, the fact that Golub did not investigate the truth of the statements does not indicate a malicious intent but rather only negligence. However, Williams can argue that Golub willfully disregarded the truth. First, Williams would argue that Golub knew that Williams was experienced and that she did not lose all her cases because Golub lured her away from the previous firm by paying her double. Williams will argue that Golub would only pay double what Williams was getting paid at the other firm if he believed that Williams was competent. Additionally, Golub would only agree to pay Williams double if he knew the exact cases that Williams had worked on at her previous firm. Moreover, Williams will argue that Golub did not know that she did not have enough money to hire a secretary but rather based on the fact that he "heard" she did not have enough money to hire a secretary. Williams will argue that the fact that her mailbox was full does not mean that she did not have enough money to hire an attorney but rather maybe she was not checking her mailbox. However, because the main defamatory statement at issue [was] the fact that she lost all her cases and that she never had a case similar was based on a lack of investigation, Williams will probably not be able to prove malice.

Adequate Relationship

In addition to proving that the statement was not made with malice, Golub would also have to prove that he and Campbell had a sufficient relationship for purposes of section 48. The court in Kashian noted that section 47(c) of the Columbia Civil Code "codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty." The two parties must have a common interest in an outcome, which can exist in the absence of a formal relationship and the communication must have been in the course of the relationship. Kashian. Additionally, it can be a contractual, business, or similar relationship. However, this definition is not exclusive and "the cases have taken an eclectic approach toward interpreting the statute." Kashian. Thus, its application

depends upon an "evaluation of the competing interests that defamation law and the privilege are designed to serve." Kashian.

Here Golub had [a] relationship with Campbell [that] would satisfy section 48. First, Golub and Campbell had a business relationship as attorney and client. However, not only did they have a business relationship, but they also shared a common interest, which was getting the most money possible for Campbell. Moreover, as set out in the Columbia Model Rules of Professional Conduct, an attorney has a duty to communicate with his client. Rule 1.4. In relation to this communication the attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4. Additionally, "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, which may be relevant to the client's situation." Rule 2.1. Thus, Golub's letter that related to Campbell's chances of success if he switched attorneys was within the course of the relationship because the information was necessary in order for Campbell to make an informed decision. Additionally, the communication was within the scope because it considered economic and social factors that were relevant to Campbell's situation. Williams might argue that this relationship had ended because Campbell had decided to switch attorneys. However, for reasons mentioned above, the relationship had not ended. Thus, because Golub and Williams not only had a business relationship, but also a common interest and because the communication was made in the course of that relationship, the relationship requirement of 47(c) will be met.

Moreover, Golub can argue that the competing interests that defamation law and the privilege are designed to serve also support the finding of an adequate relationship. As the court mentioned in Auden the absolute privilege in judicial proceedings is afforded to give citizens utmost freedom of access to the courts. Thus, attorneys are given "broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients." Thus, public policy favors the free and uninterrupted communication between an attorney and the client. This is also supported by the Rule

of Professional Conduct mentioned above. Thus, because we want to give attorneys great latitude in communications with clients, a court would probably recognize the relationship between Golub and Williams as one that satisfied the requirements of section 47(c).

Conclusion

Golub would probably be able to prove the requirements of absolute privilege as the statements were made in a judicial proceeding. Golub might also be able to prove qualified privilege. However, based on the facts a showing that the statement was not with malice might be a close call.

Answer 2 to Performance Test B

MEMORANDUM

To: Lauren Evans

From: Applicant

Date: July 30, 2009

Re: Williams v. Golub, defenses

As per your instructions, I have prepared a memorandum discussing the possible defenses for Mr. Golub for use against Ms. Williams' defamation claim against him. Based on my review of the legal materials, it appears that Mr. Golub may have two options in terms of his privilege defense, either an absolute privilege under Columbia Civil Code ("CCC") 47(b)(2) or a qualified privilege under the various sections of section 47(c). This memorandum first discusses the defamation claim itself and then the two privilege defenses, in turn.

[A] Defamation

Under section 44 of the CCC, "[d]efamation is effected by (a) libel, or (b) slander." Section 46 further provides that "[s]lander is a false and unprivileged publication, orally uttered, that charges a person with a crime or tends directly to cause injury to a person's profession, trade or business." Here, Mr. Golub wrote a letter to Mr. Campbell regarding Ms. Williams' experience and competence as a lawyer that most likely meets this definition of defamation effected by slander.

Ms. Williams, a former associate of Mr. Golub, left Mr. Golub's firm, as evidenced by a confirmatory memorandum dated January 18, 2009. Also in that memorandum, Ms.

Williams referenced the bad terms on which she was leaving and noted that she would be taking with her Mr. Campbell, a client whose paralysis case represented a very lucrative prospect for Mr. Golub's firm. In a letter dated January 20, 2008, Mr. Golub sent a letter to Mr. Campbell in order to dissuade him from transferring his representation from Mr. Golub to Ms. Williams. In that letter, Mr. Golub stated a number of things regarding Ms. Williams' legal practice that were later proved to be untrue. First, he stated that Ms. Williams "has never before handled a case with an injury such as yours." Second, after describing a case that Ms. Williams lost while at her former firm, Mr. Golub noted that "Ms. Williams lost that case and every other case she took to trial. " Both of these statements proved to be untrue according to an attorney from Ms. Williams' former firm, who noted not only that Ms. Williams had actually prevailed on the only other case that she took to trial while at that firm, and that that second case actually involved a matter very similar to the Mr. Campbell's case. Mr. Campbell subsequently sent Mr. Golub a letter effectively switching counsel on January 27, 2008.

While the statements are most likely defamatory in that they were false and concern Ms. Williams' profession as a lawyer, under Kashian, there are two types of privileges recognized in Columbia: (1) absolutely privileged communications, for which there is no liability, even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being privileged.

[B] Absolute Litigation Privilege

One type of absolute privilege available in Columbia is the litigation privilege defined in section 47(b). As articulated in Kashian, this privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings, that (2) has some connection or logical relation to the action, (3) made to achieve the objective of the litigation, and (4) by litigants or other participants authorized by law. According to Auden, the purpose of the privilege is, in part, to protect attorneys from the threat of litigation arising from the use of their best efforts on behalf of their clients. Where this privilege applies, it does not

matter whether the communication was made with malice or the intent to harm, which means that motives, morals, ethics, and intent are not relevant in determining whether this privilege applies. Mr. Golub may be able to argue that this privilege applies to the statements that he made regarding Ms. Williams for the reasons articulated below.

[1] *Judicial Proceeding*

First, Mr. Golub will have to establish that the statement was made in a judicial or quasi-judicial proceeding. Under Auden, the court noted that if the defamatory publication is made in furtherance of the litigation, it is appropriate for the courts to define liberally the scope of the term "judicial proceeding" as well as the persons who are deemed participants, and that it is not necessary that the statement be made in a courtroom or involve a function of the court. Based on this precedent, Mr. Golub may be able to argue that the communication was made in furtherance of the litigation because it concerned the representation of the client, a matter central to the furtherance of the litigation. In addition, Mr. Golub should be able to argue that a letter to a client regarding the representation thereof can be covered by the privilege because the privilege has been extended to letters to attorneys general even in the absence of a pending case, Kashian, and irrelevant statements in depositions, Auden, which suggests the breadth of the privilege. Therefore, Mr. Golub may be able to argue that the letter was in furtherance of the litigation by analogy.

[2] *Some Connection or Logical Relation to the Action*

In addition, under Auden, the defamatory matter must have some connection to the judicial proceeding, although the defamatory matter itself does not need to be relevant, pertinent or material to any issue before the court. Under this precedent, Mr. Golub may be able to argue that the letter, which related to the representation of Mr. Campbell, which is clearly related to the representation, met this standard even though it did not concern the merits of the case itself. This is particularly true given that the court in Auden noted that "[d]oubts should be resolved in favor of relevancy and

pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety." Therefore, considering the low bar to show that the matter is related to the proceeding, Mr. Golub should not have a problem meeting this element.

[3] *Made to Achieve the Objects of the Litigation*

The statements must also be made to achieve the objects of the litigation. This element may be more difficult for Mr. Golub to prove, although the bar is again not very high. For example, in Auden, the fact that the statements related to a party's credibility was sufficient for the court to find that the statements were made to achieve the litigation's objects. Here, Mr. Golub may be able to argue that the competency of Mr. Campbell's counsel is a matter that could affect the outcome of the litigation. This argument may be difficult to make, however, because it requires Mr. Golub to argue that to achieve the objects of the litigation, Mr. Campbell needed to retain Mr. Golub as his counsel. If it is possible to make a more muted version of this argument, however, Mr. Golub may also succeed on this element as well.

[4] *Confined to Statements Made by An Attorney While Performing His Function As Such*

Finally, in order for this privilege to apply, the statement must have been made by the attorney while serving as an attorney. Therefore, the attorney cannot merely make a statement as part of a judicial proceeding in order to defame others for reasons wholly unrelated to the representation. Mr. Golub should not find this difficult to prove. First, his letter itself referred to the fact that it was made in his function as an attorney. Furthermore, the letter concerned the representation in the litigation itself. Finally, while Mr. Golub had already received a letter from Ms. Williams that Mr. Campbell was no longer his client, Mr. Golub was still effectively serving as Mr. Campbell's representation because Mr. Golub had not received a letter from Mr. Campbell terminating him, which means that he was in effect still Mr. Campbell's lawyer, as discussed below. Therefore,

provided this connection is established between the litigation and the defamatory matter, the court cannot consider Mr. Golub's motives behind making the statement.

In sum, Mr. Golub may be able to prove that he had an absolute privilege to make these defamatory statements under the absolute litigation privilege. If this privilege applies, Mr. Golub will not be required to prove that he did not act with malice. However, even if Mr. Golub cannot establish that the litigation privilege applies, he may still be able to make a claim for a qualified privilege under CCC section 47(c).

[C] Qualified Interest Privilege

The delivery of the letter to Mr. Campbell including the defamatory statements may be qualified under CCC 47(c). According to Kashian, section 47(c) codifies the common law privilege or common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege is more limited than the privilege above in that (1) this privilege protects only private or pecuniary interests, such as a common interest in outcome, or a contractual relationship; (2) the communication must occur during the course of that relationship; and (3) even where the interest is one in which the privilege applies, the privilege only arises in the absence of malice.

[1] *Protected Interests*

Based on Kashian, there are two grounds under which there may have been a protected interest that gave rise to a privilege on these facts: a common interest in outcome, or a contractual relationship.

[a] Common Interest in the Outcome

The interests here are likely those envisioned to be protected under CCC 47(c). First, it is likely that Mr. Campbell and Mr. Golub had a common interest in the outcome of Mr.

Campbell's suit. In his letter to Mr. Campbell, Mr. Golub stated, "I will receive a portion of the fee in your case, and it is in both our interests that you receive the best possible result." This is supported by a number of other facts, such as the statement from Mr. Golub that he had taken the case on a contingency fee of 33% recovery plus costs, and that he had already invested hundreds of hours on the investigation and more than $30,000 for expert fees. In addition, Mr. Golub noted that "[t]here was a lot of money involved for both Campbell and me. The more he gets, the more I get."

[b] Contractual Relationship

Furthermore, as Mr. Campbell's lawyer, Mr. Golub had a contractual relationship with Mr. Golub as his lawyer. As part of this relationship, Mr. Golub had an interest in telling him about the best possible course of action. In Mr. Golub's letter, he stated that he was telling Mr. Campbell about the risks of pursuing his claim with Ms. Williams "because, as your lawyer, I have an ethical obligation to give you candid advice." This statement is further supported by Rules 1.4 and 2.1 of the Columbia Model Rules of Professional Conduct. Rule 1.4 states that "(a) a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and (b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Similarly, Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." In the comment to this section, the rules provide that a lawyer's duty to offer advice applies in certain cases even when such advice is not solicited by the client. In relevant part, the comments state "when a lawyer knows that a client proposes a course of action that is likely to result in adverse legal consequences to the client, a duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation…a lawyer may initiate advice to a client when doing so." Furthermore, the comment notes that the lawyer "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Here, there are certainly facts that we can use to support that Mr. Golub did in fact render the advice in order to advise him in the role of Mr. Campbell's lawyer. First, Mr. Golub made several statements that indicate that the purpose of the letter was to help his client make an informed decision. For example, he stated: "I just didn't want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case." In addition, in the letter itself, Mr. Golub states that the advice was given with the purpose of advising Mr. Campbell, noting that decision was for the client to make, and that he was merely providing the client with advice in order to better make this decision. Second, the information in the letter is information that a reasonable client would consider when deciding whether to pursue a case with a particular attorney. For example, he noted her track record of cases both for himself and at her prior firm, Ms. Williams' financial situation and its potential ramifications on Mr. Campbell's case, her less than exemplary behavior before the judge presiding over Mr. Campbell's case, as well as the possible ramifications of having a relatively inexperienced attorney on the chances of settlement. Finally, third, and most importantly, in the letter, Mr. Golub gave Mr. Campbell some important advice in the case that he chose to pursue the case with Ms. Williams, which indicates that he really did have the lawyer-client relationship in mind when he wrote the letter, rather than merely a purpose to defame. Furthermore, Mr. Golub noted that the files were available for Mr. C if he were to decide to make that decision. Of course, the tone of the letter is rather harsh, but Mr. Golub should be able to argue that the content of the letter was based on a privileged relationship with Mr. Golub.

Therefore, there are likely two grounds on which Mr. Golub can claim that there was a privileged interest in the statements made.

[2] *In The Course of the Relationship*

In addition, in order to qualify under the 47(c) privilege, the statement must also have been made in the course of the relationship. It could be argued that as of when Ms. Williams sent her letter to Mr. Golub on January 18, 2008, notifying Mr. Golub that she

was taking Mr. Campbell with her to her new firm, that Mr. Campbell was no longer a client of Mr. Golub. In that letter, Ms. Williams stated "Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new firm" and asked that his files be transferred to her firm. However, Mr. Golub will have to argue that this letter did not serve to sever the attorney-client relationship between Mr. Golub and Mr. Campbell because it was from Ms. Williams and not Mr. Campbell himself, an argument that will likely prevail. Therefore, the letter in question likely was sent in the course of the relationship.

[3] *Lack of Malice*

With the 47(c) privilege, however, Mr. Golub will have to establish that he did not act with malice. As noted in Kashian, it is not enough to show merely that the statement is false. Furthermore, as articulated in Rogers, mere negligence is not enough. In Rogers, defamatory statements were made about an employee involving his qualifications, experience, and personality. Rogers, the employee, attempted to argue that the statements were malicious on the grounds that they were made with such gross indifference to his rights as to amount to a willful or wanton act. Nonetheless, the court found that, even though the statements were made after only two investigatory phone calls, that there was insufficient evidence of malice. Furthermore, citing Courtney, the court noted that even without an investigation, negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged communication. Therefore, even though Mr. Golub did not make any apparent investigations on the facts, this fact alone is not enough for Ms. Williams to show that he acted with malice.

Instead, it must be shown that the publisher acted with reckless or wanton disregard for the truth. In the context of this privilege, according to Kashian, malice means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. It is based upon the surrounding circumstances. The court in Kashian articulated that malice can be proved by showing that the publisher of a defamatory

statement lacked reasonable grounds to believe the statement was true, and, therefore, acted with a reckless disregard for the rights of the person defamed. In addition, section 48 of the CCC notes that "a communication made with a good faith belief in its truth at the time it is published shall not constitute malice."

As noted above, here, Mr. Golub's statements that Ms. Williams had never won a case were false. First, there are a number of circumstances that objectively indicated to Mr. Golub that Ms. Williams did not have the experience or skill to win a major lawsuit, thereby indicating that the statement was made without malice. For example, Mr. Golub noted that, in terms of Ms. Williams' background, "she barely kept her grade high enough to graduate," and that "she seemed to resist learning what [he] tried to teach her, and her level of disorganization created some real problems for the firm." Furthermore, another associate at the firm noted that Ms. Williams was difficult to work with, disorganized, and failed to attend or be prepared for meetings with clients. That associate also noted that Ms. Williams [sic]. Second, Mr. Golub had a good faith belief that the statement was true. In fact, when asked whether he thought that the material in his letter was true, Mr. Golub noted that "I thought so at the time I wrote it."

Of course, it may be difficult for Mr. Golub to overcome the fact that there had been a tense relationship between himself and Ms. Williams before she left the firm, which may give rise to an inference that he made the statement with the intent to vex, annoy, or injure. Furthermore, he will have to overcome the fact that the tone of the letter is harsh and Mr. Golub may have included more information about Ms. Williams than necessary to prove his point. However, if Mr. Golub is able to emphasize the facts as he knew them when the statement was made, as well as his own good faith belief as to the truth of the statement itself, he may also be able to prove that he acted without malice sufficient to prove a defense of privilege under 47(c) as well.

Finally, as articulated in Kashian, evidence of a lack of malice can be shown by a suggestion that the recipient investigate the matters published themselves. Therefore, the statements made by Mr. Golub that the decision was for Mr. Campbell to make

further support that the statement was not made with malice on this basis as well. Although this argument may be tenuous because Mr. Golub did not specifically indicate that Mr. Campbell do his own investigation, and, therefore, may be something that should be left out if Mr. Golub tries to pursue this privilege at trial.

[D] Conclusion

Therefore, in light of the foregoing, Mr. Golub has two potential claims based on both an absolute and qualified privilege to the defamation claim brought by Ms. Williams.