California Bar Examination

Performance Test and Selected Answers

February 2024

The State Bar of California

OFFICE OF ADMISSIONS

PERFORMANCE TEST AND SELECTED ANSWERS

FEBRUARY 2024

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2024 California Bar Examination and two selected answers.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

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California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

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PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them 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 references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. 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. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

KEANE, LEVI & JENSON

472 Fourth Street

Gaston, Columbia

MEMORANDUM

TO: Applicant

FROM: Helen Keane

DATE: February 27, 2024

RE: Panko v. Dahir

Anton Panko brought a negligence action against our client, John Dahir. Mr. Dahir and Mr. Panko were injured in a vehicle accident after Dahir stopped at the scene of a prior vehicle accident and Panko collided with his vehicle.

Discovery has been completed. We will now file a motion for summary judgment on defendant's behalf, supported by a persuasive brief, arguing that there is no triable issue of material fact that Panko's action is barred by Columbia's Good Samaritan Act and that defendant is entitled to judgment as a matter of law on that basis. I have attached relevant portions of the previous discovery.

Please draft a memorandum of points and authorities to support the motion. Do not include an introduction, a section on the factual background and procedural history, or a conclusion, though obviously you should incorporate the facts into your argument. I will draft them after I edit your memorandum.

EXCERPT OF TRANSCRIPT OF DEPOSITION OF JOHN DAHIR BY PLAINTIFF'S ATTORNEY, EMILY GUNN

. . . .

By Emily Gunn, Plaintiff's Attorney: Please describe what happened on the morning of November 4, 2022.

By John Dahir: I was driving my semi-tractor (without a trailer) east on Route 12 in rural Gaston County. I'm not sure of the exact time, but it was before sunrise.

Gunn: What were the driving conditions like?

Dahir: Route 12 is a two-lane county road. There was heavy fog. Traffic was sparse, but I drove at 35 to 40 miles per hour, well below the speed limit of 50 miles per hour, due to poor visibility.

Gunn: What happened?

Dahir: As I drove east, I saw a van in the ditch on the side of the road. The van was upright and its headlights were on, pointing at my semi as I approached. The van's roof, windshield, and hood were heavily damaged.

Gunn: What else did you see?

Dahir: I also saw another car stopped in the road near the truck, but that car drove off as I approached. I'm not sure, but it looked like there had been a two-car accident, and the other vehicle was leaving the scene. And I saw a man, who I later learned was Ryan Tram, kind of wandering around the van. I thought Tram was drunk at first or possibly injured.

Gunn: Then what happened?

Dahir: I stopped my semi in the road.

Gunn: Did you turn on the semi's hazard flashing lights?

Dahir: I'm not sure about the hazard lights. I might have as a reflex kind of thing, but I kept my foot on the brake, rather than shifting the semi's transmission to park. The semi's rear brake lights activate automatically as long as I press on the brake pedal. Besides which, the brake lights override the hazard lights, and the brake lights are as bright as the hazard lights.

Gunn: Did you pull your semi onto the side of the road?

Dahir: I didn't pull it off the road. There was virtually no shoulder that I could pull the semi onto. I checked my side mirrors as I slowed to a halt, but did not see any sign of vehicles approaching from behind.

Gunn: Why didn't you put the transmission into park?

Dahir: When I stopped, I didn't know what the situation was. I didn't want to put it in park in case I needed to move it on down the road quickly.

Gunn: After you stopped, what happened?

Dahir: I rolled down the passenger window and asked Tram, "Are you okay?" Tram climbed up to the semi's passenger-side window and responded, "Yeah."

Gunn: Then what?

Dahir: Next, I asked Tram if he wanted me to call 911. Tram said, "Yeah, if you don't mind."

Gunn: Then what?

Dahir: Well, immediately after Tram said yes, Panko's car rammed into the back of my semi without even trying to brake.

Gunn: Did you call 911?

Dahir: No. There was no time. It all happened so suddenly.

. . . .

By Helen Keane, Defense Attorney: Mr. Dahir, between the time you stopped your semi-tractor and being rear-ended by Panko how much time had elapsed?

Dahir: No more than 15 to 30 seconds.

. . . .

EXCERPT OF TRANSCRIPT OF DEPOSITION OF REBECCA HIGGINS BY DEFENDANT'S ATTORNEY, HELEN KEANE

. . . .

By Helen Keane, Defense Attorney: Please tell us what happened on the morning of November 4, 2022.

By Rebecca Higgins: I was traveling westbound on Route 12 when I saw a semi-truck stopped in the eastbound lane. The sun was not up yet and it was quite foggy, but I saw the semi's headlights.

Keane: What did you do?

Higgins: I slowed down and pulled past the semi, parked on the side of the road opposite the semi, and activated my hazard lights.

Keane: What did you see?

Higgins: At that point, I had to turn my head a bit and I saw the back of the semi and then saw this van, you know, kind of a work van that a plumber or delivery person might drive. The van was in the ditch of the eastbound side. It was pretty beaten up. Obviously, it had been in an accident.

Keane: Did you notice if the semi had lights on its back.

Higgins: Yes, I saw the semi's brake lights on.

Keane: Did you see the driver of the van?

Higgins: I saw who at the time I thought was the van's driver, and later found out it was Mr. Tram and he was the driver of the van.

Keane: Where was Mr. Tram when you saw him?

Higgins: He was standing next to the passenger window of the semi. It looked like he was talking to the driver of the semi.

Keane: Did you hear what they were saying?

Higgins: No, they were too far away and at that point my window was up.

Keane: Then what happened?

Higgins: I turned my head back around and saw what turned out to be Mr. Panko's car traveling eastbound in my direction.

Keane: What did you do?

Higgins: I turned on my car's beams to warn Panko, but he did not slow down. I also rolled down my window, waved my arms, and yelled, but Panko still did not slow down. He just collided with the rear of the semi, without braking.

Keane: How long was it between the time you first saw the semi and the time Mr. Panko's car hit the semi?

Higgins: Oh gosh, it was a matter of seconds.

. . . .

EXCERPT OF AFFIDAVIT OF RYAN TRAM

. . . .

I simply don't remember much of what happened. I was in a daze; I've got just snippets of memory. I remember walking in circles. At some point, I talked to the person who turned out to be John Dahir, the driver of the semi-truck that stopped right after the accident. I don't remember what either of us said.

. . . .

EXCERPT OF TRANSCRIPT OF DEPOSITION OF ANTON PANKO BY DEFENDANT'S ATTORNEY, HELEN KEANE

. . . .

By Helen Keane, Defense Attorney: Tell us what happened the morning of the accident.

By Anton Panko: As I have said many times, I was driving on Route 12 heading east going to work. It was still dark and very foggy, so I was driving only about 40 miles an hour.

Keane: So what happened?

Panko: Well, just out of the blue I see this semi-truck parked in the middle of the road. Because of the visibility, I didn't have time to brake and ran into the truck's rear end.

Keane: How far away were you when you first saw the truck?

Panko: I remember seeing the rear of the semi prior to the collision, but I'm not sure of the distance at which I first saw it.

Keane: You say the semi was parked in the middle of the road. Was it over the center line?

Panko: No, no. It was in the eastbound lane. I mean that was the problem. At a minimum he should have pulled over to the shoulder out of the way.

Keane: Did you see the semi's hazard lights flashing before you struck the semi?

Panko: No, there were no hazard lights on.

Keane: Did you see Mr. Tram before the collision?

Panko: Yes. He was standing at the semi's passenger window.

Keane: Did you hear any conversation between Mr. Tram and the semi driver, Mr. Dahir, before the accident?

Panko: Of course not.

Keane: Other than you, Mr. Dahir, and Mr. Tram, are you aware of any other people that witnessed the collision?

Panko: The only one I saw is a woman named Rebecca Higgins. When I got out of my car following the accident, I saw her parked on the other side of the road pointed westbound.

. . . .

February 2024

California Bar Examination

Performance Test

LIBRARY

PANKO v. DAHIR

LIBRARY

Good Samaritan Act (GSA)
Columbia Statute 34-30

34-30. Gratuitously rendered emergency care

Sec. 1.

(a) This section does not apply to services rendered by a health care provider to a patient in a health care facility.

(b) A person who comes upon the scene of an emergency or accident, or is summoned to the scene of an emergency or accident and, in good faith, gratuitously renders emergency care at the scene of the emergency or accident is immune from civil liability for any personal injury that results from:

(1) any act or omission by the person in rendering the emergency care; or

(2) any act or failure to act to provide or arrange for further medical treatment or care for the injured person; except for acts or omissions amounting to gross negligence.

Chung v. Delva

Columbia Supreme Court (2001)

Hana A. and Kwan W. Chung appealed from a summary judgment dismissing their negligence action against Andre Delva. We conclude there are genuine issues of material fact whether Delva is entitled to immunity under the Good Samaritan Act (GSA), Columbia Statute (CS) 34-30, and we reverse and remand for further proceedings.

While returning to their home, the Chungs encountered blizzard-like driving conditions. Falling snow and strong winds caused occasional “white-outs,” and the highway was slippery from ice and compacted snow. As the Chungs neared Gaston, they saw a semi-tractor and trailer jackknifed in the ditch along the driving lane and stopped to determine whether the truck occupants needed any assistance. While the Chungs' car was stopped, it was struck from behind by a car driven by Ibrahim Hopida. After Mr. Chung got out of the car, talked briefly with Hopida and exchanged insurance information with him, Mr. Chung began walking back to his car and Hopida continued on his journey.

Before Mr. Chung got back to his car, a second semi-tractor and trailer, operated by Delva, came upon the scene and stopped near Mr. Chung. Delva had a passenger with him whose window was rolled down. The passenger asked “if everything was okay.” Mr. Chung said they were “fine” and Delva should move on because “there was no sense making the accident any worse than it already was.” Delva began to leave, but his tractor-trailer slid backwards toward the Chung vehicle, in which Hana had remained, and pinned it between Delva's trailer and the jackknifed semi-tractor and trailer already in the ditch. Mr. Chung ran into the ditch to avoid Delva's truck.

The Chungs settled with Hopida for injuries sustained from the first collision. In September 1998, the Chungs brought this action against Delva seeking to recover damages for personal injuries allegedly suffered from the second accident. Delva filed a motion for summary judgment claiming the GSA barred the Chungs' action. The trial court concluded that, because Delva stopped to see if anyone at the accident scene needed help, the Chungs' action was, as a matter of law, barred by the GSA. The Chungs appealed from the summary judgment dismissing their action.

Summary judgment is a procedural device for promptly disposing of a lawsuit without trial if, after viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact. While any two parties in a lawsuit may allege that facts are in dispute, the disputed facts must be material. In simple terms, if the disputed facts would not change the result regardless of how the dispute was resolved, they are immaterial.

Columbia’s GSA bars actions against a person who, gratuitously and in good faith, renders aid or assistance at the scene of an emergency or accident, except for acts or omissions amounting to gross negligence.

“Emergency care” is statutorily defined to mean: “any actions which the aider reasonably believed were required to prevent death or serious permanent injury, disability or handicap, or reasonably believed would benefit the injured or ill person, depending upon the aider's perception of the nature and severity of the injury or illness and the total emergency situation, and that the aider reasonably believed the aider could successfully undertake.” CS Sec. 34-29 (1).

The Chungs argue the trial court erred because merely stopping at the scene of an automobile accident and inquiring whether any assistance is needed does not, as a matter of law, constitute rendering aid or assistance within the meaning of the GSA. The Chungs also argue in the alternative that summary

judgment was improper because it is unclear what Delva's intentions were when he stopped the semi-tractor and trailer on the highway.

We reject the Chungs' contention that the act of stopping on the side of the road at the scene of an accident to inquire whether any assistance is required cannot constitute rendering aid or assistance under the GSA.

Our primary objective in construing a statute is to ascertain the intent of the Legislature by looking at the language of the statute itself and giving it its plain, ordinary, and commonly understood meaning. Statutes are to be construed in a practical manner.

The obvious purpose of the GSA is to encourage those who do not have a preexisting duty to voluntarily act in times of emergency by limiting the threat of civil liability for the actions taken. Stopping at the scene of an accident to assess an apparent emergency situation and to learn whether assistance is required will normally be the first action taken by a person willing to help if the circumstances warrant assistance. The Chungs' argument that the GSA does not apply until life-saving affirmative action measures are actually undertaken is not supported by the broad statutory language and is inimical to the purpose of the Act.

We nevertheless reverse and remand for trial because genuine issues of material fact exist which preclude the granting of summary judgment in this case.

Under the terms of the GSA, Delva had to establish at least one of two things to have rendered aid or assistance necessary or helpful in the circumstances: (1) that Delva rendered actions which he reasonably believed were required to prevent death or serious injury and he reasonably believed he could successfully undertake; or (2) that Delva rendered actions that he reasonably believed would benefit an injured or ill person and he reasonably believed he could successfully undertake. Moreover, each alternative must be judged from Delva's

overall perception of the nature and severity of the injury or illness and the total emergency situation. Thus, the statute combines elements of the reasonable person standard as well as the aider's subjective state of mind. Generally, issues involving the reasonable person standard and a person's subjective state of mind are inappropriate for disposition by summary judgment. Additionally, when the nature of an emergency situation is not clearly apparent, the question whether there existed an emergency situation that warranted application of a Good Samaritan law has been held to be an issue of fact not amenable to summary judgment disposition.

In this case, the trial court found “it is uncontroverted, based upon Mr. Chung's own deposition testimony, that Delva stopped his truck at the accident scene to determine whether anybody needed help.” However, Delva presented no direct evidence showing his own state of mind or why he stopped the truck. There is no affidavit, deposition testimony, or other evidence from Delva addressing these questions. At most, the facts show Delva stopped the truck, the passenger's window was rolled down, and the passenger asked whether everything was okay. Although Mr. Chung testified Delva “stopped to see if everything was okay,” Mr. Chung further testified he did not talk to the driver of the truck and he believed the passenger had his window rolled down because “he was trying to see the side of the road, I don't know.”

Besides the lack of direct evidence of Delva's intentions and state of mind, other reasonable inferences could be drawn from Delva's act of stopping the truck. Delva's passenger may have had the window rolled down in an effort to maintain eye contact with the side of the road for navigational purposes. Alternatively, Delva may have seen the initial accident and slowed the truck as a precautionary measure, and because of the icy conditions, wind, and slow speed, he was unable to continue and simply stopped at a point near Mr. Chung. Other reasonable inferences could be drawn.

Moreover, even if Delva stopped the truck to ask whether everything was okay, there is no evidence Delva actually intended to provide aid or assistance, or to what extent he would have been willing and able to provide assistance if assistance was needed. Nor is there evidence Delva believed he could reasonably undertake any required actions even if he, in fact, intended to provide them. The trial court's opinion does not address the reasonableness of Delva's beliefs, which is a statutory prerequisite for immunity.

Undoubtedly, there will be cases in which immunity under the GSA can be determined under summary judgment standards. This is not such a case. A reasonable person could draw more than one conclusion from the evidence in the record. Under the unique circumstances of this case, we conclude there are genuine issues of material fact whether Delva is entitled to immunity under the GSA, and the trial court erred in granting summary judgment dismissing the Chungs' action.

Given our decision that there are issues of material fact, we need not reach Defendant’s claim that Delva’s actions constituted gross negligence.

Miller v. Jones

Columbia Court of Appeal (2007)

Following a nonjury trial, Andrew Miller appeals from the decision of the trial court that found Miller liable for gross negligence and awarded compensatory damages of $10,000 and punitive damages of $50,000. To award punitive damages, there must be a finding of gross negligence. The sole issue Miller raises is whether the court's decision awarding punitive damages was unsupported by its findings. Concluding the court's findings do not support its decision regarding gross negligence, we reverse the court's award of punitive damages.

On December 1, 2006, Miller, was involved in an accident while driving his truck. At approximately 4:00 p.m. Miller came to an intersection with a stop sign. Miller states that he stopped and looked both ways. Miller proceeded into the intersection and struck another vehicle. The intersecting road did not have a stop sign. Miller did not know where the car came from and felt that it must have been in a blind spot. The car flipped more than once. The driver of the car was seriously injured and had to be taken to the hospital from the accident scene for treatment. The damage for the accident was estimated to be between $5,000 and $10,000.

Miller argues that because the court's findings do not indicate that he committed gross negligence, they are insufficient to support the judgment awarding punitive damages.

Gross negligence is defined as a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party. S*ee, Palace Exploration Co. v. Petroleum Dev. Co.* (10th Cir. 2004) ("Gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty or property of another that may result in such a gross want of care for the rights of others and the public that a finding of a willful, wanton, deliberate act is justified."). To establish

gross negligence a party must demonstrate ordinary negligence and must then prove that the defendant acted with utter unconcern for the safety of others, or with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law.

At no point did the trial court's findings indicate that Miller committed gross negligence; instead, the findings indicate merely that Miller was negligent. The distinction is not merely semantic. Indeed, our Supreme Court has recognized that when comparing negligence to gross negligence, "the level of conduct amounting to a breach of that duty is quite different." *Sharp v. Hale* (Colum. Supreme Ct. 2000). As the court failed to find that Miller's conduct constituted gross negligence, and it made a specific finding of mere negligence, its findings were insufficient to support the judgment awarding punitive damages, which requires gross negligence.

Further, the court's factual findings are insufficient to support a finding of gross negligence. The question of whether an act or omission constitutes gross negligence is generally a question of fact. As in a summary judgment motion, however, the question may become one of law if the facts are undisputed and only a single inference can be drawn from those facts. Here, the facts are not disputed. Miller approached an intersection, stopped at a stop sign, proceeded into the intersection, and struck a vehicle that he had not seen, claiming that it was in his blind spot. We conclude that these facts, as a matter of law, indicate that Miller was negligent, but not grossly negligent.

Nowhere in its findings does the court indicate that Miller engaged in any sort of conduct with reckless disregard. Indeed, the court found that Miller's "actions may not have been intentional, but if the claimant had a blind spot he should have taken more care in looking both ways." The fact that Miller did look both ways clearly indicates that he did not recklessly disregard this duty to other drivers. Instead, Miller did not "disregard" his duty at all; he merely failed to

adequately meet it. Therefore, Miller was negligent, but his regard for other motorists precludes a finding of gross negligence. We conclude the court's findings fail to support its judgment and the evidence fails to support a finding of gross negligence that would justify an award of punitive damages.

Reversed in part.

PT: SELECTED ANSWER 1

I. Motion for Summary Judgment Standard

Under Columbia law, "[s]ummary judgment is a procedural device for promptly disposing of a lawsuit without a trial if, after viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact. While any two parties in a lawsuit may allege that facts are in dispute, the disputed facts must be material. In simple terms, if the disputed facts would not change the result regardless of how the dispute was resolved, they are immaterial." *Chung v. Delva*.

II. There is No Genuine Issue of Material Fact that Defendant is Entitled to GSA Immunity

Defendant submits that there is no genuine issue of material fact that he is entitled to immunity from civil liability under the Columbia Good Samaritan Act. This statute provides, "A person who comes upon the scene of an emergency or accident, . . . and, in good faith, gratuitously renders emergency care at the scene of the emergency or accident is immune from civil liability for any personal injury that results from: (1) any act or omission by the person in rendering the emergency care; or (2) any act or failure to provide or arrange for further medical treatment or care for the injured person; except for acts or omissions amounting to gross negligence." CS Sec. 34-40(1)(b).

Here, there is no genuine issue of material fact that Defendant's actions and omissions were in the context of rendering "emergency care" as that term is defined. The Columbia Supreme Court has observed that, within the meaning of this statute,

"emergency care" means "'any actions which the aider reasonably believed were required to prevent death or serious permanent injury, disability or handicap, or reasonably believed would benefit the injured or ill person, depending upon the aider's perception of the nature and severity of the injury or illness and the total emergency situation, and that the aider reasonably believed the aider could successfully undertake.'" *Chung v. Delva* (Colum. 2001) (quoting CS Sec. 34-29(1)).

Summary judgment may be granted under this statute. Although the Columbia Supreme Court has held that "whether there existed an emergency situation that warranted application of a Good Samaritan law has been held to be an issue of fact not amenable to summary judgment disposition," it also noted in the same opinion that "[u]ndoubtedly, there will be causes in which immunity under the GSA can be determined under summary judgment standards." *Id*. Here, Plaintiff cannot show a genuine issue of material fact that Defendant is not entitled to GSA immunity under the applicable standards.

Under the relevant statutory language, Defendant is entitled to summary judgment arising out of his GSA immunity. First, the predicate of the statute requires that "a person . . come[ ] upon the scene of an emergency or accident . . . and, in good faith, gratuitously render[ ] emergency care at the scene of the emergency or accident." The Columbia Supreme Court, in an opinion directly addressing the matter, has elaborated on the nature of emergency care, holding that "the statute combines elements of the reasonable person standard as well as the aider's subjective state of mind." *Chung v. Delva.* Thus, to obtain immunity under the GSA, Defendant must show that there is no genuine issue of material fact that he rendered emergency care within the meaning of

the GSA, by showing that (1) he subjectively believed he was rendering emergency care, and (2) that the belief was objectively reasonable, considering "the aider's perception of the nature and severity of the injury or illness and the total emergency situation" and whether "the aider reasonably believed the aider could successfully undertake" his actions. *See* CS Sec. 34-29(1).

Because the statute embodies a "reasonable person standard" as well as inquiry into "the aider's subjective state of mind," it is necessary to set forth the undisputed facts as to these two issues. Defendant, John Dahir, testified at his deposition that he "was driving [his] semi-tractor (without a trailer) east on Route 12 in rural Gaston County" when he "saw a van in the ditch on the side of the road." (*See* Dep. John Dahir). The van appeared to Dahir to be "upright and its headlights were on," and they were "pointing at [his] semi as [he] approached." (*Id.*). Notably, Dahir also discovered that "[t]he van's roof, windshield, and hood were heavily damaged." (*Id.*). Dahir also noticed a vehicle quickly speed away as he approached, and he inferred that "the other vehicle was leaving the scene" of a two-car accident. (*Id.*). This left only Dahir to provide any assistance to the occupants of what was apparently a badly damaged, wrecked van in a rural part of Gaston County.

As he approached, he noticed the van's driver, who was later identified as Ryan Tram, was stumbling around the van. Dahir "thought Tram was drunk . . . or possibly injured" (*Id.*), which are, of course, likely circumstances to be observed at the scene of a multi-vehicle accident. Although Dahir testified that he could not remember whether he activated his vehicle's hazard lights, he did recall decelerating so that he could speak to Tram. The relevant undisputed facts that occurred next are worth reproducing in full:

"**Q.** After you stopped, what happened? **A.** I rolled down the passenger window and asked Tram, 'Are you okay?' Tram climbed up to the semi's passenger-side window and responded, 'Yeah.' **Q.** Then what? **A.** Next, I asked Tram if he wanted me to call 911. Tram said, 'Yeah, if you don't mind.' **Q.** Then what? **A.** Well, immediately after Tram said yes, Panko's car rammed into the back of my semi without even trying to brake." (*Id.*).

Of course, Dahir never had the opportunity to call 911, due to the second accident involving both his semi and Plaintiff's vehicle. However, this is not a prerequisite to GSA immunity because Dahir subjectively and reasonably believed that he was providing the necessary services within the context of an emergency. The Supreme Court has noted that a Good Samaritan under the statute can merely "stop[ ] on the side of the road at the scene of an accident to inquire whether any assistance is required" can "constitute rendering aid or assistance under the GSA." *Chung*. Thus, arguments "that the GSA does not apply until life-saving affirmative action measures are actually undertaken is not supported by the broad statutory language and is inimical to the purpose of the Act." *Chung*. As such, Dahir's testimony is sufficient to warrant summary judgment, if the remainder of the GSA immunity requirements are without genuine factual dispute.

However, Dahir's deposition testimony establishes the uncontroverted fact that he sincerely believed he had happened upon the scene of an accident, with a damaged vehicle and a lone, dazed driver, and that he intended to contact emergency medical services. There can be no doubt that Defendant's testimony establishes that the belief was held in "good faith" within the meaning of CS Sec. 34-40, and that it was his subjective state of mind during the accident. However, Defendant agrees that the belief

must also be reasonable, and there can be no question that the belief was reasonable. There is also no genuine issue of material fact that the circumstances--involving a badly damaged vehicle with a collapsing roof, windshield, and hood, and a stumbling, possibly injured or intoxicated driver--reasonably indicate an accident has occurred and that emergency services could be tendered within the meaning of the statute. Moreover, another driver, Rebecca Higgins, who witnessed the accident noted that "[o]bviously, it had been in an accident" (Dep. Higgins), thus adding to the reasonableness of the belief. Therefore, there is no genuine issue of material fact that Defendant is entitled to GSA immunity.

It should be noted that, in *Chung*, the Columbia Supreme Court found that the record lacked "direct evidence of Delva's intentions and state of mind," and thus reversed the trial court on the applicability of GSA immunity due to this lack of evidence. *Chung*. In factual distinction, the driver in *Chung* merely "ask[ed] whether everything was okay," and there was no evidence that he "actually intended to provide aid or assistance, or to what extent he would have been willing and able to provide assistance if assistance was needed." *Id.* Finally, the Supreme Court added that there was no evidence the defendant in that case "believed he could reasonably undertake any required actions if he, in fact, intended to provide them." *Id.* Here, this case presents the evidence needed to apply the GSA under summary judgment standards, as was predicted in *Chung*. Dahir did not merely ask whether everything was okay; in fact his deposition testimony establishes that he gratuitously offered to provide aid or assistance to Tram by offering to contact emergency services, which establishes both the necessary belief and intent, the reasonableness of his belief, and the express extent to which he was willing to

provide and undertake assistance in the form of a 911 call.

II. Plaintiff Cannot Establish a Genuine Issue of Material Fact that the Gross Negligence Exception Applies

Next, Defendant anticipates that Plaintiff will argue that the "gross negligence" exception embodied in CS Sec. 34-30(2) applies. First, Defendant notes that this exception only applies to the second subsection of the Good Samaritan statute, and thus Defendant enjoys Good Samaritan immunity regardless of gross negligence with respect to his activities under section (1) of the statute. Because Defendant's acts or omissions could have concerned "render[ing] emergency care" under the statute per section (1), as discussed at length above, the gross negligence exception does not apply.

However, even were Defendant's actions to fall under the second subsection of the Good Samaritan statute, such that it is subject to the "gross negligence" exception, Plaintiff cannot establish a genuine issue of material fact showing that Defendant acted with "gross negligence" within the meaning of this statute. Columbia defines "gross negligence" as "a conscious, voluntary act or omission reckless disregard of a legal duty and of the consequences to another party." *Miller v. Jones* (Colum. Ct. App. 2007); *see also Palace Exploration Co. v. Petroleum Dev. Co.* (10th Cir. 2004). "To establish gross negligence a party must demonstrate ordinary negligence and must then prove that the defendant acted with utter unconcern for the safety of others, or with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law." *Miller.* "The question of whether an act or omission constitutes gross

negligence is generally a question of fact. As in a summary judgment motion, however, the question may become one of law if the facts are undisputed and only a single inference can be drawn from those facts." *Id.*

In *Miller*, a truck driver came to an intersection at a stop sign, stopped and looked both ways, and then proceeded into the intersection, where he struck another vehicle. The trial court found facts constituting ordinary negligence, but that these undisputed facts did not allow for an inference for gross negligence. Importantly, the Columbia Court of Appeal thereby found that the undisputed facts can support a finding of ordinary negligence while failing to support an inference of gross negligence, warranting judgment as a matter of law.

Here, the facts are undisputed. The weather was dark and foggy, traffic was sparse, and Defendant was moving at a slower speed than the posted speed limit out of an abundance of caution due to the weather. (See Dep. Panko, Dahir). After happening upon the scene of the accident, Defendant came to a stop in the road due to his belief that there was no shoulder. (*See* Dep. Dahir). Higgins noted that Defendant's "brake lights were on" (Dep. Higgins), which Defendant testified were as bright as his hazard lights (*See* Dep. Dahir), leaving Defendant no alternate or safer way of indicating his presence. This was also noted by Higgins, who passed by the scene of the accident and attempted to warn Panko of Defendant's presence before he collided with Defendant's vehicle, but was unsuccessful in doing so. (*See* Dep. Higgins).

Assuming *arguendo* that these facts even indicate ordinary negligence--given that Defendant intended to render emergency services to a possibly injured person, and

given that he had no shoulder to pull onto and possessed no brighter lights to indicate his presence in the fog--there can be no genuine issue of material fact that the facts do not give rise to a permissible inference of gross negligence. It is true that there is some factual dispute in the record as to the length of time that elapsed between Dahir's stop and Panko's collision, and whether there was a shoulder at all, and whether his brake lights were on, but Defendant submits that these are "immaterial facts" which "would not change the result regardless of how the dispute was resolved." *Chung*.

Simply put, the question is whether Defendant "recklessly disregard[ed] this duty to other drivers." *Miller.* Although the situation was not ideal, there is no evidence indicating that Defendant acted with reckless disregard for other drivers in his rendering of emergency care. Therefore, because there is no genuine issue of material fact that Dahir was not grossly negligent, and that he does not fall under the exception in subsection 2 of the GSA statute, Defendant is entitled to GSA immunity and should be dismissed from this action with prejudice.

PT: SELECTED ANSWER 2

TO: Helen Keane

FROM: Applicant

DATE: February 27, 2024

RE: Panko v. Dahir

Please find below a memorandum of points and authorities in support of our prospective motion for summary judgment. The memorandum is formulated as a draft argument section so that it may be seamlessly integrated into our draft motion. Potential weaknesses in our case are formulated as counterarguments. Please let me know if you have any further questions.

I. MR. DAHIR IS ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF COLUMBIA'S GOOD SAMARITAN ACT.

Columbia's Good Samaritan Act, CS 34-30, prescribes certain categories of civil immunity to those who come "upon the scene of an emergency accident, or [are] summoned to the scene of an emergency or accident, and in good faith, gratuitously renders emergency care at the scene of the emergency or accident." CS34-30(b); see also Chung ("Columbia's GSA bars actions against a person who, gratuitously and in good faith, renders aid or assistance at the scene of an emergency or accident"). Specifically, the good samaritan is immune from civil liability for any personal injury that results from (1) any act or omission by the person in rendering the emergency care, or

(2) any act or failure to act to provide or arrange for further medical treatment or care--unless grossly negligent. CS34-30(b)(2); see also Chung (explaining that Columbia's GSA excludes from its protections "acts or omissions amounting to gross negligence").

Under Columbia law, conduct will qualify as "emergency care" if (1) the aider "reasonably believed" the conduct was "required to prevent death or serious permanent injury, disability or handicap" or (2) the aider "reasonably believed" the conduct "would benefit the injured or ill person," and (3) the aider reasonably believed" they could "successfully undertake" the emergency aid. Chung (quoting CS SEc. 34-29(1). Reasonableness is assessed based "upon the aider's perception of the nature and severity of the injury or illness and the total emergency situation. Id. Stated differently, the aider's belief must be objectively reasonable based on the aider's subjective perception of the situation at hand. Chung.

The GSA does not withhold immunity until life-saving affirmative action measures are actually undertaken. Chung. Indeed, stopping on the side of the road at the scene of an accident to inquire if any assistance is required may in some instances constitute rendering aid or assistance under the GSA. Chung.

When in doubt about the GSA's scope, courts should look to the plain, ordinary, and commonly understood meaning of the GSA. Chung. Practicality is key. For the GSA, the "obvious purpose . . . is to encourage those who do not have a preexisting duty to voluntarily act in times of emergency by limiting the threat of civil liability for the actions taken. Chung.

A. A party is entitled to summary judgment when there are no genuine dispute of

material fact and the moving party is entitled to judgment as a matter of law.

Summary judgment is "a procedural device for promptly disposing of a lawsuit without trial if, after viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact." Chung. Facts are not in genuine dispute simply because "two parties in a lawsuit may allege that the facts are in dispute." Id. Rather, the facts must be material and the dispute must be genuine. Id. To be material, a dispute fact must be capable of changing the result of the motion for summary judgment if viewed in one party's--or another's--favor. Id.

Summary judgment may in some instances be appropriate in determining whether GSA immunity applies. See Chung ("Undoubtedly, there will be cases in which immunity under the GSA can be determined under summary judgment standards.").

B. There are no genuine dispute of material fact regarding whether, based on his subjective perception of the situation Mr. Dahir reasonably believed that emergency aid was needed and whether he could provide it.

Here, the undisputed facts indicate that Mr. Dahir had an objectively reasonable belief, based on his subjective perceptions of the scene, that his conduct would benefit an injured person.

When Mr. Dahir pulled up to the scene, his subjective perception was that two cars had gotten into an accident; one car was fine and drove off, but the other appeared to be severely damaged. Depo. He inquired further, asking the person in the vehicle (Tram) whether Tram was okay and whether Tram wanted Mr. Dahir to call 911. That

confirmed Mr. Dahir's subjective perception of the situation that the "nature or severity" of Tram's injury was such that it required emergency aid.

That subjective perception is objectively reasonable. When a person in a damaged vehicle indicates that he needs assistance from a 911 dispatcher, it is reasonable for a person to think that the injured person would "benefit" from the aider's emergency assistance.

It was also objectively reasonable for Mr. Dahir to believe that he could provide emergency aid. Mr. Dahir was a competent adult and--until Mr. Panko crashed into Mr. Dahir's vehicle-- Mr. Dahir was able to call 911. Calling 911 was the precise sort of emergency aid that Mr. Dahir had offered and that Tram had accepted.

Mr. Panko will argue that summary judgment is not appropriate here because the GSA implicates questions about Mr. Dahir's subjective state of mind. Mr. Panko will argue that, as in Chung, "issues involving the reasonable person standard and a person's subjective state of mind are inappropriate for disposition by summary judgment." Moreover, as in Chung, the person who was being aided in this case-- Tram-- does not have any recollection of why Mr. Dahir stopped.

This argument is not persuasive. In Chung, the appellate court determined the trial court erred by concluding that it was "uncontroverted" that the aider stopped his truck at the accident scene to determine whether anybody needed help, when in reality the aider had presented "no direct evidence showing his own state of mind or why he stopped the truck"-- no affidavit, deposition testimony, or any other evidence. Here, however, Mr. Dahir has provided direct evidence through his deposition testimony of why he stopped

and what the person being aided understood, and asked for, at the time. These facts are undisputed and give rise to only one inference-- a reasonable person would have believed that Tram was injured and that an aider could benefit that injured person.

The undisputed facts will also show that Mr. Dahir had an objectively reasonable belief, based on his subjective perceptions of the scene, that he could actually provide aid.

What is more, the aider in Chung had not presented any evidence about whether he "actually intended to provide aid or assistance"; "to what extent he would have been willing and able to provide assistance if assistance was needed" or if the aider believed "he could reasonably undertake any required actions." Chung.

Here, Mr. Dahir's undisputed testimony shows that he actually intended to provide aid or assistance. He asked Tram if Tram needed 911 assistance--something all competent adults can reasonably do. And Mr. Dahir indicated that he was willing to provide that assistance until Mr. Panko crashed into him.

Moreover, Mr. Panko will argue that the nature of the emergency situation here was not "clearly apparent"-- making summary judgment inappropriate. See Chung.

This argument will also be unpersuasive. The undisputed facts show that as Mr. Dahir approached Tram's vehicle, the roof, windshield, and hood of the vehicle were heavily damaged. Depo. The only other car near the damaged vehicle was not attempting to help, but drove off, leaving behind the damaged vehicle--and those inside. The emergency was clearly apparent here.

The undisputed facts show that Mr. Dahir satisfies the affirmative elements of

Columbia's GSA.

C. There are no genuine disputes of material fact regarding whether Mr. Dahir committed gross negligence in rendering aid.

Gross negligence is defined as "conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party. Miller (citing Palace Exploration). Gross negligence may be an "intentional failure to perform a manifest duty" in "reckless disregard" or "callous indifference" to the consequences to others. Palace Exploration (relied upon by Miller). To establish gross negligence "a party must demonstrate ordinary negligence" and then "prove that the defendant acted with utter unconcern for the safety of others, or with such a reckless disregard for the rights of others that a conscious indifference to consequences is implied in law." Miller.

Gross negligence only exists if a party *disregards* a duty of care--and substantially so--not simply because the party failed to adequately fulfill that duty. Miller.

A lack of gross negligence may be established at summary judgment if "the facts are undisputed and only a single inference can be drawn from those facts." Miller. A party is not grossly negligent merely because he "should have taken more care." Miller.

The undisputed facts show that Mr. Dahir did not act with utter unconcern for the safety of others or a conscious indifference to consequences to others.

Mr. Dahir's conduct as he was driving on November 4 showed a genuine attempt to comply with his duty of care as a driver on the road.

Undisputed deposition testimony from Mr. Dahir shows that, because of the foggy conditions and the resulting poor visibility, he was driving well-below the speed limit as he approached Tram's car.

Moreover, when Mr. Dahir stopped his car, he kept his foot on the breaks--which exhibited a light to oncoming traffic-- that was just as bright as his hazard lights. He also checked his mirrors as he slowed to a halt and ensured that he "did not see any sign of vehicles approaching from behind." Depo. Indeed, undisputed witness deposition testimony from *plaintiff's own witness* shows that other drivers could see the lights on the back of Mr. Dahir's truck even through the heavy fog on November 4. Higgins Depo.

Mr. Panko will argue that Mr. Dahir was negligent because there is a dispute of material fact as to whether Mr. Dahir turned on his hazard lights when he stopped to offer assistance to Tram. This argument is unpersuasive. As Chung explains, a dispute of fact will alter the outcome of the case if resolved in one party's favor. But here, if Mr. Panko is right that Mr. Dahir did not turn on his hazard lights, that will *at most* give rise to a showing of negligence--not gross negligence.

Take, Miller, for example. There the Columbia Court of appeals determined that the defendant was negligent because he could have taken *more* care to look both ways when he knew that he had a blind spot, but "the fact that Miller did look both ways clearly indicates that he did not recklessly disregard his duty to other drivers." Here, Mr. Dahir may have been able to take *more* care by pulling to the side of the road and turning on his hazards, the fact that he was (1) coming to a slow stop, (2) keeping an

eye out for other drivers, (3) and keeping his equally bright brake lights on, exhibit that Mr. Dahir did not recklessly disregard his duty to other drivers. Mr. Panko has not presented any evidence showing otherwise.

Indeed, the evidence strongly shows that Mr. Panko would have collided into Mr. Dahir even if Mr. Dahir had put his hazard lights on. Higgins Depo.

There are no genuine disputes of material fact as to whether Mr. Dahir was grossly negligent; he was not.

Conclusion

There is no genuine dispute as to whether Mr. Dahir satisfies the elements of Columbia's GSA--he does. Nor is there any dispute about whether Mr. Dahir engaged in gross negligence--he did not. Mr. Dahir is entitled to summary judgment on plaintiff's negligence claims. Affording immunity here comports with the very "obvious purpose" of Columbia's GSA.