

GRADER'S GUIDE

*** QUESTION NO. 4 ***

SUBJECT: CONTRACTS

1. ABC's claim against Windsor based on setting aside the release agreement (50 points).

ABC and Windsor entered into a release agreement in which ABC received \$100,000 in exchange for a release from its claim that Windsor owed \$200,000 for the modifications to the tennis facility. To set aside the release agreement, ABC would probably claim that it signed the release under economic duress.

Economic duress is a valid basis for setting aside a release agreement where one party involuntarily accepted the terms of another, circumstances permitted no other alternative, and such circumstances were the result of coercive acts of the other party. *Northern Fabrication Co., Inc. v. Unocal*, 980 P.2d 958, 960 (Alaska 1999); *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 657 (Alaska 1992).

Whether a party acted involuntarily is a subjective test. *Id.* Thus, ABC could claim that it signed the release involuntarily, and that would be sufficient to satisfy the first requirement. ABC would probably maintain that it signed involuntarily because otherwise it would have failed to survive financially.

Whether ABC had any alternative to signing the release is an objective test, under the second requirement. *Id.* ABC could have sued Windsor for breach of contract in the courts, for failure to pay for the modifications. However, ABC would probably argue that such a lawsuit would have taken too much time to be a reasonable alternative, and that by the time it obtained a judgment for the full \$200,000 it would have been bankrupt. It is possible under these circumstances that a court would find that a lawsuit was not a practical alternative.

As for the third requirement for demonstrating economic duress, ABC would have to show coercive acts by Windsor and a causal link between the coercive acts and the circumstances of economic duress. The coercive acts could be acts which were criminal, tortious, or even merely wrongful in the moral sense. *Zeilinger*, 823 P.2d at 658. ABC might be able to meet this requirement if it could show that Windsor deliberately withheld payment of an acknowledged debt knowing that it would force ABC to accept less than the full amount because of ABC's financial condition. *Northern Fabrication*, 980 P.2d at 961.

Windsor knew that ABC was in financial difficulty before the parties signed the release agreement. Windsor stated that it would consider paying the entire amount that ABC claimed subject to review of ABC's billing records, but then only agreed to pay half of the claimed amount when it learned of ABC's financial problems, and without a review of the billing records. However, the facts do not indicate that Windsor ever acknowledged that it owed ABC the full amount for the modifications. Also, the facts do not establish that Windsor withheld payment of the \$200,000 to coerce ABC into signing the release agreement. Finally, Windsor did not cause ABC's financial problems according to the facts.

While ABC entered into the release agreement because of its financial burdens, that is not Windsor's fault. Quite simply, economic necessity, very often the primary motivation for compromise, is not enough, by itself, to void an otherwise valid release. *Zeilinger*, 823 P.2d at 658. The Alaska Supreme Court has noted that the preservation of agreements entered into in good faith and the encouragement of settlement of disputes constitute strong arguments for enforcing releases. *Witt v. Watkins*, 579 P.2d 1065, 1068 (Alaska 1978).

Whatever the merits of ABC's claims that Windsor owed \$200,000 for the modifications to the tennis facility, a court would likely find that the parties settled that dispute under the release agreement, according to the facts provided.

2. ABC's claim against Windsor for disclosure of the tennis court design (50 points).

ABC has a valid claim against Windsor for breach of the nondisclosure agreement. All the required elements of contract formation are present. See generally *Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 665 n.12 (Alaska 2002)(the formation of a valid contract requires an offer encompassing all essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound); *Magill v. Nelbro Packing Co.*, 43 P.3d 140, 142 (Alaska 2001)(same); *Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997)(same).

ABC offered to disclose its design under certain conditions, and Windsor unequivocally accepted the offer. Both parties offered consideration: ABC disclosed its design to Windsor in order to improve ABC's chances to obtain the construction contract. Windsor promised to keep the design confidential, which design would potentially lower Windsor's construction and operating costs. There is nothing in the facts to indicate that the parties did not intend to be bound by the agreement.

A nondisclosure agreement is not a typical agreement for the sale of goods or services at an agreed-upon price; rather, it is an agreement for disclosure of an idea in exchange for a promise not to use the idea without including the disclosing party in its implementation. *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660, 665 (Alaska 2002). Windsor breached the nondisclosure agreement by using the design without ABC's knowledge or participation for the Seattle tennis facility.

ABC would probably seek its expectation damages as a result of Windsor's breach of the nondisclosure agreement. One purpose of awarding damages for a breach of contract is to put the injured party in as good a position as that party would have been in had the contract been fully performed. *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068, 1071 (Alaska 1981). The damages available in a breach of contract case are limited to those damages that are the natural consequence of the breach. *Arctic Contractors, Inc. v. State*, 564 P.2d 30, 44-45 (Alaska 1977).

The appropriate measure of damages for Windsor's breach of the nondisclosure agreement could be the lost profit that ABC would have realized if it had participated in the construction of the Seattle facility, if it could show that it was willing and able to build the Seattle facility. *Reeves*, 56 P.3d at 667. In order to recover lost profits in a breach of contract action, the plaintiff must present evidence sufficient to calculate the amount of loss caused by the breach. Damages must be proved with reasonable certainty, and there must be a reasonable basis for computing the award. *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 41 (Alaska 1998).

Windsor might argue that ABC's profits would be too speculative. An award of lost profits is not appropriate if it is the result of speculation. *Dowling Supply & Equip., Inc. v. City of Anchorage*, 490 P.2d 907, 909-10 (Alaska 1971). However, ABC might be able to demonstrate the expected expenses and profit, using its own data from other similar construction projects, or using data from Seattle construction companies.

Alternatively, ABC's appropriate damages might be measured through a reasonable fee for granting use of its design by another construction company for the Seattle project, if ABC was unable to build the Seattle facility.

Thus, ABC should be able to recover damages in the amount of its expected profit that it was denied by Windsor's breach of the agreement, or through a reasonable fee for the use of its design.