



**California  
First-Year  
Law  
Students'  
Examination**

**Essay Questions**

**October 2008**

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**OCTOBER 2008 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2008 California First-Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page 3.

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## **ESSAY EXAMINATION INSTRUCTIONS**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

You should answer the questions according to legal theories and principles of general application.

## Question 1

Abby and Paula entered into a valid contract under which Abby agreed to buy and Paula agreed to sell for \$1.5 million a printing press for Abby's business. Abby made a \$500,000 payment to Paula at the time of the sale and agreed to make the final payment of \$1 million in six months.

Just prior to the date the final payment was due, Abby sold her business, including the press, to Bert. As part of the sale, Bert agreed with Abby to pay Paula the \$1 million due her. Abby represented in the purchase agreement between Abby and Bert that all of the business equipment was in working order, although she knew that the press never functioned as it was intended to. In fact, Abby had previously requested of Paula that she repair or replace the press, but Paula had refused to do so.

After Bert bought the business he discovered the problem with the press. He told Paula that he would not pay her the \$1 million due until she repaired or replaced the press. Paula immediately filed a breach of contract lawsuit against Bert for the outstanding \$1 million balance. Bert denies any obligation to pay Paula the \$1 million on the basis that he had never entered into any contract with Paula.

In addition, Bert asserts two other defenses: First, that the printing press is defective and unsuitable for its intended purpose. Second, that Abby materially misrepresented the condition of the press.

1. Under what theory or theories may Paula be successful in her breach of contract action against Bert? Discuss.

2. What is the likelihood that the additional defenses asserted by Bert will prevail? Discuss.

## Answer A to Question 1

Abby and Paula entered into a valid contract. This removes formation issues of offer, acceptance and consideration from issue.

This is a contract for goods and UCC applies. A “good” is personal property that is moveable at the time of the sale. Here, the property is a \$1.5M printing press which was movable to Abby’s place and is, therefore, a “good”.

Paula as a seller of printing presses and Abby as a business owner in need of a \$1.5M printing press can both be assumed to be Merchants based on special knowledge and/or experience in performing the duties of selling presses or printing. Merchants have a higher duty of “fair dealing” which becomes important in the defense to the breach action based on the faulty press (see Bert’s Defenses infra).

**1<sup>st</sup> call: Under what theory or theories may Paula be successful in her breach of contract action against Bert?**

### **Paula v. Bert:**

Paula is a 3<sup>rd</sup> party beneficiary under the contract between Abby and Bert (discussed below). She may sue Bert for breach under her rights as the 3<sup>rd</sup> party beneficiary.

She also has the right to demand assurance of payment from Bert as the delegatee of Abby’s duty. Here, we also find that Bert repudiated the contract duty to pay Paula when he indicated: “He [Bert] told Paula that he would not pay her the \$1M due until she repaired or replaced the press.” When this occurred, Paula did not have to wait for a specific time of performance but was able to bring an action for breach immediately upon such anticipatory repudiation.

Each theory that Paula uses depends on whether there was a valid delegation of the duty to pay to Bert and, therefore, the creation of rights in Paula as a 3<sup>rd</sup> party beneficiary. These two issues are now discussed below:

### **Delegation:**

Definition: A delegation occurs when duties under an existing valid contract are passed over to a third party. In order for this to be effective the following must be considered:

**Was the duty delegatable:** The courts do not favor delegation but certain duties are delegatable if they are not too personal to the contract. Here, the duty delegated was payment of money which is not considered too personal. There is no indication that the contract between Paula and Abby contained any clause prohibiting delegation.

Duty is delegatable.

**Did Bert assume the duty:** When “Bert agreed with Abby to pay Paula the \$1M due to her” he assumed the duty that had been delegated.

**Effect of Delegation:** When a duty is delegatable and has been assumed, it places the delegatee in the shoes of the delegator. Here, Bert assumed the duties of Abby-“stepping into Abby’s shoes”. Thus, if Abby owed Paula \$1M then Bert now owed Paula \$1M.

**Novation:** A novation is an agreement among all of the parties to an agreement that an assignment and/or delegation of rights/duties is acceptable. Here, that would require that Paula agreed in advance to the delegation. Here, there is no indication of such agreement by Paula so there is no Novation.

**Defenses:** Bert has a defense to the contract he formed with Abby based on misrepresentation which may void that contract and eliminate his responsibilities to Paula (discussed infra under heading “**Bert’s Defenses**”).

### **3<sup>rd</sup> Party Beneficiary:**

**Definition:** A third-party beneficiary is one who receives rights or a benefit through a contract between two or more other parties who, while forming the contract, intended to benefit the 3<sup>rd</sup> party. Here, Paula became a third-party beneficiary at the time that Abby sold her business to Bert and placed into the contract with Bert the delegation of the duty to pay Paula the \$1M owed as the balloon payment for the printing press. When this delegation was placed into the contract (represented in the purchase agreement between Abby and Bert) and Bert agreed to pay it manifests present intent to benefit Paula. Paula is, therefore, a 3<sup>rd</sup> Party Beneficiary.

**Privity:** Normally, only those in privity have rights within a contract. However, Lawrence v Fox determined that, in the case of third-party beneficiaries, privity is not required. Paula, therefore, has rights if other elements are met under this contract.

**Intent of contracting parties:** In order for Paula to have rights there must have been present intent on Abby and Bert’s part. Discussed supra.

**Classification of 3<sup>rd</sup> party beneficiary:** Whether one is an intended beneficiary (RSt.) which is a Creditor or Donee beneficiary or if one is merely an incidental beneficiary affects the rights of the 3<sup>rd</sup> party. Here, because Bert assumed a duty to pay a debt owed to Paula, Paula is a Creditor Beneficiary (an Intended Beneficiary). This gives her strong contractual rights if she is vested.

**Vesting:** In order for a 3<sup>rd</sup> Party to be able to enforce any potential rights under a contract for which they became the 3<sup>rd</sup> P Beneficiary, they must first be vested. Typically, for creditor beneficiaries vesting occurs on notice (some jurisdictions notice and assent). Here, the facts do not provide much information about notice but one may assume notice had been made by the statement: “He [Bert] told Paula that he would not pay her the \$1.5M due until she repaired or replaced the press”; and by the fact that “Paula immediately filed a breach of contract lawsuit against Bert”. Paula’s rights would be considered vested.

Therefore, Paula could be successful in her action for breach against Bert absent any valid defenses.

**Call #2: Bert's additional Defenses – likelihood Bert will Prevail?**

Bert has two significant defenses he may raise:

That the printing press is defective and unsuitable for its intended purpose; and That Abby misrepresented the condition of the press when he and she entered into their contract.

Each will be discussed in turn:

**Defective Press:** Bert, by stepping into the shoes of Abby, may assert all defenses against Paula that Abby could assert. Here, Abby had informed Paula previously that “the press never functioned as it was intended to”; and “had previously requested of Paula that she repair or replace the press, but Paula had refused to do so”. Paula, as a Merchant, has a higher duty of fair dealing. Between Merchants there is an implied warranty of fitness for the intended use. Here, Abby could reasonably expect that a \$1.5M printing press would operate as it was intended to do. Here, the press “never did”. This implies that right from the start, the good delivered was defective. When the contract is for a specific good such as this, it must perfectly conform or the buyer has a right to reject it (Perfect Tender Rule). Here, Abby informed Paula that it was defective and demanded assurance that it would be repaired or replaced. Paula’s refusal to do so is a breach of contract. Bert may assert this same defense against Paula and is likely to prevail.

**Misrepresentation:** Paula only has an action against Bert if there is a valid contract between Bert and Abby as her rights are derivative as a third-party beneficiary. Here, Bert may argue that Abby’s material misrepresentation of the status of the equipment is a valid defense to contract formation between them. Here, Abby put in the purchase order that “all of the equipment was in working order” despite the fact that “she knew the press did not function as it was intended to”. Bert should prevail against Abby, which will extinguish Paula’s rights against him [Paula may still sue Abby.]

## **Answer B to Question 1**

### **Paula v. Bert**

#### **UCC**

The transaction involves a dealing amongst merchants and a printing press which is considered goods under UCC.

#### **Goods**

UCC requires that goods be identified, be present and existing, before an interest in them can pass.

Here, the printing press is present and existing.

#### **Merchants**

Merchants are those who hold themselves out as having special knowledge and skill and are required to act in good faith.

Here, all the parties are merchants, Paula is a merchant who sold the printing press, Abby is the merchant who initially purchased the printing press, and Bert was the merchant who thereafter assumed the printing press when he purchased Paula's business.

#### **Offer**

Unlike common law, where the offer is the outward manifestation of present contractual intent definite and certain in terms and communicated to offeree, the UCC only requires the quantity to be evidenced, where in this case is one printing press.

#### **Acceptance**

Unlike common law, where acceptance is the unequivocal assent to the terms of the offer, under UCC acceptance may be promise of shipment, the act of shipment or shipment with notice. In this case Abby's initial acceptance was evidenced by the printing press receipt confirmation.

#### **Consideration**

Unlike common law, where the consideration is that which is bargained for and given in exchange of a return promise or act and which requires legal detriment, under UCC an offer made by a merchant is sufficient without consideration for



time stated, reasonable time, but in no event longer than three months, known as the firm offer rule.

### **Valid Contract**

Having said that and provided by the facts, a valid contract exists under which Abby agreed to buy and Paula agreed to sell for \$1.5 million a printing press for Abby's business.

### **Assignment**

An assignment is when a party to a contract intentionally releases him/her self from any rights under the contract and instead creates these rights under a third-party. Privity is not required, though the rights must be assignable and vested in the third party.

The facts provide that as part of the sale, Bert agreed with Abby to pay Paula the \$1 million due her. Not considering the effect of the work "with" which could still keep Abby liable, Abby may have successfully assigned her agreement with Paula to Bert in the sales contract of her business. Since privity is not required and since the rights are not too personal or prohibited by the contract, thus are assignable. The rights vested in Bert when Bert agreed to pay Paula the \$1 million and its effect is that Bert replaces Abby in the contract between Abby and Paula.

Thus, Abby assigned the rights to the printing press.

### **Delegation**

A delegation of duties is possible where it's not prohibited by contract nor it is too personal.

Provided that the facts do not indicate that any delegation is against the contract, and since the duties are not too personal, Abby did successfully delegate her duties to pay for the printing press to Bert.

The effect of the assignment, which is the right to the printing press and the delegation to pay for the printing press via the sales contract executed by Abby and Bert, makes Paula the third-party beneficiary.

### **Third-Party Beneficiary**

Third-party beneficiary is identified at the outset of the agreement, unlike assignment or delegation. Privity is not required, only the intention of the parties when executing the agreement to be in the benefit of the third-party beneficiary.

In this case, the third-party beneficiary is Paula, [to] whom the rights vest according to majority with notice and assent, according to minority upon reliance.

Thus, Paula is the intended third-party beneficiary creditor since a debt is due her for the printing press.

The establishment of the third-party beneficiary via assignment and delegation thus creates the contractual obligation between Bert and Paula. The effect of the delegation on Abby is that she will still be secondarily liable for the \$1 million due Paula for the printing press. However, having found the contractual link amongst Bert and Paula, Bert will owe Paula the \$1 million.

## **Breach**

### **Anticipatory repudiation**

Paula will assert that when Bert denied any obligation to pay Paula the \$1 million on the basis that he never entered into any contract with Paula, that Bert breached his duty to pay.

## **Damages**

Paula is entitled to the \$1 million, however must correct the issues with the printing press (infra) under warranty.

## **Warranty – Defense asserted by Bert**

Express warranty is expressly stated in the contract. In this case the facts do not support the finding of such warranty.

Implied warranty is implied in law from seller (Paula) to buyer (Bert).

Implied warranty of merchantability is when the seller represents that the goods are of fair and average quality for normal use.

Implied warranty of fitness is when the seller knows of the buyer's intended use and the buyer justifiably relies on the seller's knowledge and skills.

It can be said that Paula is liable for the defects of the printing press, which is limiting it from performing just as a fair and average printing press during normal use. Further, it can also be argued that Paula knew the buyer's intended use and the buyer relied on her special skills and knowledge regarding the printing press and its functions.

### **Misrepresentation of the condition of the press by Abby – Defense asserted by Bert**

This claim by Bert will be successful against Abby and not in defense to the case brought by Paula.

Bert may argue that Abby intentionally misrepresented material facts regarding the functioning of the printing press, knowing it would induce Bert's reliance, to which he did.

Bert will be able to recover any out-of-pocket damages against Abby.

However, as mentioned, Bert must pay the \$1 million and Paula must fix the issues with the printing press.

### **Perfect Tender Rule**

Perfect tender rule mentions that in the event of nonconforming goods, the buyer may reject or accept all or portion.

### **Single Unit**

Since the printing press is a single unit, perfect tender rule may only apply in the event the singly [sic] unless it has an extreme effect on the contract in its entirety.

### **Acceptance**

An acceptance under UCC can be by any of the following: acceptance after inspection, failure to reject, or the use of the goods. Provided that Abby was the initial party who did use the printing press and did not reject within reasonable time, it can be stated that there was sufficient acceptance by Abby. However, had she not used the printing press and had she notified Paula within reasonable time she could have rejected the printing press.

## Question 2

Alice operates a daycare center in her home from Monday through Friday for children from ages 6 months to three years old. One Friday, she discovered some mice in her house and called Bob, an exterminator. She told Bob that she runs the daycare center in her home for very young children and needs to get rid of the mice by the following Monday, when the children will return.

On Saturday, Bob placed small plastic packages of poison pellets in the corners of every room in the house. He explained that the mice would gnaw through the plastic packaging to eat the pellets, and then die shortly thereafter. On each package was printed the following warning:

“DANGER: THIS PACKAGE CONTAINS POISON, WHICH MAY BE HARMFUL TO HUMAN HEALTH IF SWALLOWED!”

Before leaving Alice’s house, Bob told her that the mice should ingest the pellets by Monday morning and that she could if she wanted to remove what is left of the packages before the children arrived.

On Sunday, Carol came for the first time to clean Alice’s house. Carol did not know that Alice operated a daycare center in her home. Carol noticed several packages of poison in the corners of the rooms, but cleaned around them.

Shortly before the children arrived on Monday morning, Alice removed as many of the packages of poison as she could find. Later that day, nine-month-old Victor, one of the children in Alice’s daycare center, was crawling along the floor of the living room when he found a package that Alice had missed. It had already been gnawed into by a mouse, and Victor reached in and ate some of the pellets. He became seriously ill. Medical tests determined that Victor’s illness was caused by his ingestion of the mouse poison.

Under what theory or theories might Victor’s parents bring an action for damages against Alice, Bob and Carol? Discuss.

What defenses, if any, might Alice, Bob and Carol assert, and what is the likely result? Discuss.

## Answer A to Question 2

VICTOR V. ALICE

### NEGLIGENCE

Negligence is the failure to conform to a standard of care, the breach of which is the actual and proximate cause of plaintiff's damages.

### DUTY

A duty is owed to all foreseeable plaintiffs. Foreseeability is determined through the Cardozo and Andrews tests. Under Cardozo, a duty is owed to foreseeable plaintiffs in the "zone of danger" whereas, under Andrews, a duty is owed to all.

Under the Cardozo view, Victor is a foreseeable plaintiff because he is [a] child in Alice's daycare, the zone of danger.

Under the Andrews view, Victor is owed a duty.

Therefore, a duty is owed to Victor by Alice.

### STANDARD OF CARE

The standard of care owed is to act as a reasonably prudent person. However, landowners have a higher duty of care depending on the classification of the individual on the landowner's land.

#### LICENSEE/INVITEE?

A licensee is a person invited on the landowner's land for a benefit of their own whereas an invitee is invited on the landowner's land for the benefit of the landowner.

Here, Victor is on Alice's land for Alice's care, which may constitute Victor as a licensee. However, Alice runs a daycare business to which Victor's presence is also a benefit to Alice.

Therefore, Victor is an invitee.

#### STANDARD OF CARE OWED TO INVITEE

The standard of care owed by a landowner to an invitee is to warn of known dangerous defects and make reasonable inspections to discover defects that could potentially pose as a dangerous condition.

Therefore, a standard of care exists.

### BREACH OF DUTY

A breach occurs when defendant's conduct falls below the standard of care owed to plaintiff.

Here, Alice was aware that poisons were placed in the corner of her home and she failed to pick them all up as the facts state that she “picked up only what she could find.” Alice will argue that she took reasonable care in collecting all of the poison packets. Victor’s parents will argue that Alice could have exercised reasonable care by contacting Bob the exterminator to account for all the poison packets. Alice did not exercise reasonable care by warning Victor’s parents or the parents of the other children that poison packets were present in her home to fix the mouse problem and the packets were a known dangerous condition. Further, if Alice was not sure that she had picked up all of the packets, she had knowledge that the packets were placed in the corners of the house and that she could have kept Victor and the children away from the corners to avoid potential injury.

### CAUSATION

The defendant’s acts must be the actual and proximate cause of plaintiff’s injuries.

#### ACTUAL CAUSE (CAUSE IN FACT)

Actual cause is determined when plaintiff would not have been injured “but for” defendant’s acts.

Here, “but for” Alice’s failing to pick up all the poison packets, Victor would not have been injured.

Therefore, there is actual causation.

#### PROXIMATE CAUSE (LEGAL CAUSE)

Proximate cause is determined when the injury to plaintiff was a foreseeable result of defendant’s acts with no intervening causes.

Here, it is foreseeable that if the poison packets were not completely collected in a house full of young children that a child could possibly obtain possession of them and put the poison in their mouth. The facts do not indicate any intervening causes to break the chain of causation.

Therefore, there is proximate causation.

#### ATTRACTIVE NUISANCE DOCTRINE

Under the attractive nuisance doctrine, a landowner is liable for the injury of a person on his land if 1) a dangerous condition was present, 2) the landowner was aware of the dangerous condition, 3) the landowner was aware of the frequency of children on his property, 4) landowner was aware that the children on the property would not appreciate the danger because of their incapacity.

Here, Alice was aware that the poison packets were placed in her home because of her request for the exterminator to kill the mice, which satisfies the element of a dangerous condition was present.

Here, Alice was aware that the poison packets were dangerous because they were strong enough to kill the mice and the warning on the front that states it is “harmful to human health if swallowed.”

Here, Alice operated a child daycare center, which means that she was aware that children were frequently on her property.

Here, the children that Alice cared for were between the ages 6 months to 3 years old, which means that they most likely would not appreciate the danger from the presence of a packet that contained poison.

Therefore, Alice is liable under the Attractive Nuisance Doctrine.

### **DAMAGES**

Damages are the physical injuries suffered by the plaintiff.

Here, Victor became seriously ill due to the ingestion of the poison packets.

Therefore, the damage element is satisfied.

### **REMEDIES**

Plaintiff is entitled to general and special damages for the injuries caused by defendant.

Here, Victor is entitled to medical expenses incurred (special damages) and any present and future pain and suffering (general damages).

### **DEFENSES**

#### **CONTRIBUTORY NEGLIGENCE**

A plaintiff is contributorily negligent if his own negligence contributed to his own injuries. If a plaintiff is found contributorily negligent he will be completely barred from recovery.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **COMPARATIVE NEGLIGENCE**

A plaintiff is comparatively negligent if his own negligence contributed to his own injuries. In a pure comparative negligence state, a negligent plaintiff may recover no matter how high his negligence is in comparison to defendant's. However, in a modified negligence state, a negligent plaintiff can only recover if he is 49% negligent or less.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **ASSUMPTION OF THE RISK**

A plaintiff has assumed the risk if he 1) was aware of the dangerous risk, and 2) appreciates the dangers of the risk, 3) voluntarily encounters the risk.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **JOINT AND SEVERAL LIABILITY**

When there exists several negligent persons contributing to the injury sustained by plaintiff, each defendant will be held jointly and severally liable for the total amount of plaintiff's injuries.

Here, Alice will argue that Bob the Exterminator was also negligent (see *infra*) and that he should be held jointly and severally liable for Victor's injuries.

## **CONTRIBUTION**

If Alice compensates Victor for the full amount of his damages Alice may see contribution from Bob for the damages since Bob's negligent act contributed to Victor's injuries.

## **VICTOR V. BOB**

### **NEGLIGENCE**

#### **DUTY**

A duty is owed to all foreseeable plaintiffs.



A duty is owed to all foreseeable plaintiffs. Foreseeability is determined through the Cardozo and Andrews tests. Under Cardozo, a duty is owed to foreseeable plaintiffs in the “zone of danger” whereas, under Andrews, a duty is owed to all.

Under the Cardozo view, Victor is a foreseeable plaintiff because he is [a] child in Alice’s daycare, the zone of danger where Bob placed the poison.

Under the Andrews view, Victor is owed a duty.

Therefore, a duty is owed to Victor by Bob.

## **STANDARD OF CARE**

A professional owes a higher standard of care comparable to other professionals with similar experience and education in the same localities.

Here, Bob is considered a professional because he is an exterminator in the profession of exterminating mice.

Therefore, Bob owes a standard of care in comparison with comparable exterminators.

## **BREACH**

See Supra.

Here, Bob breached his duty by not informing Alice of the amount of poison packets that he had placed or coming back the following Monday to remove the packets himself. In addition, he informed Alice that she could pick up the poison packets “if she wanted,” implying that the packets did not pose an immediate danger, since he did not emphasize immediate removal. Further, Bob knew that children are frequently in Alice’s home because Alice told Bob that she ran a daycare for very young children, and for that reason Bob could have placed the packets in areas of the home that cannot be accessed by children.

Therefore, Bob breached his duty.

## **CAUSATION**

### **ACTUAL CAUSE**

See Supra.

“BUT FOR” Bob placing the poison packets in the corners of Alice’s, easily accessible to Victor, Victor would not have eaten the pellets and gotten ill.

## **PROXIMATE CAUSE**

See Supra.

It is reasonably foreseeable that placing poison packets in an area where young children can access them would result in injury.

## **INTERVENING CAUSE**

Bob will argue that the hole gnawed by the mouse was an intervening cause, but that result was foreseeable and does not break the chain of causation.

Therefore, Bob is the actual and proximate cause of Victor's injuries.

## **DAMAGES**

Damages are the physical injuries suffered by the plaintiff.

Here, Victor became seriously ill due to the ingestion of the poison packets.

Therefore, the damage element is satisfied.

## **REMEDIES**

Plaintiff is entitled to general and special damages for the injuries caused by defendant.

Here, Victor is entitled to medical expenses incurred (special damages) and any present and future pain and suffering (general damages).

## **DEFENSES**

### **CONTRIBUTORY NEGLIGENCE**

A plaintiff is contributorily negligent if his own negligence contributed to his own injuries. If a plaintiff is found contributorily negligent he will be completely barred from recovery.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **COMPARATIVE NEGLIGENCE**

A plaintiff is comparatively negligent if his own negligence contributed to his own injuries. In a pure comparative negligence state, a negligent plaintiff may recover no matter how high his negligence is in comparison to defendant's. However, in a modified negligence state, a negligent plaintiff can only recover if he is 49% negligent or less.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **ASSUMPTION OF THE RISK**

A plaintiff has assumed the risk if he 1) was aware of the dangerous risk, and 2) appreciates the dangers of the risk, 3) voluntarily encounters the risk.

Here, Victor was nine months old and because of his young age he is presumed to lack the capacity to be negligent.

Therefore, this defense will fail.

## **JOINT AND SEVERAL LIABILITY**

When there exists several negligent persons contributing to the injury sustained by plaintiff, each defendant will be held jointly and severally liable for the total amount of plaintiff's injuries.

Here, Bob will argue that Alice was also negligent (see supra) and that she should be held jointly and severally liable for Victor's injuries.

## **CONTRIBUTION**

If Bob compensates Victor for the full amount of his damages Bob may seek contribution from Alice for the damages since Alice's negligent act contributed to Victor's injuries.

## **VICTOR V. CAROL**

### **NEGLIGENCE**

See Supra.

## **DUTY**

See Supra.

Here, Victor is not a foreseeable plaintiff and Carol does not owe Victor a duty because the facts state that she had come to Alice's house for the first time and that she was unaware that the home was used for a daycare. Although she noticed the poisons present in the rooms, Carol will argue that she was there to clean the home and that she believed that Alice placed the packets there for a purpose unknown to her.

Therefore, no duty is owed.

## **INDEMNIFICATION**

Carol may seek indemnification as she was not liable for the injuries sustained by Victor.

## **Answer B to Question 2**

### VICTOR v. ALICE

#### Is Alice liable for NEGLIGENCE?

Negligence is when there is a duty owed and the breach of that duty is the factual and proximate cause of plaintiff's damages.

#### DUTY

One has the duty to act with a standard of reasonable care.

Here, Alice has the duty to make sure the premise of her house is reasonably safe as a professional who runs a daycare center, i.e., no poisonous rat pellets laying around for children to ingest.

Therefore, Alice has a general duty.

#### LANDOWNER'S DUTY

Landowner has the duty to inspect any discoverable dangers and to fix the dangers.

Since this is Alice's home, she has the landowner's duty to remove all poison pellet packages to avoid any harm done.

Therefore, Alice has a duty as a landowner.

#### DUTY TO AN INVITEE

One has a duty to their invitee to warn of dangers, inspect any discoverable dangers, and to fix the dangers.

Victor is an invitee to Alice's home because Victor is there for the purpose of Alice's supervision. Therefore, Alice has the duty to warn Victor (and his parents) of the poisonous pellet packages that were placed in the house as well as to find all the packages remaining and remove all the remaining packages.

Therefore, Alice has a duty to Victor as an invitee.

#### BREACH OF DUTY

Breach of duty is when the defendant fails to perform his/her duty of standard of reasonable care.

Alice breached her duty because she failed to pick up all the packages of poison in her home. Alice will argue that she did not breach her duty, because she picked up all the ones she could find. However, she did not make an effort to know exactly how many packets there were or where all the packets were by asking Bob so that she can ensure that she gets all of them.

Alice may argue that [sic].

Therefore, Alice breached her duty.

#### ATTRACTIVE NUISANCE DOCTRINE

Under the attractive nuisance doctrine, if the defendant knows that there is danger that will potentially attract children, the defendant has the duty to keep children away from the danger.

Alice, as a daycare professional for children between 6 months to three years old should know that children at young ages tend to put things they find in their mouths. Since poison pellets probably look like candy to children, Alice needs to take an extra step of care to make sure there are absolutely no leftover poisonous packages laying around and that children get access [to] those packages.

#### FACTUAL CAUSE

Factual cause is the cause that sets the following acts in motion, withstanding the “but for” and “substantial certainty” tests.

“But for” Alice not picking up all of the packages of poisons, Victor would not have ingested the poison and become ill. It is also “substantially certain” that if she does not pick up all the poisonous packages that children may think it is okay for them to ingest and become ill.

Therefore, Alice is the factual cause.

#### PROXIMATE CAUSE

Proximate cause is the factual cause, notwithstanding an unforeseeable independent and intervening act.

It is foreseeable that if Alice leaves poisonous rat pellets around her house, in which she operates her daycare from, that children may find them and eat them and become injured. Alice may argue that there are intervening causes, such as Carol coming to clean her house and not picking up the packages and Bob was the one who actually placed the packages around her house.

However, those are not independent intervening causes Carol is only hired to clean her house and not to rearrange or remove items from her house and Bob was there to place the poison there by Alice’s request.

Therefore, Alice is the proximate cause.

#### DAMAGES

Damages are the injuries and/or other losses that the plaintiff suffered as a result of the defendant’s negligence.

Here, due to Alice's negligence, Victor became seriously ill from eating the pellets.

### **CONCLUSION TO NEGLIGENCE**

As discussed above, Alice had the duty towards Victor to act with standard of reasonable care and the breach of that duty was the factual and proximate cause of Victor's damages. Therefore, Alice is liable for negligence.

### **DEFENSES – CONTRIBUTORY NEGLIGENCE**

Under contributory negligence, if the plaintiff's own negligence contributed to his injuries, he is barred from recovering for damages against the defendant.

Alice will assert that because Victor was the one who found the package and ate the pellets, that Victor is contributorily negligent to his own injuries.

This defense will fail because Victor is only 9 months old and is too young to know that the pellets are dangerous and will contribute to his own injuries.

### **DEFENSE – ASSUMPTION OF RISK**

Under assumption of risk, if the plaintiff knows and appreciated the dangers that were involved and participated in the danger anyway, he assumes the risk involved.

Alice will assert that Victor should have known that the pellets are dangerous and assumed the risk of eating them anyway.

This defense will fail because, as discussed supra, Victor is 9 months old and is too young to know and appreciated the dangers involved with ingesting rat poison.

## **VICTOR V. BOB**

### **Is Bob Liable For NEGLIGENCE?**

Negligence as defined supra.

### **DUTY**

Duty as defined supra.

Bob has the duty to ensure that his customers (i.e., Alice) is aware that the pellet packages must be picked up or else because it is harmful to someone who ingests it. He also has the duty to make sure that the packages are discarded properly because he is in the business as an exterminator and should know that if packages are not discarded properly that it is harmful to someone who ingests it.

Therefore, Bob has a duty.

### BREACH OF DUTY

Breach of duty as defined supra.

Bob breached his duty because he did not emphasize the need to ensure all remaining packages are removed before the children arrived.

Bob will argue that he told Alice that she could remove the packages from the premises and also that on each of the packages there is a warning sign printed on it about how it is harmful to humans if swallowed. However, as evidenced by the facts, he only told Alice that the mice should ingest the pellets by Monday morning and if she wanted to remove the remaining packages, he is not informing Alice the importance of removing the packages and also by saying "if", he gave her an option to choose whether or not to remove the packages, thus implying that the packages may not be that dangerous.

Therefore, Bob has breached his duty.

### FACTUAL CAUSE

Factual cause as defined in supra.

"But for" Bob not requiring and emphasizing to Alice to pick up all the packages, Alice would have ensured to pick up all the packages. Since Alice did not pick up all the packages, Victor ingested the pellets. Also, it [is] "substantially certain" that if all the packages are not picked up, that someone may get hurt from ingesting the poison.

### PROXIMATE CAUSE

Proximate cause as defined above.

Here, it is foreseeable that if Bob did not either return to pick up all the packages or instruct Alice that she must pick up all the packages, it is foreseeable that young children can be hurt by ingesting it since Bob knew Alice ran a daycare center in her home for very young children.

Bob will argue that Alice is the independent intervening cause because she should have picked up all of the packages, and if she did, Victor would not have been hurt. However, as discussed above, Bob should have emphasized and required that Alice pick up all the packages, instead of giving her an option to do so. Therefore, Alice is not an independent and intervening cause and thus not breaking the chain of causation.



Therefore, Bob is the proximate cause.

### DAMAGES

Damages discussed and defined supra.

### **CONCLUSION TO NEGLIGENCE**

As discussed above, Bob had the duty towards Victor to act with [a] standard of reasonable care and the breach of that duty was the factual and proximate cause of Victor's damages.

Therefore, Alice is liable for negligence.

### **DEFENSES – CONTRIBUTORY NEGLIGENCE**

Defined and discussed above.

This defense will fail for Bob as well for the same reasons it will fail for Alice.

### **DEFENSE – ASSUMPTION OF RISK**

Defined and discussed above.

This defense will fail for Bob as well for the same reasons it will fail for Alice.

### **VICTOR V. CAROL**

#### **Is Carol Liable for NEGLIGENCE**

Negligence as defined supra.

#### DUTY

Duty as defined supra.

Carol is hired by Alice to clean Alice's house. Carol has the duty to clean Alice's house with [the] duty of a professional and ensure that after the cleaning of the house that there are no dangers that she left behind.

Carol does not have the duty to make sure she removes any dangerous items from Alice's home (i.e., the rat poison) that Carol, herself, did not place there. Victor will argue that she does have a duty because she saw the packages and cleaned around them. However, there are no facts that indicate that she knew what those packages were when she was cleaning.

Therefore, it will depend on what the court finds whether Carol has a duty or not.

## BREACH OF DUTY

Breach of duty as defined supra.

If the courts do find that Carol had a duty towards Victor, Victor will argue that Carol breached her duty because she didn't pick up the packages when she saw them.

Therefore, Carol has breached her duty.

## FACTUAL CAUSE

Factual cause as defined supra.

"But for" Carol not picking up the packages of poison, Victor would not have had a chance to ingest it. It is also substantially certain that if poison is ingested by someone, they can become injured.

## PROXIMATE CAUSE

Proximate cause as defined above.

Under Judge Cardozo's proximate cause, defendant is only liable for damages caused to plaintiffs within the foreseeable zone of danger. Carol will argue that Victor is not within the foreseeable zone of danger because she had no knowledge that Alice operated a daycare facility.

Under Judge Andrews' proximate cause, defendant is liable for damages caused to all plaintiffs. Victor will argue that under Judge Andrews' proximate cause, Carol is the proximate cause.

Depending if the court follows Judge Cardozo or Judge Andrews, Carol may still be considered the proximate cause.

## DAMAGES

Damages discussed and defined supra.

## CONCLUSION TO NEGLIGENCE

As discussed above, Carol had the duty towards Victor to act with [a] standard of reasonable care but the breach of the duty may only be the factual cause and not also the proximate cause of Victor's damages. Carol may or may not be found negligent.

## **DEFENSES – CONTRIBUTORY NEGLIGENCE**

Defined and discussed above.

If Carol is found to be negligent, this defense will fail for Carol as well for the same reasons it will for Alice and Bob.

## **DEFENSE – ASSUMPTION OF RISK**

Defined and discussed above.

If Carol is found to be negligent, this defense will fail for Carol as well for the same reasons it will fail for Alice and Bob.

### Question 3

Deanna, a single mother of ten-year old Vickie, worked as a cashier at the local grocery store. Deanna had recently broken off her relationship with Randy, a drug addict who had been violent toward her on several occasions. One morning Randy was in the parking lot outside the grocery store and telephoned Deanna at work. Randy told Deanna that a friend of his was outside Vickie's school. Randy said that if Deanna did not immediately bring \$1,000 to Randy in the parking lot, he would call and direct his friend to harm Vickie.

Over the next several minutes, Deanna put in her pants pocket \$400 from her cash register at the grocery store. She then went to the manager's office, where she had heard there was a safe containing a large amount of cash. No one else was in the manager's office.

Alma, an assistant manager who works at the cash register next to Deanna's, saw how upset Deanna was after the phone call. Alma followed Deanna to the manager's office, where she found Deanna looking through desk drawers. Deanna told Alma that she was looking for the keys to the safe because she "needed some papers" from it. Alma smiled, told Deanna where the keys were, and then said, "You don't have to lie to me, Deanna. I'll be outside keeping watch for you." Deanna replied, "Thank you so much, Alma, I am in a desperate situation right now and will return the money to the safe as soon as I can."

As Alma stood in the hallway outside the manager's office, Deanna opened the safe, removed \$600, relocked the safe, and returned the key to its location. Deanna then brought \$1,000 to Randy in the grocery store parking lot.

What crimes, if any, can Deanna and Alma reasonably be charged with, and what defenses might each assert? Discuss.

### **Answer A to Question 3**

What crimes can Deanna and Alma be charged with and what defenses might they assert?

State v. Deanna

Common Law Burglary

Common Law Burglary is defined as the breaking and entering [of a] dwelling house of another at night with the intent to commit a felony.

Here, the local store is not a dwelling house, and the theft does not occur at night, and there is not breaking and entering. Thus, there is no Common Law Burglary.

Modern Statutory Burglary

Modernly, breaking has evolved into unauthorized entry. Nighttime has been eliminated. Dwelling house has changed to any protected structure. Here, we have an unauthorized entry into a protected structure, the safe, during the day without consent or privilege.

Inner Door Doctrine

If a room or inner structure is part of the protected structure, here, the Grocery Store, if the D breaks into the Safe, it will be construed as an inner breaking for burglary purposes.

Here, Deanna broke into the safe, and took \$600 which was the property of another, the Store. Thus, unauthorized entry and breaking into the safe, without consent, with the intent to commit a crime, the larceny, taking of the \$600.

Defenses

Deanna will argue that she had consent of Alma, who was her supervisor. Store will assert that Alma had no such right and that the entry was without consent, voiding the use of the key. The defense fails, and she commits a larceny.

Larceny

Under the Common Law (CL) is a trespassory taking of and carrying away of the tangible personal property of another with the specific intent to permanently deprive the owner.

Here, Deanna, takes the property with the “intent to return the money” according to the facts. If the Court believes this, she would have a defense to the larceny and the underlying modern burglary. However, she handles the money in such a way, “giving the money to Randy,” who intends to abscond with it. Since she lacks the substantial capacity to return the money, then the Court must find the “intent to permanently deprive or steal”. Further, Deanna is a low level

employee, and would only have custody of any money. This also leads to larceny and not embezzlement.

Thus, Deanna will be guilty of larceny.

### Defenses

#### Consent/Condonation

Is defined as willingness by the victim. Here, Deanna will argue that Alma gave her consent and the key to the safe. The DA will argue that the key was given to Anna with “fraudulent intent”, as she told Alma she was going to find some papers.

This would give rise to the Continuing Trespass doctrine. Thus, when Deanna gives the money to Randy, who has no intent to return it to her, the mens rea, for intent to steal, becomes concurrent with the continuing trespass in larceny.

#### Duress

Is defined as an act by another person, which in the reasonable person would lead to the compunction to commit a crime. It is only available for minor crimes like larceny and not murder. Here, Randy threatened immediate harm to Deanna’s daughter, a very serious offense of severe bodily injury. A reasonable person of normal resistance would probably have acted the same. If believed by the Court, Deanna could have a defense to the larceny and the Burglary supra.

#### Embezzlement

Is defined as the wrongful conversion of the tangible personal property of another entrusted with lawful possession.

When Deanna took the \$400 from the cash register it was already in safekeeping of the Grocery Store (Store). Thus, store had possession, and even though Deanna would usually have only custody, here she has possession. Deanna puts the money in her pocket, and thus she intends to “convert it to her own use” by giving it to Randy. Since she had possession the property charge on the \$400 is embezzlement.

Thus, Deanna, can be charged with Embezzlement of the \$400.

#### Conspiracy

Is the agreement by 2 or more persons with the Specific Intent to Commit the Target Crime.

Modernly, the majority requires an overt act in furtherance of the Conspiracy.

Here, the target crimes will be larceny and Burglary of the Safe.

### Wharton Rule

There must be one more criminal mind to commit a conspiracy than is required to commit the crime. Here, since larceny and embezzlement can be committed by one person the rule is satisfied.

### Pinkerton Rule

All coconspirators can be charged with and convicted of all the crimes of the other coconspirators, which are committed in furtherance of the criminal conspiracy.

### Agreement

At Common Law that was all that was required. Modernly, there is the overt act here; the opening of the safe with the key is the overt act.

### Implied Agreement

Here, the facts are silent about the agreement; however, Alma “followed Deanna into the manager’s office” and stood lookout for her. This would be an implied agreement to commit the crime by Alma. If the Court does not find this as an agreement, the DA can still get Alma as an accomplice, as noted infra. Under Pinkerton, both of the D’s, Deanna and Alma, will be charged with all of the crimes.

### Unilateral Theory of Conspiracy

Under a jurisdiction that follows the MPC, only the Defendant has to consider himself as conspiring with someone to be charged with conspiracy. Thus, in a jurisdiction that follows the MPC, Deanna could be charged with conspiracy without the agreement of Alma.

### **Conclusion**

**Larceny of the \$600.**

**Embezzlement of the \$400.**

**Modern Statutory Burglary of the Safe.**

**Conspiracy to Commit Larceny, Embezzlement, and Burglary.**

### State v. Alma

#### Accomplice

Is defined as Aiding and Abetting the Principal in the commission of the crime with the Specific Intent that the crime be committed. Here, Alma by conduct accompanied Deanna to the office to open the safe. She also smiled, which is construed as consent, and proceeded to “keeping watch for you”.

Thus, by conduct she aided Deanna by telling her where the keys were, and demonstrated her approval. So Alma aided and abetted Deanna in the crimes.

Accomplice Liability

An accomplice is chargeable with all the crimes of the principals that are reasonably foreseeable in the target crimes. Here, the larceny and embezzlement, and the burglary of the safe are all foreseeable. Thus, if the Court does not find the agreement in the conspiracy then Alma can still be charged as an accomplice.

Defenses for Alma. None.

Conclusion

Alma can be charged with all of the crimes of Deanna, either under Conspiracy Theory, or as an accomplice depending on whether the Court finds the Agreement for the Conspiracy (Implied by Conduct).



### **Answer B to Question 3**

#### **CRIMES OF DEANNA (D)**

##### EMBEZZLEMENT - \$400

Embezzlement is accomplished when a defendant has fraudulently converted personal property of another through lawful possession of the property, with the intent to permanently deprive the other of the property. Distinguishing possession as lawful makes embezzlement distinct from other theft crimes because the property is not always taken through a trespass inconsistent with the rights of a true owner, but rather is converted (absorbed to make of no use by the owner) by the defendant who can be in a fiduciary capacity, such as an employee, banker, or executor.

When D took the \$400 out of her register, it was not a necessarily unlawful taking, since cashiers are entrusted by their employers to remove money from the safe as part of their job responsibilities. However, her taking was fraudulent since [she] removed the money with the intent to deprive the store of it in order to pay Randy (R) the blackmail money for Vickie (V), and thus her intent to use the \$400 was inconsistent with her employer's trust with her job. Moreover, since she took the money while she was working at the time of the taking, D had a right to possess it at the time she removed it. Lastly, because the money was not hers to take, it was the personal property of Store (S).

Therefore, without an effective defense by D, D will be convicted for embezzlement for the \$400. Additionally, the prosecution could argue that since D formed intent to steal prior to taking the money from the register, the taking was not lawfully possessed and D should be convicted of larceny. However, the fact that D had intent to deprive for permanent and private use is not determinative.

##### DURESS

Duress is available as a defense if the defendant acted criminally due to threatened serious harm or death to himself, his family, or another person, and the defendant reasonably believes the crime needs to be committed due to the immediate threat in order to avoid the harm. Duress can be used as a defense unless the crime is murder (except felony murder), manslaughter, or a property offense. None of the exceptions apply, as the threat was to another person, D's son.

D will probably be successful in her defense unless she cannot establish that the belief she had of an immediate battery to V was reasonably imminent. Because R had a history of violence with D, and R and D had recently broken off their romantic relationship, it is likely that D had reasonable grounds to believe that R was telling the truth about his friend being near V's school, and the threat of harm to V would actually occur. However, since it was morning and V was likely at

school in the custody of several adult supervisors, it might be unreasonable for D to believe that even if R's friend got into the school he would be successful in beating V. Further, since there was a phone in the grocery store near the register of D which she used to talk to R when he delivered the threat, D reasonably could have called the police, or called the school to warn of R's friend looking for V, instead of reacting by embezzling the money. Nonetheless, since D knew of R's capacity for violence and a caring mother can reasonably be expected to panic or succumb to threats of violence to a son, the question of whether D reacted reasonably should be left to a jury. Apart from the element of imminency, the rest of the elements are satisfied since the threatened harm was violence. V is D's son, and D actually did believe the harm would occur, since her conduct manifests belief.

Thus, if the jury finds D's belief of an imminent serious threat to V reasonable, then she should be excused under duress.

### THEFT

Theft is modernly the grouping given to an assortment of property crimes including larceny, larceny by trick, (merge into larceny) larceny, embezzlement, and forgery.

### ATTEMPTED LARCENY

An attempt is a substantial step towards the completion of a crime with the specific intent to complete it.

When D was looking through the drawers, the prosecution could allege that it was a substantial step towards the crime of larceny. D will say that her only intent was to save her daughter, not to steal.

Thus, D will prevail if she is found to have an unacceptable mental state. Note though that attempt will merge into a completed larceny.

### LARCENY BY TRICK – KEYS

Larceny by trick is a fraudulent representation of fact to another, with the intent to deprive her of possession to property.

When D told A "I need to look in the safe for some papers" she made a false representation, since she needed to get in the safe and steal the money. Moreover, when D responded by giving her the keys to the safe, despite her assumption that D was lying, D acquired possession to the keys. It was merely possession of the keys acquired by D, so her intention to return and the fact that she did return it is not relevant. Note that while the register was allowed access by D as an employee, the safe in the manager's office is not, which is indicated by the fact that D did not know where the keys were when she searched through the drawers, and A did since she was in the manager's office and A is an assistant manager.

Thus, D might be charged with larceny by trick, unless her intention from making the statement was not to compel A to give her possession of the keys.

### LARCENY - \$600

Larceny is a trespassory taking and carrying away of personal property belonging to another, with an intent to permanently deprive the other of it.

The taking was trespassory for the reasoning described above which is that access to the safe was not a fiduciary privilege afforded to D. Additionally, when D took the \$600 from the safe she removed it from the safe, and walked out, which is sufficient for a “taking” and “carrying away” of the store’s \$600 right of possession in property. Lastly, because D intended to take the \$600 she took from the safe, and expressed that she would “return it as soon as she could” is not preclusive for larceny because she intended to give R the money she took from S, permanently depriving S of those \$600.

As such, D may be charged with Larceny, and a conviction of larceny by trick could merge into this if a lesser included offense exists,

### DEFENSE

#### DURESS

D will likely give the same reasoning for Larceny as she does to Embezzlement, which should turn on the same issue of reasonable conduct discussed above.

### CRIMES OF ALMA (A)

#### SOLICITATION

Solicitation occurs when a party speaks to another with the specific intent to encourage her to commit a crime, either for her, or on her behalf. The crime solicited will merge into the completed crime, an attempt, or, if the other party responds affirmatively, into a conspiracy. Liability for solicitation will attach as an accomplice to the crime solicited, since the person acted to facilitate the occurrence of the crime.

When A said to D “I’ll be outside watching [for] you” it could reasonably be understood as encouragement to go forth with the crime A believed D was perpetrating. However, the solicitation came after D had undertaken performance into stealing from the safe, and since D had already formed the proper mental state to steal from the store, A is probably better analyzed under an accomplice theory.

#### ACCESSORY TO LARCENY

An accessory is a party who aids, abets, or otherwise contributes to the commission of a crime with the specific intent that it be committed. A principal need not be convicted itself of the crime in order to be an accomplice;

it is sufficient that the helper had a requisite mental state and act in furtherance of the crime in order to be convicted.

When A told D that she would watch out for her, and that D “did not have to lie” about the reason for her looking through the drawers, she implicitly confirmed to D that she approved of the crime, and actively would help to bring about the theft. Since A was a manager and could know of the location of the keys, A’s communication to D of the location of the keys was a significant help in order to get into the safe.

As such, D should properly be charged as an accessory to theft, and if solicitation is found it would merge.

### CONSPIRACY TO COMMIT LARCENY

A conspiracy is an agreement between 2 or more people to commit an unlawful act, with the specific intent between the parties to agree as well as to commit the crime, and in some jurisdictions a substantial step is necessary.

The prosecution will argue that because A “understood” what D was doing in taking the money from the safe, when A said “I’ll watch out for you” and D said “Thank you, I’ll return it as soon as I can” an agreement took place between the two of them, since they had a mutual understanding and assent for D to take the money from the safe. D will argue in response that she did not have the requisite intent to conspire with D [sic], since her influence from R inspired her to steal, and that she thus did not intend to take the money but for R’s threat to V.

D will probably prevail regardless of the outcome with her duress defense, since it will [be] difficult to show that even if she did act unreasonably that her intent to steal was separate from the threat from R.

As such, unless the jurisdiction has adopted the Model Penal Code’s unilateral conspiracy doctrine, A did not conspire with B.

### DEFENSE

A will argue that she should not be an accessory because she did not know what crime D was going to commit. That will fail since she knew D would likely steal from the safe.

## Question 4

Selma owned two adjoining parcels of land. She entered into negotiations to sell her west lot to Barnaby, who was looking for a good location for his new carpet store. On Selma's adjoining east lot were a large billboard that would obscure the view of Barnaby's carpet store, a partially-collapsed, abandoned greenhouse, and several abandoned cars and old tires.

After Selma and Barnaby agreed on a price for the west lot, they signed a valid standard real estate sales contract. In a blank space at the end of the contract under the caption, "Other Terms," were the handwritten words, "Selma to clear debris from adjoining east lot." The standard contract also contained a clause, "This contract represents the entire agreement of the parties. There are no additional representations, promises or conditions precedent to the effectiveness of this agreement." According to Barnaby, Selma had promised during their negotiations that she would remove the billboard, the greenhouse, the cars and the tires from the adjoining east lot if Barnaby agreed to purchase the west lot.

By the date for the closing of the sale, Selma had not yet done any work on the adjoining east lot, although she told Barnaby that she fully intended to do everything she had promised. The parties exchanged the purchase price and a deed to the west lot. The following week, Selma had the abandoned cars and old tires removed from the adjoining east lot. When Barnaby asked her about the removal of the billboard and the greenhouse, Selma denied having made any commitment to remove the billboard, which she said brings in substantial rental income from advertisers. She also denied promising to remove the greenhouse, which she indicated she hoped to repair and reopen some day.

Barnaby wants to keep the purchased lot and has already started construction of the carpet store. He would, however, like to obtain a court order directing Selma to remove the billboard and greenhouse and/or to collect monetary damages from her for breach of contract.

1. Is Barnaby likely to prevail in a breach of contract action against Selma? Discuss.
2. If Barnaby does prevail against Selma, is he entitled to specific performance and/or monetary damages? Discuss.

## Answer A to Question 4

### **BARNABY V. SELMA**

This is a breach of contract case wherein a valid contract exists that Barnaby claims was breached by Selma.

### **BREACH – Did Selma breach her contract with Barnaby?**

A breach occurs [when] one party to a contract fails to perform in accordance with the provisions of the contract. If a breach is material, the court will not enforce the contract but if the breach is minor, a court will usually enforce the contract but award damages for the breach.

In this case, Barnaby claims that Selma breached the standard real estate sales contract, where he claims that, in addition to selling him the west lot, he claims that Selma agreed also to remove a large billboard, a partially-collapsed, abandoned greenhouse, and several abandoned cars and old tires. Selma will argue that she did not breach the contract because she removed the “debris” from the lot as promised. Whether a breach occurred will depend on the specific provisions of the contract.

### **CONDITIONS**

The contract at bar contains a condition precedent, which is a condition that one must meet prior to the duty of the other party to perform, which states, “Selma to clear debris from adjoining east lot”. Selma contends that she met this condition by removing the abandoned cars and old tires from the east lot. Barnaby argues that she was also required to remove the greenhouse and billboard pursuant to a promise made by Selma during their negotiations. It should be noted that the facts show that Selma did not meet this condition prior to Barnaby’s closing on the west lot and that Barnaby waived his right to rescind the contract because he proceeded to close on the contract without requiring Selma to perform as required. Instead, he relied on Selma’s promise that she “fully intended to do everything she had promised.” To Barnaby, this meant removal of the billboard and greenhouse as well as the cars and tires but to Selma, she only meant the cars and tires. Thus, there is no meeting of the minds.

Instead of asking the court to rescind the contract, Barnaby wants to keep the lot and has asked the court to find that Selma has breached the contract by failing to remove the billboard and greenhouse. Whether the court finds that Selma breached her duty will depend on whether the contract is clear as to the intent of the parties. If a contract is not clear, a court will look to parol evidence.

## **PAROL EVIDENCE**

Parol evidence is a doctrine that holds that a court will only look to the four corners of a contract to interpret the intention of the parties and that no oral agreements made between the parties will be allowed into evidence in order to determine the intent of the parties.

In this case, Selma will argue that parol evidence is not allowable because there is an integration clause contained in the contract, which states, “This contract represents the entire agreement of the parties. There are no additional representations, promises or conditions precedent to the effectiveness of this agreement.”

### **A. Integration/Merger Clause**

When a contract contains an integration or merger clause, as it is sometimes called, a court is reluctant to look outside the four corners of the contract because this clause is evidence that the parties intended for all their extraneous agreements to have been fully incorporated into the contract. Barnaby will argue that parol evidence is still allowed even when there is an integration clause when a term in the contract is ambiguous or unclear.

### **B. Ambiguity**

When a contract contains a provision that is ambiguous, the courts will allow parol evidence into evidence even when there is a merger/integration clause in the contract as long as it does not change or add a term but only clarifies a term.

Here, Barnaby will say that the term “debris” is unclear and that parol evidence should be permitted in order to clarify the term as it was intended by the parties. Barnaby will also maintain that as long as the parol evidence does not change or add a term, it is allowable even in light of the integration clause. Barnaby will say the term ‘debris’ is ambiguous because it is unclear what this term means. Barnaby will submit that allowing parol evidence will not change this term or add to the term but will only clarify the intent of the parties as far as what was to be removed from the adjoining lot.

Selma will argue that the term ‘debris’ is not ambiguous because the term pertains only to those things that have no value and pertains essentially to trash. She will further argue that she removed all the ‘debris’ or trash from the lot as required. Barnaby will argue that a partially-collapsed abandoned greenhouse is trash as much as abandoned cars are trash. Barnaby makes a good point so that it is likely that the court will allow parol evidence to determine whether Selma promised to remove the greenhouse as part of the ‘debris’.

As to whether the billboard is considered 'debris', it is unlikely that a large billboard that brings revenue to Selma would be considered 'debris'. On the issue of the billboard, a court will most likely not allow parol evidence to clarify the intent of the parties.

In the event that the court allows parol evidence and the court or jury finds that it was the intention of the parties to remove the greenhouse, the Court will find that Selma breached the contract and fashion[ed] a remedy. The question remains then whether the court will require specific performance or award monetary damages to Barnaby.

### **SPECIFIC PERFORMANCE**

A court will order specific performance in cases involving subjects that are unique, such as real estate.

If a court finds through parol evidence that Selma promised Barnaby that she would remove the partially-collapsed, abandoned greenhouse, it is likely that the court will order Selma to remove it or move it to a location that will not interfere with Barnaby's property. This is not to say that Selma could not construct a new greenhouse in the same spot or some other structure but she would be required to remove the existing one from the lot.

### **DAMAGES**

A court has the power to award damages for breach of contract. Exemplary damages are not ordinarily awarded in contract cases and there is no evidence that there was a liquidated damages clause in the agreement between Barnaby and Selma. There is also no information to show that Barnaby incurred any reliance damages, which are damages awarded based on a reliance of a representation made by a party concerning the value. General damages are damages that [are] not of a pecuniary nature, such as pain and suffering, loss of consortium, etc. Here, Barnaby has not suffered any general damages. Therefore the court is left with awarding special damages, which are pecuniary damages. Since Barnaby has not built his carpet business, he cannot show any pecuniary losses as a result of Selma's breach. According[ly] the court will most likely not award any monetary damages.



## **Answer B to Question 4**

### **Barnaby vs. Selma**

#### **Statute of Frauds**

In contract law, the statute of frauds states that the following contracts must be in writing to be enforceable at law: marriage, contracts which cannot be completed within a year, contracts regarding land, executor contracts, guarantors of debts, and for goods over \$500.

Here, this contract is regarding the sale of land because it is for the sale of a parcel of land. Contracts for the sale of land must be in writing in order to be enforceable in court. Selma and Barnaby executed a standard real estate sales contract.

Therefore, this contract does not fall within the statute of frauds.

#### **Parol Evidence Rule**

In contract law, the parol evidence rule states that in a written contract that represents the entire agreement, prior negotiations cannot be used as evidence as to the terms of the contract.

Here, there was a statement in the contract which stated that "This contract represents the entire agreement of the parties. There are no additional representations, promises or conditions precedent to the effectiveness of this agreement." This statement means that all prior negotiations, evidence, or promises will not be admissible when determining the terms of the contract. The parol evidence rule encourages the free flow of negotiations without the fear that will be used against the parties later after the contract has been written.

Here, there is a note at the bottom of the contract which states, "Selma to clear debris from adjoining east lot." Since this was written into the contract, this could be part of the contract, but any pre-negotiations talk could not be used to clarify what was meant by this statement.

Therefore, any negotiations regarding the removal of the billboard and the greenhouse which were pre-contract negotiations will not be able to be admissible to determine the terms of the contract.

#### **Breach of Contract**

Under contract law, a breach of contract occurs when one part fails to perform their duties as required by contract.

Here, pursuant to the contract, Selma was required to remove the debris, as a condition of the contract. Selma did have the abandoned cars and the old tires removed from the adjoining east lot. Barnaby is making the claim that debris was to include the partially-collapsed, abandoned greenhouse and the billboard sign. If this is true, then Selma would be in breach of contract because she did not remove these. Selma is making the claim that she never made any commitment to remove the billboard nor the greenhouse.

In this case, since the court will not be able to look at prior negotiations, the court would have to look toward the meaning of debris and evaluate the greenhouse and billboard as to whether they are included in this term.

Selma stated that the billboard brings in substantial rental income from advertisers. Selma also stated that she hoped to repair and reopen the greenhouse someday.

In this case, the court could determine that the greenhouse is abandoned and therefore debris, unless Selma is able to repair it within a certain manner of time. In the case of the billboard, if the billboard truly is bringing substantial income, then this would unlikely be included in the term debris.

### **Specific Performance**

Under contract law, specific performance occurs when the court will award a specific item, action, etc. because monetary damages are inappropriate.

Here, if the court rules that Selma is in breach of contract by not removing the debris, then it may be unjust to award Barnaby a monetary amount when what Barnaby actually wants and the contract requires [is] the specific performance of removing those items.

Therefore, if the court determined that the billboard and/or the greenhouse were within the meaning of debris as to the contract, then the court could award an order for specific performance requiring Selma to remove the remaining debris.

### **Special Damages**

Under contract law, special damages are damages which are pecuniary in nature, meaning that they result from economic loss, such as loss of business, etc., which are a consequence of the breach.

Here, the carpet store is still in construction, so the debris remaining on the adjoining lot will not at this point result in customer loss or loss of business.

Therefore, at this point, it will not be likely that Barnaby will be awarded special damages. If Barnaby prevailed and the court decided not to make Selma remove

the items, then the court could award any damages that it believed would result from the debris in a judgment in favor of Barnaby.