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Beware of the Dark Side of the Farce

Keith A. Rowley

BEWARE OF THE DARK SIDE OF THE FARCE

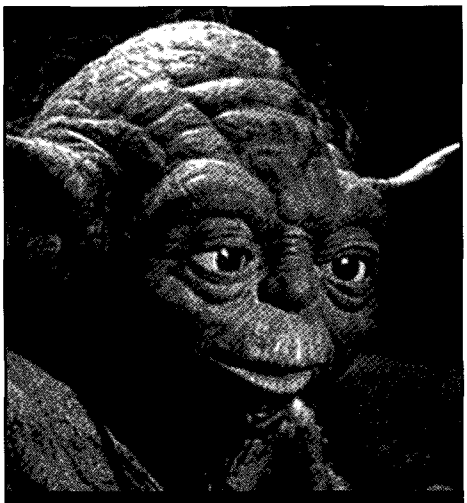
By Keith A. Rowley

In *Berry v. Gulf Coast Wings Inc.*,[1] a case that has garnered an unusual amount of attention in both the legal and popular press for what seems to be a simple contract dispute,[2] a former Hooters waitress, Jodee Berry, is suing her former employer for breaching its promise to award a new Toyota to the winner of an April 2001 contest. Berry alleges that her manager, Jared Blair, told Berry and the other waitresses at the Panama City, Florida Hooters that whoever sold the most beer at each participating Hooters locations during April 2001 would be entered in a drawing, and that the winner of the drawing would receive a new Toyota.

As the contest progressed, Berry alleges that Blair told the waitresses that he did not know whether the winner would receive a Toyota car, truck, or van, but that the winner would have to pay any registration fees on the vehicle. In early May, Blair informed Berry that she had won the contest, and proceeded to blindfold her and lead her to the parking lot outside the restaurant. Waiting for her there was not a Toyota car, truck, or van, but a doll of the character Yoda from the *Star Wars* movies - a "toy Yoda." Clever, eh? Blair was laughing. Berry was not. Berry sued for breach of contract and fraud. As I tell my students from time to time, I teach Contracts, not Torts, so I want to focus on the contract issues and, more specifically, on the viability of one of the defenses advanced by Hooters: It was a joke.[3]

The Lessons of Lucy and Leonard

The case best known to most lawyers and judges in which a party attempted to avoid contractual liability on the basis that it was only kidding when it made the alleged promise or formed the alleged contract is *Lucy v. Zehmer*.[4] Lucy had been trying to purchase Ferguson Farm from the Zehmers for years. One evening, over drinks, Lucy offered to buy the farm from the Zehmers for $50,000 ($30,000 more than Mr. Zehmer had once verbally agreed to take for the farm before backing out of the deal). After a fairly lengthy discussion, Mr. Zehmer wrote the following on the back of a restaurant receipt: "We do hereby agree to sell to W.O. Lucy the Ferguson Farm complete for $50,000 title satisfactory to buyer." Both Mr. and Mrs. Zehmer signed the writing, and then Mr. Zehmer gave it to Lucy.[5] A couple of weeks later, when Lucy informed Mr. Zehmer that he had the $50,000 in cash and was ready to close, Mr. Zehmer replied that he never intended to sell the farm to Lucy.[6]



WHAT A JOKE! A former Hooters waitress thought she had won a new Toyota. Instead she was given a "toy Yoda."

In their answer to Lucy's suit for breach of contract, the Zehmers argued, *inter alia*, that Mr. Zehmer had agreed to sell the farm to Lucy only "in jest," and that Lucy knew perfectly well that Zehmer was planning on keeping the farm for his son.[7] Reversing the trial court, the Virginia Supreme Court characterized the Zehmers' defense as "unusual, if not bizarre, ... [w]hen made to the writing admittedly prepared by one of the defendants and signed by both."[8] The court then found that (1) the extent and nature of the parties' discussions prior to the execution of the writing, (2) Mr. Zehmer's acquiescence to Lucy's insistence that Mr. Zehmer change the wording of the writing and that Mrs. Zehmer also sign it, (3) the fact that both Mr. and Mrs. Zehmer separately signed the writing, and (4) the Zehmers allowed Lucy to leave with the signed writing without any suggestion that they did not intend to be bound by it "furnish[ed] persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter."[9]

Moreover, and more particularly relevant to the parties in *Berry*, the court also found that, even if Mr. Zehmer thought the agreement was a joke, "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."[10] Expressing what has come to be known as the "objective manifestation of assent" test,[11] the court held:

> [T]he law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.... Therefore, a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.
>
> 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.[12]

A more recent case of note is *Leonard v. Pepsico, Inc.*[13] Pepsi ran a series of TV advertisements with the common theme "Drink Pepsi, Get Stuff" in conjunction with a "Pepsi Stuff" catalog that included a variety of items that could be purchased using "Pepsi Points."[14] One such advertisement featured, along with more mundane items (a t-shirt, a leather jacket, and sunglasses), a Harrier fighter jet.

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Displayed across the bottom of the TV screen was "HARRIER FIGHTER 7,000,000 PEPSI POINTS."[15]

Leonard consulted the Pepsi Stuff catalog. He did not find the Harrier jet listed. He did find that he could purchase Pepsi Points for 10 cents each and that he could order promotional merchandise with as few as fifteen earned (as opposed to purchased) Pepsi Points. Leonard proceeded to raise $700,000 to purchase 7,000,000 Pepsi Points. He then submitted an order form, along with 15 earned Pepsi Points, and a check for $700,008.50.[16] Through an exchange of correspondence, Pepsi refused to process Leonard's order, arguing that the Harrier jet was included in the advertisement "to create a humorous and entertaining ad."[17]

Leonard sued Pepsi alleging, *inter alia*, breach of contract. The district court granted Pepsi summary judgment because, *inter alia*, "no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier jet."[18]

Starting from the premise that "[a]n obvious joke ... would not give rise to a contract,"[19] and recognizing the counterpremise that, "if there is no indication that the offer is 'evidently in jest,' and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer,"[20] the *Leonard* court explained that "the obvious absurdity of the commercial" defeated Leonard's argument that it "was not clearly in jest."[21] Judge Wood based her conclusion on five factors: (1) the exaggerated claim "that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives"; (2) the "high improbability" that a teenager would be allowed to fly a Harrier and able to do so under the conditions depicted; (3) the "exaggerated adolescent fantasy" depicted; (4) the absurd use of a combat jet to commute to school; and (5) the fact that amassing 7,000,000 Pepsi Points would require drinking "roughly 190 Pepsis a day for the next hundred years" or raising $700,000 to purchase a $23,000,000 jet - clearly, "a deal too good to be true."[22]

Between the Poles

Lucy and *Leonard* represent the two ends of an enforceability spectrum. On one end, an offer and acceptance that has all of the outward manifestations of a serious contract will be enforced, despite the fact that one of the parties harbored a secret intent not to be bound. On the other, a statement or act that no reasonable person could understand to be an offer or acceptance will not give rise to a contract, despite the fact that one party may have been in earnest. What of the seemingly vast middle ground between these two poles?

The richest vein of reported case law on the enforceability of agreements made in jest arises out of sham marriages. The reported cases generally fall into two categories: those in which both parties agree that the marriage was only in jest,[23] and those in which only one party argues that the marriage was only in jest.[24] In the former, courts have found no marriage contract because, in the words of the leading case, "[m]ere words without any intention corresponding to them will not make a marriage or any other civil contract," provided that "both parties intended and understood that they were not to have effect."[25] In the latter, courts have refused to invalidate the marriage contract because, absent a "show[ing] that both parties intended and understood that they were not entering into the matrimonial relation," one party "could not avoid the marriage by a mental reservation [or] secret intention not to become [wed to the other]."[26]

"Joke" or "sham" contracts in other contexts have received somewhat less uniform treatment from the courts. Still, there is ample authority that, in the absence of an obviously outlandish act or statement, like that in *Leonard*, or a context that belies the likelihood of genuine contractual intent,[27] both parties must have understood the act or statement to be insincere at the time the alleged contract was made in order to avoid forming a contract.[28]

The record in *Berry* is insufficiently developed to conclude whether the context in which Blair announced the contest to Berry and her co-workers belied his sincerity, whether Berry believed at the time of Blair's statement that it was a joke, or whether a disinterested third party present when Blair made the announcement would have concluded that both Blair and the waitresses knew that Blair's offer was insincere. It does seem safe to conclude that Blair's statement was not so obviously outlandish that no reasonable person could have taken it seriously. A new Toyota seems like a rather lavish prize for the waitress selling the most beer in a month, but then a $20,000 reward to anyone who could prove that a car dealer was selling new vehicles for more than $89 over factory invoice seems even more disproportionate to the effort required to earn the prize. Yet, in *Rosenthal v. Al Packer Ford, Inc.*,[29] the reason the plaintiff failed to prevail was not because the court found that the offered reward did not give rise to a contract; but, rather, because the court found that the offeror did not breach the contract.[30]

Parting Shot

Whether Jodee Berry is ultimately successful against Hooters remains to be seen. However, she has already survived summary judgment, which suggests that Hooters will end up spending substantially more money defending this lawsuit than it would have cost them to perform. Our moral: If you are going to use the farce, *beware of the dark side.*

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ENDNOTES

1 No. 01-2642 Div. J (Fla. 14th Cir. Ct., Bay County, filed July 24, 2001). Gulf Cost Wings operates the Hooters in question. *Berry v. Gulf Coast Wings* settled shortly before this issue went to press, making the case itself, but not the legal issues it raises, moot.

2 *See, e.g., You've Won a Brand New ...: Proffered Prize Produces Pique*, ABA J., Oct. 2001, at 18; Oh, *What a (Bad) Feeling, Toy Yoda*, HOU. CHRONICLE, Aug. 13, 2001, at A2; *Employer Promised Toyota, Not Toy Yoda, Suit Says*, ANDREWS EMP. LITIG. REP., Aug. 7, 2001, at 12; *Waitress Refuses to be Toyed With*, BBC NEWS, July 29, 2001.

3 Two other contract issues suggest themselves: (1) whether Blair's statement, even if not clearly in jest, constituted an offer to form a contract that could be accepted by Berry's performance; and (2) whether Berry gave consideration sufficient to bind Hooters to the terms of Blair's offer. The first issue may hinge on

how much similarity the court finds between the nature of the offer in *Berry* and the line of "reward" cases epitomized by *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q.B. 484, and, more recently, by *Barnes v. Treece*, 549 P.2d 1152 (Wash. Ct. App. 1976). "A lawful enforceable contract may come into being when one announces ... an offer or promise that he will give or pay a reward or prize to a person who performs a specified act, and the offer is accepted by performance of the act." Rosenthal v. Al Packer Ford, Inc., 374 A.2d 377, 378 (Md. Ct. Spec. App. 1977). Berry sold the most beer at her restaurant during April 2001. However, that only entitled her to be entered in the drawing, not to receive the Toyota.

As for the second issue, courts appear willing to find consideration to support employer-initiated prizes and bonus programs as long as the employee, *inter alia*, must put forth extra effort or stay employed when she was otherwise free to leave. *See, e.g.*, Holland v. Earl G. Graves Publ'g Co., 46 F. Supp. 2d 681, 687 (E.D. Mich. 1998); Olson v. Bondurant & Co., 759 P.2d 861, 864 (Colo. Ct. App. 1988). Such offers are distinguishable from offers of prizes that do not require any performance by the offeree. The latter generally lack consideration. *See, e.g.*, Lamb v. U.S. Sales Corp., 390 S.E.2d 440, 441 (Ga. Ct. App. 1990). The Hooters contest was not simply a drawing for a Toyota. Berry had to sell the most beer at her restaurant during April 2001 in order to qualify for the drawing.

4 84 S.E.2d 516 (Va. 1954).

5 *See id.* at 518.

6 *See id.*

7 *See id.* at 517-18.

8 *Id.* at 520.

9 *Id.* at 520-21.

10 *Id.* at 521.

11 *Id.* at 522 ("If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind."); *see, e.g.*, Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1197 (9th Cir. 1996); James Hardie Gypsum (Nevada), Inc. v. Inquipco, 112 Nev. 1397, 929 P.2d 903, 906 (1996).

12 *Lucy*, 84 S.E.2d at 522 (citations omitted). The *Lucy* court's statement about the law imputing an intent "corresponding to the reasonable meaning of his words and acts" has been echoed in a number of subsequent cases. *See, e.g.*, Am. Rock Salt Co. v. Norfolk S. Corp., 180 F. Supp. 2d 420, 423 (W.D.N.Y. 2001); Multicare Med. Ctr. v. Dept. of Soc. & Health Serv., 790 P.2d 124, 133 (Wash. 1990).

13 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

14 *See Leonard*, 88 F. Supp. 2d at 118.

15 Judge Wood's description of the advertisement is delightful, but too long to include in the space allotted. *See id.* at 118-19. You can view all three versions of the subject advertisement via links on Professor Val Ricks's web site. *See* http://gateway.stcl.edu/faculty-dir/ricks/casebook/Leonardv.Pepsico.htm (last visited May 1, 2002).

16 *See Leonard*, 88 F. Supp. 2d at 119. The court's opinion does not explain why the check was in the amount of $700,008.50, instead of $699,998.50 - the cost of the 6,999,985 Pepsi Points Leonard needed to purchase to supplement the 15 he had already earned. Perhaps he added $10 to cover the shipping and handling charges on the $23 million, 14 ton aircraft. *See id.* at 129.

17 *Id.* at 120.

18 *Id.* at 127.

19 *Id.*; see also 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.11, at 30 (rev. ed. 1993) (disqualifying "acts evidently done in jest or without intent to create legal relations" from being considered offers because they "do not lead others reasonably to believe that they are empowered 'to close the contract'"), *cited with approval in Leonard*, 88 F. Supp. 2d at 127.

20 *Leonard*, 88 F. Supp. 2d at 127-28 (citing Barnes v. Treece, 549 P.2d 1152, 1155 (Wash. Ct. App. 1976), and *Lucy v. Zehmer*, supra, as cases in which a reasonable person could conclude that the subject act or statement was not clearly in jest).

21 *Id.* at 130.

22 *See id.* at 128-29.

23 *See, e.g.*, Crouch v. Wartenberg, 104 S.E. 117 (W. Va. 1920); McClurg v. Terry, 21 N.J. Eq. 225 (1870).

24 *See, e.g.*, Girvan v. Griffin, 108 A. 182 (N.J. 1919); *In re* Imboden's Estate, 86 S.W. 263 (Mo. Ct. App. 1905).

25 *McClurg*, 1870 WL 5173, at *2.

26 *Imboden's Estate*, 86 S.W. at 268.

27 *See, e.g.*, Graves v. Northern N.Y. Publ'g Co., 22 N.Y.S.2d 537, 538 (N.Y. App. Div. 1940) (holding that no contract was formed based on an alleged offer that ran in the defendant newspaper's "joke column" and promised to pay $1,000 to the person who would furnish the offeror with a telephone number the offeror could have gotten free from directory assistance).

28 *See, e.g.*, N.Y. Trust Co. v. Island Oil & Transp. Corp., 34 F.2d 655, 655-56 (2d Cir. 1929) (holding paper transaction between corporate parent and subsidiary was "a sham, which nobody did, and nobody advised could, understand as intended to be more"); Allensworth v. Allensworth's Executrix, 39 S.W.2d 198, 202 (Ky. 1931) ("[S]tatements, if not made in earnest and understood by [their recipient] not to have been made in earnest, cannot be the basis of a contract."); Keller v. Holderman, 11 Mich. 248, 248 (1863) (holding that, because "the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn, ... no contract was ever made by the parties"). *But cf.* Deitrick v. Sinnott, 179 N.W. 424, 428 (Iowa 1920) (permitting the defendant to avoid contractual liability based on his testimony that he was "merely jesting" and the absence of competent evidence to the contrary); Theiss v. Weiss, 31 A. 63, 67 (Pa. 1895) (suggesting that the jury could have excused the defendant from contractual liability based on the testimony of a disinterested third party "that the defendant's statement to the plaintiff ... was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke").

Whether both parties understood the act or statement to be insincere is a question of fact. *See, e.g.*, Good v. Chiles, 41 S.W.2d 738, 739 (Tex. Civ. App. 1931), *rev'd on other grounds*, 57 S.W.2d 1100 (Tex. Comm'n App. 1933); *Theiss*, 31 A. at 67.

29 374 A.2d 377 (Md. Ct. Spec. App. 1977).

30 *See id.* at 381-82. NL