

DePaul University College of Law
Class Simulation Video
Professor Cauble

Dear Admitted Students,

The video that I have recorded is a simulation of a Contracts class. Contracts is a required first year course at DePaul and at most other law schools. The contracts course provides critical foundational knowledge of the common law generally and contracts law specifically. In addition, your first semester 1L classes will provide you with the necessary tools to study law, including reading cases and other sources of legal authority, understanding the law, and applying legal principles to hypotheticals.

In preparation for watching the video, you should read the case below (*Lucy v. Zehmer*) including the footnotes (the footnotes were not contained in the original case – they include information that I added to clarify some of the terminology that may be new to you). You should also consider the answers to the questions that follow the case. I will discuss these questions in the video.

I would also like to make one other suggestion of something you can do to make the class simulation more closely resemble a real class. If you live with a friend or family member who is willing, consider asking them to also read the case and watch the video with you. At various points in the video, I will suggest that you might pause it to think about a question that I have asked. You could use that opportunity to not only think about the question yourself but discuss it with your friend or family member before resuming the video. If you do not live with someone who can participate in this exercise with you in person, please feel free to share the materials and the link with them and ask if they are willing to watch it with you while you collaborate with them over the phone.

If you have any questions about the class simulation or otherwise, please feel free to contact me.

I hope to have a chance to meet all of you in the fall!

Sincerely,

Emily Cauble

Professor of Law
DePaul University College of Law

Supreme Court of Appeals of Virginia.¹

W. O. LUCY AND J. C. LUCY

v.

A. H. ZEHMER AND IDA S. ZEHMER.

JUDGE: BUCHANAN

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for \$50,000.² J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: 'We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer,' and signed by the defendants, A. H. Zehmer and Ida S. Zehmer....

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.³

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer \$20,000 for the farm which Zehmer had accepted, but the agreement was oral and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, 'I bet you wouldn't take \$50,000.00 for that place.' Zehmer replied, 'Yes, I would too; you wouldn't give fifty.' Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to

¹ You will notice that this is a case decided by a court in Virginia. You will find that many of the cases you encounter in your first year courses are not specifically Illinois cases. That said, in many instances, you will be reading cases that establish foundational principles that apply in most jurisdictions. For instance, the "objective theory of contract" discussed in this case is a rule that cuts across jurisdictions. Also, the aim of many first year courses is to teach you how to read cases and apply the materials in the cases to new facts. Thus, the idea is not necessarily to learn all of the possible rules that might apply in Illinois. Rather, the goal is to acquire the tools that you will need to research the new issues that you encounter as a practicing lawyer.

² Note: "Specific performance" is a remedy that involves the court ordering the parties to perform under the contract. If the plaintiffs were granted specific performance, the court would order the defendants to transfer the farm to plaintiffs in exchange for the plaintiffs' payment of \$50,000.

³ This means that a lower court held in favor of the Zehmer's (concluding that the Lucy's had no right to specific performance), and the Lucy's appealed that decision to the Supreme Court of Virginia.

W. O. Lucy the Ferguson Farm for \$50,000 complete.' Lucy told him he had better change it to 'We' because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for \$50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him \$5 which Zehmer refused, saying, 'You don't need to give me any money, you got the agreement there signed by both of us.'

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise \$50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for \$11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was 'pretty high.' He said to Lucy, 'Boy, you got some good liquor, drinking, ain't you?' Lucy then offered him a drink. 'I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too.'

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, 'I bet you wouldn't take \$50,000.00 for it.' Zehmer asked him if he would give \$50,000 and Lucy said yes. Zehmer replied, 'You haven't got \$50,000 in cash.' Lucy said he did and Zehmer replied that he did not believe it. They argued 'pro and con for a long time,' mainly about 'whether he had \$50,000 in cash that he could put up right then and buy that farm.'

Finally, said Zehmer, Lucy told him if he didn't believe he had \$50,000, 'you sign that piece of paper here and say you will take \$50,000.00 for the farm.' He, Zehmer, 'just grabbed the back off of a guest check there' and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to 'see if I recognize my own handwriting.' He examined the paper and exclaimed, 'Great balls of

fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine.'

After Zehmer had, as he described it, 'scribbled this thing off,' Lucy said, 'Get your wife to sign it.' Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he 'was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm.' Zehmer then 'took it back over there * * * and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' * * * I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, 'I bet you wouldn't take \$50,000 cash for that farm,' and Zehmer replied, 'You haven't got \$50,000 cash.' Lucy said, 'I can get it.' Zehmer said he might form a company and get it, 'but you haven't got \$50,000.00 cash to pay me tonight.' Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, 'I agree to sell the Ferguson Place to W. O. Lucy for \$50,000.00 cash.' Lucy said, 'All right, get your wife to sign it.' Zehmer came back to where she was standing and said, 'You want to put your name to this?' She said 'No,' but he said in an undertone, 'It is nothing but a joke,' and she signed it....

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have \$50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he 'was high as a Georgia pine, ' and that the transaction 'was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most.' That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. ...It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

...Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs.

Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend....

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, 'We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.' ...

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. ...In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer \$5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74.....

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties....

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

Questions to Consider

- (1) The key facts in *Lucy v. Zehmer* are:
 - a. Lucy had on prior occasions asked Zehmer about buying the Ferguson farm and Zehmer refused.
 - b. Lucy claimed that they previously made an oral agreement for sale of the farm but Zehmer refused to sell as promised.
 - c. On the night in question, Lucy arrived at Zehmer's bar with alcohol and said to Zehmer: I bet you wouldn't take \$50,000 for the farm. Zehmer said that he would, but that he was sure Lucy didn't have that kind of money.
 - d. Zehmer wrote out an agreement to sell the farm for \$50,000 on the back of a restaurant check, and there was some back and forth about changing the "I" to "We" and adding terms, such as the sale being conditional on Zehmer having good title to the farm. Zehmer had his wife sign the document as well, whispering to her that it was just a joke or a bluff.
 - e. Lucy took the document and tried to give Zehmer \$5 to seal the deal, and at that point (or maybe some days later depending on who you believe) Zehmer said it was a joke.
 - f. Lucy assigned half the contract to his brother.
 - g. He and his brother are suing for specific performance.
 - h. They lost at trial court and appealed.

- (2) In *Lucy v. Zehmer*, Zehmer advances two arguments: (1) he lacked the capacity to form a contract due to intoxication and (2) his promise to sell the farm was not serious but rather was a joke or a bluff. How does the Court address each argument?

- (3) The decision in *Lucy v. Zehmer* includes several articulations of the "objective theory of contract". Here is an example:
 - a. *If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party.*

(4) To test your understanding of the objective theory of contract, consider two variations on Lucy v. Zehmer and how the court would rule under these variations:

- a. A reasonable person would have known that Zehmer's promise to sell the farm was a joke (imagine it was an agreement to sell for \$20, everyone in the bar laughed, there was no back and forth discussion), but Lucy (being more gullible than most) thinks the promise is serious.
- b. A reasonable person would have thought that Zehmer's promise to sell the farm was serious, but Lucy knows the promise was a joke. In other words, imagine the promise was made in a very serious setting, Zehmer signed a lengthy detailed agreement prepared by a lawyer, but Zehmer secretly planned the whole thing as a bluff to see if Lucy had \$50,000. Lucy, in fact, knows that it was a bluff (and we have evidence of this – perhaps a friend of Lucy's testifies that Lucy said to him: "I know Zehmer didn't mean it, but I'm going to hold him to it.")

(5) Given the objective theory of contract, if you were representing Zehmer, which facts that were underemphasized in the court's opinion, might you try to emphasize in an attempt to convince the court that no contract was formed?

(6) The remedy Lucy sought was specific performance. We will discuss remedies in detail in the Contracts course. For now, you can take note of the fact that "specific performance" involves the court ordering the parties to fulfill the promises made in the contract. Thus, when the court ordered specific performance, it ordered the Zehmer's to sell the farm to the Lucy's for \$50,000.

"Specific performance" is not the typical remedy for breach of contract. It is more typical to award money damages to put the parties in the same economic place in which they would have been if the contract had not been breached.

Assume, for example, Law Firm has a contract to buy paper from Office Supply Company for \$1,200. Office Supply Company breaches the contract (i.e. Office Supply Company refuses to sell the paper). Law Firm has paid nothing to Office Supply Company. If Law Firm can purchase paper from another seller for \$1,300, Law Firm will be awarded money damages of \$100 (\$1,300 - \$1,200). This compensates Law Firm for having to pay \$100 more than the contract price to buy the paper that Law Firm was entitled to purchase under the contract.

One area in which specific performance is often granted is contracts for the sale of land or other real property. Why do you think specific performance is common for such contracts?

(7) In the 1990s Pepsi ran a promotional campaign where you could obtain "Pepsi Points" and use them to acquire "Pepsi Stuff." Pepsi points could be obtained by buying Pepsi or by buying points (at 10 cents a point). Here is a link to the commercial:

<http://www.youtube.com/watch?v=ZdackF2H7Qc>

A 20-year old who watched the commercial raised \$700,000 and mailed a check for that amount to PepsiCo indicating that he was accepting the offer to exchange 7 Million Pepsi Points for a Harrier Jet (an item that cost approximately \$23 million). When PepsiCo refused to deliver the Harrier Jet, the 20-year old sued for specific performance.

What arguments would you make on behalf of the plaintiff (the 20-year old) and what arguments would you make on behalf of Pepsi Co?