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SAMPLE OF BARWINNERS ANSWER BOOK

BAR HINT: REMEMBER TO PUT IN ALL CAPS YOUR HEADNOTES. CENTER, AND UNDERLINE THEM EXAM BOOKLET ON THE BAR EXAM.

TORTS -- "Art & Bildco"

1. PETE'S RIGHTS AGAINST ART

NEGLIGENCE

In order for Pete to recover in negligence against Art, Pete must plead and prove, Duty, Breach of Duty, Actual Causation, Proximate Causation and Damages.

Note: (This cause of action (Pete v. Art) is for ordinary negligence and not for products liability negligence. As an architect, Art was the provider of a service not a product (e.g. "plans and specifications.") Therefore, Art's liability is for professional malpractice or malfeasance, not for product's liability.)

Duty

General Duty

Art has a duty to act as a reasonable person would in like or similar circumstances to avoid causing unreasonable risk of harm to others.

Special Duty-Professionals

Art is a professional (e.g. an architect). Art must possess the minimum common skill of members in good standing in his profession. Art must act as a reasonable architect would in like or similar circumstances. Art's duty was to provide plans and specifications for the development as a reasonable architect.

To Whom is This Duty Owed?

Once it has been established that Art owed a duty, the question becomes whether he owed a duty to this particular plaintiff, Pete.

In the Palsgraf case, Cardozo held that "a defendant owes a duty of care to a foreseeable plaintiff in the zone of danger." Under the Andrews dissent, followed in some jurisdictions, if a defendant owes a duty to anyone, he owes it to the whole world, limited only by the rules of proximate cause.

(Modernly, most jurisdictions follow the *Andrews* view).

Under the Cardozo view, Art would argue that Pete was not in the foreseeable zone of danger. This argument would fail in that it is highly foreseeable to a builder, that a homeowner would have guests in his home. Further, it is foreseeable that those guests would be injured if the house were improperly designed and unable to withstand the natural elements in that area. Therefore, under the Cardozo view, Pete would be in the foreseeable zone of danger. Thus, Art owed Pete a duty of due care.

Under the Andrews view, a duty was clearly owed to Fred the Homeowner. Art has a duty to design a house safe for its occupants. If a duty is owed to one, here, Fred, then a duty is owed to the whole world and this would certainly include Pete.

Breach of Duty

Art had a duty to act as a reasonable architect would in like or similar circumstances in drawing up the plans and specifications of the house. Would a reasonable architect,

knowing that the Builder had developments all over the state, design plans that could only be used in regions where it never snowed?

Art will argue that he did not have a duty of due care to design winter homes for the snow regions of the state. This argument will fail because Art knew "Bildco had developments all over the state" and yet Art failed to prohibit or limit Bildco's use of the plans.

Pete will argue that Art had a duty of due care to either limit Bildco's use of the plans to southern regions, to warn Bildco of the limited use of his designs to certain areas, or to design a house which could withstand the elements of nature in that state.

By failing to do so, Art breached his duty to Pete as the risk of harm and the probability of its occurrence outweighed the slight burden on Art to design a safe house.

Actual Causation

Was Art's negligence the cause in fact of Pete's injuries?

"But-for-Test"

Can it be said that "but for" Art's negligence the plaintiff, Pete would not have been injured?

Here, since there are two defendants (Art and Bildco) the but-for test does not apply. It is unclear whether Art's plans were defective, thereby causing Pete's injuries, or whether the plans were adequate, and Bildco improperly built the house. Therefore, where you have two or more defendants, each of whom could have caused the injury (*Summers v Tice*), the substantial factor test should be applied.

Substantial Factor Test

Here, Art was certainly a substantial factor in bringing about Pete's injuries. Pete may use *Summers v. Tice* to shift the burden to Art and Bildco to determine as between the Architect and the builder, who was responsible for the roof collapsing.

Proximate Causation

Did anything intervene between defendant's negligent act and plaintiff's injuries such that the defendant Art will be relieved of liability?

Proximate cause is a policy consideration that places a limit on the defendant's liability.

Direct or Indirect Causation

Here, there are two intervening forces that came between Art's act of producing the plans and Pete's injuries. Each intervening force will be analyzed separately:

Will Bildco's Act of Building the House Break the Chain of Causation?

An intervening act is one by a person, animal or act of God that acts on the chain of causation.

Dependent v. Independent

Dependent intervening acts are those caused as a reaction to the set stage created by the defendant's original negligence. If Bildco actually built the house in a defective manner, but the plans and specifications were good, this subsequent gross negligence would absolve Art from liability. However, the facts are silent on this point. Thus, Bildco's acts were dependent on Art and thus, Art is not relieved of liability.

Foreseeable v. Unforeseeable

It is foreseeable that a builder will build according to the architect's plans and specifications and/or will build defectively. Thus, Bildco was a foreseeable intervening act.

Therefore, Bildco's liability will not relieve Art from liability. Bildco's negligence was a dependent intervening force in that Art's negligent plans and specifications set the stage for Bildco's negligence.

In conclusion, Bildco's acts will not relieve Art of liability. Each was a substantial factor in bringing about Pete's injuries.

Will the Snowfall Break the Chain of Causation?

Dependent v. Independent

The snowfall was an independent intervening act of God. Usually "acts of God" are considered independent and will break the chain of causation.

Foreseeable v. Unforeseeable

Here, the facts indicate that the snowfall was "heavy but not unusual." Thus, the snowfall was foreseeable. Further, Art knew Bildco developed all over the state and it was foreseeable that the plans would be used elsewhere. The facts state several times that "heavy snowfalls were not unusual for the area."

In conclusion, the snowfall, therefore, was foreseeable and will not relieve Art of liability.

Damages

Damages must be actual, certain, foreseeable, and unavoidable. The personal injuries of Pete are given by the facts and Pete can recover all pecuniary losses resulting from his injury as well as damages for pain and suffering.

Defenses

The facts do not establish any issues of contributory negligence or assumption of the risk. Thus, Pete will be able to recover against Art under a negligence theory.

Products Liability

Again, it is not appropriate to analyze Art's actions in terms of products liability. Here, Art has provided a SERVICE NOT A PRODUCT.

2. Pete v. Bildco

PRODUCTS LIABILITY

Is Bildco a manufacturer, designer? The facts indicate that Bildco is a “builder-developer” with “developments of ‘new’ housing all over the state.” The fact that Bildco’s product are new homes, instead of widgets is irrelevant. Pete can sue Bildco under product’s liability theories.

There are five possibly theories of recovery in Products Liability. They are: Negligence, Strict Liability, Express and Implied Warranty, and Misrepresentation. Only those applicable will be discussed.

NEGLIGENCE-PRODUCT’S LIABILITY

Product's liability negligence focuses on the defective product

Proper Plaintiff

The proper plaintiff is anyone within the foreseeable use of the product. Here, Pete is a friend of Fred. It is highly foreseeable that friends will be staying at or using one's home, Pete is a proper plaintiff in that he was endangered by the product as a household guest.

Proper Defendant

Manufacturers/retailers are proper defendants. Here the facts indicate that Bildco is a "builder-developer" with "developments all over the state." Bildco did not just build one unique house. He built many houses that he then placed into the stream of commerce. This makes Bildco a manufacturer and therefore a proper defendant.

Duty

Bildco must act as a reasonable manufacturer would in the same or similar circumstances in manufacturing the product.

To Whom Is The Duty Owed:

Under the Andrews view, a duty is owed to the world. Under the Cardozo view, a duty is owed only to foreseeable plaintiffs in the zone of danger. Here, even under the Cardozo view, Bildco owed Pete a duty in that Pete, as an occupant in Bildco’s home, was in Bildco’s foreseeable zone of danger. A household guest is in the zone of danger of the builder of the house.

Breach of Duty

In Products liability breach of duty depends on the existence of a product that is unreasonably defective. Pete must show that the breach of Bildco's duty resulted in a defective product.

There are three types of breach. A defect in manufacturing, defect in design or defect in warning. The central question is how would a reasonable manufacturer or designer with the same skill, knowledge and experience act in like or similar circumstances.

Clearly, a builder/developer would build (manufacture) housing that can withstand the weather conditions in the area where the home is built. Further, a reasonable manufacturer/retailer/designer should have known, when building the house, that the roof (defect in design) was insufficient to withstand weather forces in the area. There is no question that the house was defective for the location. Bildco breached its' duty to Pete.

Actual Causation

Given the number of factors involved in Pete's injury, it is most likely that Bildco's negligence was a substantial factor in bringing about Pete's injuries. Art's negligence was also a substantial factor in bringing about Pete's harm.

Proximate Cause

The issue is whether there were any intervening forces to break the chain of causation. An intervening force by a person, animal or act of God, that acts on the chain of causation.

The Snowfall

The snowfall was an intervening force coming between Bildco's negligence and Pete's injuries. However, the snowfall, as discussed above in *Pete v. Art*, was a foreseeable independent ("act of God") intervening force. The facts state that "heavy snowfall was not unusual" for that area and thus foreseeable. Therefore, the snowfall will not relieve Bildco of liability.

Damages and Defenses

Bildco will be held jointly liable for Pete's injuries. There are no facts to suggest any contributory negligence or assumption of the risk on the part of Pete. Thus, Pete will be able to recover against Bildco in product's liability under a negligence theory

STRICT LIABILITY-PRODUCT'S LIABILITY

Liability is based on the establishment of a defective product and not based on fault. Liability attaches even where persons involved have exercised all possible care.

Proper Plaintiff

All persons who are endangered by the defective product.

Pete was endangered by the defective product. He was injured while using the house for the weekend.

Proper Defendant

All persons engaged in the commercial distribution of products are liable.

As discussed, Bildco was engaged in the commercial distribution of houses and housing developments, thus Bildco is a proper defendant.

Is the Product Defective?

There are three tests to determine if the product was defective. All three will be separately analyzed.

a) Consumer Expectation Approach--RS 402(a)

Product is defective when it is unreasonably dangerous in its normal intended use. The product is dangerous beyond the expectation of the ordinary consumer and the manufacturer must have been able to foresee the dangers of the product.

Here, a roof that cannot withstand the usual weather conditions in the area and caves in, is unreasonable dangerous beyond the expectations of the ordinary consumer. (An occupant does not expect a roof to collapse.) Further, Bildco, should have been able to foresee the dangers of the roof during construction of the house.

b) Feasible Alternative Test:

The court will balance what it would cost market the product as it is against what it would have cost to market the product free of danger. If a safer product would require unreasonably high costs, the product is not defective.

Here, there was a breach of duty unless a safer house would have required unreasonably high costs. Nothing in the facts indicates such costs would result if the house were built to withstand the added weight of snow.

c) California View (Barker v. Lull Engineering Co.)

There was a defect in the product and this defect was the proximate cause of Pete's injuries.

Actual Cause

The defect, which injured Pete, was in existence at the time it left the defendant's control, (i.e. Bildco's control. The facts indicate the house was "new." No facts indicate anything was done to the roof while Fred owned the house.

Proximate Cause

There was no intervening event between construction of the house by Bildco, and the collapse of the roof due to structural defects that would indicate that the defect occurred after Bildco gave up control.

Damages

Pete can recover all physical pain and suffering and economic losses against Bildco in strict product's liability.

Defenses

No defenses such as misuse are available to Bildco under this fact pattern.

Express Warranty

Under the facts, Bildco did not make any express promises or warranties concerning the fitness of the house. Therefore, Pete cannot proceed under this theory

Implied Warranty

In every sale of goods there is an implied warranty that (1) the goods are of a quality equal to that generally acceptable among those who deal in similar goods and (2) the goods are fit for the ordinary purpose for which they are used.

Goods of Quality Generally Acceptable?

Here, a house that has a roof, which collapses, is not of the quality generally acceptable among those who deal in similar goods.

Goods Fit for Ordinary Purpose?

Further, the goods were not fit for the ordinary purpose for which they are used. A house with a roof that collapsed is not fit for the purpose of habitation. In addition, a house built in snow country is impliedly warranted to be able to withstand a normal snowfall. The defect in this house breaches the warranty resulting in Bildco's liability. Fault is not required.

Privity

Under UCC § 2318, and in the majority of states, privity is required between the seller and the injured party. This theory is extended to the purchaser and his family and is sometimes extended to guests in his home.

Here Pete was a guest of the homebuyer, Fred. As such he is a proper plaintiff and there is privity.

Damages and Defenses

There are no applicable defenses. As discussed Pete has been injured and can recover all appropriate damages. He can recover against Bildco for breach of the implied warranty of merchantability.

3. PETE V. FRED

NEGLIGENCE

Duty:

General duty

Fred has a duty to act as a reasonable person would in like or similar circumstances to avoid unreasonable risk of harm to others.

Special Duty:

As an owner of land, Fred's liability if any will be analyzed under special duty rules pertaining to owners and occupiers of land.

The duty of an owner of land derives from the status of the plaintiff coming onto the land.

Licensee

As a guest, Pete is a licensee, one who comes onto the land for his own purposes. Here, Pete came onto Fred's land for his own purpose, to stay as a household guest. Thus Pete is a licensee.

Fred's duty to licensee Pete is to warn or make safe KNOWN dangerous condition on the land.

Breach of Duty

Here, the facts are clear that Fred was not aware of the defect in the roof. Nor did he have any notice of a problem. The land occupier does not have a duty to inspect. Fred only has a duty to warn or make safe KNOWN dangerous conditions on the land. Therefore, Fred did not owe a duty to Pete. In the absence of a duty to warn there is no liability. Pete's cause of action against Fred in negligence will fail. No duty can even be assumed here for purposes of argument.

Conclusion:

Since Fred did not breach any duty to Pete, Pete cannot recover against Fred for negligence. The additional discussion of causation and damages will not be analyzed. Fred was not negligent to Pete.

Therefore, Pete can recover against Art for ordinary negligence. Pete can recover against Bildco for Products Liability Negligence, Strict Products Liability, and Implied Warranty. Pete cannot recover against Fred.