

**TRANSITIONING FROM MISSION IMPOSSIBLE  
TO MISSION ACCOMPLISHED:  
Tools to Increase Variety and Efficiency  
in Assessment and Teaching Students Basic Skills**

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Value of Variety  
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**Agency Law Writing Exercise**  
**“The Icy Driveway”**  
**25 points**

**Hypo:** James drove some friends to his cabin near South Lake Tahoe. The cabin is located at the end of a steep and winding driveway that is often icy. He left the car with the keys in it at the top of the driveway so he could walk down the path to ensure that the conditions were safe. After he determined that the conditions were safe, his friend Dean said, “I’ll drive the others.” James nodded. Unfortunately Dean drove poorly and caused the vehicle to slide off the driveway and roll down a steep hill, injuring several of the vehicle occupants. Can James be held liable for the injuries? Why or why not?

**Rules:** A principal may be held liable for the negligent acts of his servant. A servant is one employed to perform service for another in his affairs and who with respect to his physical conduct in the performance of the service is subject to the other’s control or right of control. An unpaid volunteer may be a servant if acting upon the principal’s request or direction.

## Agency Law Writing Exercise

### Sample Answer 1

The issue in the present hypothetical is whether James can be liable for the injuries the occupants of his car sustained as a result of Dean's negligence.

In this case, Dean acted as the servant of James in the capacity of a gratuitous agent. James, in turn had control over Dean's activity in that he could have prevented Dean from driving his vehicle by refusing to delegate that duty to him. James could argue that they were both on a joint venture and, by driving his car, Dean did not further James' business only. Dean, on the other hand, would counter James by arguing that he was acting as a gratuitous agent and servant without expectation of a reward. Therefore, James should be completely liable for the injuries of his passengers under vicarious liability. James could further argue that while he allowed Dean to drive, he did not control directly the instrumentality, which caused the accident and thus the passengers' injuries. Dean would argue that while he might have been James' gratuitous agent, he did not engage in his distinct occupation and did not have the skills needed for a professional driver.

Overall, Dean stands a better chance to prevail in this liability action, since he acted as a gratuitous agent, and James had the right to control his conduct.

Score: \_\_\_\_\_

### Grading Rubric

Narrow statement of the issue (3 points): \_\_\_\_\_

Clear, concise rule statement (4 points): \_\_\_\_\_

Use of specific facts in analysis (6 points): \_\_\_\_\_

Incorporation of logical inferences (5 points): \_\_\_\_\_

Solid conclusion (2 points): \_\_\_\_\_

Proper IRAC structure (3 points): \_\_\_\_\_

Professionalism (tone, grammar) (2 points): \_\_\_\_\_

TOTAL: \_\_\_\_\_/25

**Agency Law Writing Exercise**  
**Sample Answer 2**

Was Dean acting as a servant of James in driving the car?

The facts indicate that James drove some friends to his cabin, which infers that James owned the car and had control or a right of control over the car. He then left the car with the keys in it and nodded affirmatively in response to Dean when Dean said, "I'll drive the others." Both of these facts tend to show that James consented to allowing Dean to drive the car. It is also reasonable to infer that Dean sought permission to drive the others when he orally offered to drive the car down the icy driveway, and James' conduct – nodding – indicated consent. Driving the vehicle to the cabin was a service for James "in his affairs" because he had undertaken to drive his friends to that location.

It is likely that a court would find Dean to be a servant of James in driving the car. The facts suggest that Dean drove poorly and therefore negligently. Therefore, James would be liable under the doctrine of respondeat superior for the negligent actions of his servant.

Score: \_\_\_\_\_

**Grading Rubric**

Narrow statement of the issue (3 points): \_\_\_\_\_

Clear, concise rule statement (4 points): \_\_\_\_\_

Use of specific facts in analysis (6 points): \_\_\_\_\_

Incorporation of logical inferences (5 points): \_\_\_\_\_

Solid conclusion (2 points): \_\_\_\_\_

Proper IRAC structure (3 points): \_\_\_\_\_

Professionalism (tone, grammar) (2 points): \_\_\_\_\_

TOTAL: \_\_\_\_\_/25

## MEMORANDUM

To: Associates

From: Heather Harshman, Partner

Re: Fremont v. Dooley, Case No. 54-909, analysis of two contested libel issues

Date: January 31, 2012

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### DISCUSSION

This memorandum will address two of the four elements of libel in the lawsuit between Arthur Dooley (“Dooley”) and his landlord Otis Fremont (“Fremont”). Libel requires the **intentional publication of false statements** about a person that **humiliate** the person or subject him to the **loss of social prestige**.

**Publication** occurs when the defamatory matter is **delivered in written or other permanent form** to a **third person**. **Publication** is uncontested because Dooley’s fliers were **delivered in written form** to people around him when he was hit by a bicyclist. Being struck caused the fliers to be scattered by the wind. The people were not Fremont, the person against whom the allegations were made, so they were **third persons**.

**Humiliation** is also uncontested because Dooley accused Fremont of having “a long record of criminal convictions” when Fremont had only received three violation notices and a threat of a court order from the local housing commission. Since Fremont both made the repairs required by the commission and has a clean record, he was **humiliated** by Dooley’s statement that was likely made to at least 200 people since that is the number of copies Dooley made.

**Intent to publish** will be discussed in Part I. How the fliers were distributed will be a primary focus in this section. The **falsity** of Dooley’s statement will be addressed in Part II. The difference between receiving the notices and criminal convictions will be at the heart of the discussion.

**It is likely the court will find that Dooley did not have the intent to publish the fliers. (5)**

Intent occurs when the person is **reasonably chargeable with appreciation or knowledge** of the **likelihood** that the defamatory material **will be read by a third person. (8)**

**Intent** and the Part II element of **falsity** were discussed in White v. Ball (1996). Ball sent a letter to the president of R&T Construction Company in which he accused an R&T employee of stealing his watch while remodeling his home. A male friend of an employee stole the watch when he picked her up from Ball’s home at the end of a work day. The court held that Ball’s accusation was a **minor inaccuracy** because of the relationship between the employee and the thief, therefore the **gist** of his statement was substantially true. Also, since the president was a **third person** and he read the letter that Ball addressed to him, Ball had the **intent to publish to a third person. (11)**

**Intent** and **falsity** were also addressed in Simmons v. Deluxe Plaza Hotel (1988), but with contrary findings. The Deluxe manager wrote Simmons a letter that falsely accused him of failing to pay for and taking articles from a room. Mistaking Simmons for the true culprit, the manager sent the letter to Simmons's house via certified mail, not realizing that Simmons was married. His wife signed for and read the letter. The court found that, although the statement was **false**, the manager did not have the requisite **intent** because his action fell short of showing he was **reasonably chargeable** with **appreciation** or **knowledge** of the **likelihood** that the letter would **be read by a third person**, the wife. The possibility of this happening was not sufficient. (1)

Fremont will argue that Dooley had the **intent** to **publish** to a **third person** because his conduct is similar to that of Ball in White. Ball preparing the letter with the **intent** to **publish** it to the president established that he was **reasonably chargeable** with **appreciation** or **knowledge** of the **likelihood** that it would be **read by a third person**. Similarly, this is established by Dooley creating 200 fliers with the **intent** to **publish** them to the tenants in his building, who are **third persons** since they are not Fremont. Both Ball and Dooley *wanted* the material to be read by **third persons** – that was their purpose for creating the documents. Due to these similarities, the court should apply White to this matter and find that Dooley had the requisite **intent** to **publish**. (6)

Simmons does not apply because the manager prepared the letter for the plaintiff to read it, not a **third person**, whereas Dooley created the fliers with the **intent** to **publish** all 200 of them to **third persons**. It is irrelevant that passerbyers were the recipients of the fliers rather than the tenants because they are still **third persons**. (13)

Dooley will argue that he did not have the **intent** to **publish** to **third persons** because his conduct is similar to that of the hotel manager in Simmons. The manager purposefully addressing the letter to Simmons and not **knowing** that Simmons was married is similar to Dooley choosing to not distribute the fliers and not **knowing** that he would be hit by a bicyclist while carrying the fliers. The fliers being **published** when he was hit was not something Dooley could have **reasonably appreciated** or had **knowledge** of since it was an accident. Since the Simmons court found that the manager not **anticipating** the wife reading the letter did not establish that he was **reasonably chargeable** with **appreciation** or **knowledge** of the **likelihood** that it would be **read by a third person**, the court should find similarly for Dooley because he did not **anticipate** the fliers would be **read by third persons** due to him being hit by a bicyclist. (2)

White does not apply because Ball **intentionally** addressed the letter to the company president who was a **third person** since he did not steal the watch. It was not by accident that the president's name appeared on the envelope, unlike in Dooley's situation where the fliers were accidentally scattered by the wind when he was struck by a bicyclist. Since the fliers were published because of an accident rather than Dooley's **intent** for them to be **published**, White should not be applied. (12)

It will likely be found that Dooley did not have the **intent** to **publish** the fliers because being hit by a bicyclist is what caused the fliers to be **published to third persons**. Since Dooley did not act of his own volition in **publishing** the fliers, it is probable the court will find he did not have the **intent** to do so. (3)

**It is likely the court will find the allegations in Dooley's fliers were false. (17)**

A statement is **false** if the **gist**, the **sting**, of the matter is **false**. **Minor inaccuracies** and **technical errors** in **legal terminology** and **reports of matters involving legal violations** do not prove **falsity**. (9)

**Falsity** was discussed in Willow v. Orr (2001), which established that statements can be substantially true despite **errors** and **inaccuracies**. Ms. Orr wrote a letter to fifteen of her neighbors that said, "Help! Jason Willow kidnapped my child and said he would do it again." This statement was in response to her husband, Jason, taking their four-year-old son Matthew without her permission during their custody battle. She searched for Matthew for six weeks, ultimately finding him with his father in another state. A court ordered Matthew's return to her. The court found that Ms. Orr's allegations were substantially true because her mistaken use of the term "kidnapping" was only a **minor inaccuracy** and **technical error in legal terminology** and **reports of matters involving legal violations** that did not prove **falsity**. (4)

Fremont will argue that the content of the fliers was **false** because their **sting** was far from the truth. Just as the manager in Simmons mixing up the identity of Simmons with the true culprit was found to be a **false** accusation that had a **stinging** affect on Simmons, here, Dooley mixing up the term "criminal convictions" with the much lesser offense of "notices of violations" created a **false** statement that had a **stinging** affect on Fremont. The offender was not Simmons, just like the notices of violations were not criminal convictions. The court should apply Simmons and find that Dooley's statement was **false**. (15)

Willow does not apply because taking a child without the parent's consent could be reasonably construed as kidnapping by a lay person, whereas receiving notices of violations from a commission could not be reasonably construed as criminal convictions. White does not apply for the same reason. Ball saying that an employee stole the watch was viewed as being substantially true because someone who went to his home to see an employee stole it – there was a connection between the employee and friend. Contrarily, there is no connection between a notice of violation and criminal convictions – they are two extremes that aren't in the same arena. Since Ms. Orr's statement was viewed as a **technical error**, Ball's statement was viewed as a **minor inaccuracy**, and their statements were found to be true, these cases do not apply because Dooley's statement was a major **error** and **inaccuracy** and therefore **false**. (7)

Dooley will argue that the content of the fliers was not **false** because their **gist** was factually accurate. The court in Willow found that Ms. Orr indicating that her husband had kidnapped their son was not **false**. Her **technical error** in using the **legal term** “kidnap” did not obviate the fact that what she alleged was substantially true, which is similar to Dooley’s **technical error** in using the **legal term** “criminal convictions.” Although Fremont had no criminal record, he did receive three notices of violation from the local housing commission, and the commission threatened to seek a court order to force him to correct the violations. For a lay person like Dooley, this sounded like Fremont was criminally convicted for the violations. His **technical error** in using “criminal convictions” does not change that the **gist** of what he said was substantially true, just as in Willow. (14)

Similarly, since the court in White found that Ball alleging that an employee stole his watch was substantially true, the court in the situation at hand should find that Dooley’s allegation was substantially true. Although there was a **minor inaccuracy** in Ball’s statement since it was a friend of an employee who stole the watch, due to the relationship between the employee and the friend, his statement was deemed to be true. This is like Dooley’s statement having the **minor inaccuracy** of his use of the term “criminal convictions.” Fremont *had* received multiple violation notices and a threat to get a court order. Due to Fremont’s relationship with the commission, Dooley’s statement should be deemed to be true, just as Ball’s statement was. The court should apply the holdings in Willow and White and find that Dooley’s statement was not **false**. (10)

It is probable the court will apply Simmons and find that Dooley’s statements were **false**. This is because the **gist** of the allegations made by both the manager and Dooley were far from the truth. (16)

### CONCLUSION

It will likely the court will find that Dooley is not liable for Fremont’s libel allegations because only one of the two contested elements can be satisfied. It can probably be established that Dooley did not have the **intent** to **publish** the fliers because an accident caused them to be **published to third persons**. Accidents by their nature are not intentional or planned. Dooley could not have had the requisite **knowledge** that he would be hit by a bicyclist which would cause the fliers to be scattered by the wind and consequently **published to third persons**.

The **falsity** element will likely be established because of the significant discrepancy between Dooley’s statement and the actual situation. Saying that Fremont had a history of criminal convictions was an extreme take on Fremont receiving notices of violation and a threat of a court order for needed repairs. The **gist** of Dooley’s statement being far from the real situation makes it likely that it will be found to be **false**.